

Case Name:

R. v. [REDACTED]

**Between
Her Majesty the Queen, and**

[REDACTED]

[2014] O.J. No. 5563

Toronto Court File Nos. 4811 998 11-10007787-01 and -02

Ontario Court of Justice

B. Wolski J.

Heard: March 11-13, 18, 19, April 22, May
30, June 24, August 13, October 7,
2013; January 6, 7 and June 11, 2014.

Judgment: October 6, 2014.

(14 paras.)

Counsel:

Ms. Cory Landgon, counsel for the Crown.

Mr. David O'Connor, counsel for the accused [REDACTED].

Mr. Andrew Stastny, counsel for the accused [REDACTED].

Reasons for Judgment

1 B. WOLSKI J.:-- On the evening of July 16th, 2011, during the annual Beaches Jazz Festival, [REDACTED], a young person within the meaning of the *Youth Criminal Justice Act*, and two other individuals were investigatively detained by Toronto Police Officers Atwood and Alexander. During a search of a black motor vehicle, from which Officer Atwood observed [REDACTED], and the young person to exit, P.C. Atwood located a handgun underneath the

driver's side rear floor mat, tucked partly underneath the driver's seat. As a result, [REDACTED], [REDACTED], and the young person were arrested. The two other young men who were investigatively detained were released from that detention because Officer Atwood determined he could not, on the information he had, connect them to the vehicle in which the handgun was located.

2 At approximately 7:56 p.m., the Toronto Police Service received a 911 call from a gentleman who lived in a building located south of Queen Street East, on Joseph Duggan Boulevard. The gentleman reported that in the parking lot south of his building, the second vehicle from the west entrance of the parking lot, on the south side of the parking lot he observed four or five young black men. Further description provided was that they were wearing white t-shirts and one of them was wearing a red baseball cap. The gentleman reported that he believed he saw a handgun and that one of the white-t-shirted young black men may have put the handgun inside his waistband.

3 Officer Atwood and his escort, Officer Alexander, were dispatched to that location, activating their lights and sirens which also activated their onboard camera. Just prior to their cruiser turning into the west entrance of the parking lot on Joseph Duggan Boulevard, Officer Atwood observed a young black man in a white t-shirt exit from the driver's side door of the second vehicle, east of the west entrance, on the south side of the parking lot. He also observed another young black man wearing a red ball cap exit from the driver's side rear door of the automobile, walk around the trunk end of the car, meeting up on the passenger side rear of the vehicle with a third black man in a white t-shirt exiting from the passenger side rear door of the black car.

4 Two other young black men similarly dressed in white t-shirts were observed sitting at the west entrance of the parking lot. When the cruiser stopped inside the west entrance of the parking lot, the three young men who exited from the car approached the officers. The onboard camera was running. Officer Atwood and Officer Alexander engaged the three young men who had exited the vehicle, as well as the two young men who were sitting in conversation.

5 Officer Atwood determined that the information provided to him by the police dispatcher through the gentleman caller was sufficiently accurate and reliable (four or five black men, one with a red ball cap, in a vehicle parked, in a specific location, black in colour) that he placed all five young men under investigative detention.

6 Subsequently, other officers arrived and assisted Atwood and Alexander. The identities of the two young men who were not seen exiting the parked black vehicle, were detained by the officers and those two young black men wearing white t-shirts were advised they were no longer under detention and they left the area, walking southbound on Joseph Duggan Boulevard. While the five young men were in investigative detention, because of the nature of the call (gun call), all five young men were patted down to ensure that no handgun was in their waistband. The remaining three young men were advised by Atwood that he was going to search the vehicle. [REDACTED] provided the keys to the vehicle to Officer Atwood. While other officers remained with the three young men, Atwood and Alexander began a search of the parked black car. Officer Atwood located

a handgun under the rear driver's side passenger floor mat. The floor mat, together with the handgun had been tucked underneath the driver's seat. The butt end of the handgun was observed by Atwood before he disturbed the floor mat. Atwood testified in cross-examination that the portion of the handgun that he observed did look somewhat like a cellular phone. Upon the discovery of the handgun the young person, together with [REDACTED] were arrested.

7 Although originally charged, the young person, who did testify in these proceedings, had the charges against him withdrawn by the Crown and he provided a statement to the Toronto Police. It is interesting to note that the young person who testified was not cross-examined on any prior inconsistency in the statement he provided to the police regarding his knowledge of the handgun in the black car.

8 The identity of the gentleman caller who reported the activities in the Joseph Duggan parking lot was established. That gentleman testified in these proceedings that his view of the activity around the black car was from a balcony window. He made his observations in a very brief amount of time and then went to his telephone, where he reported what he had seen. He did not re-attend at the window following his initial observations. Of the five men who were under investigative detention, some were wearing white t-shirts with sleeves; others were wearing tank-top-type t-shirts. The witness was unable to identify any of the people in the parking lot. He indicated he observed and heard conversation between two of the young men both wearing white shirts. He was unsure if they were wearing sleeved white shirts or tank-tops. One appeared to be coaxing the other to touch what the caller believed was a handgun being passed between the two of them.

9 The young person who was arrested, charged, and then provided a statement to the police, and was no longer facing charges, testified that he was unaware that there was a handgun in the vehicle which belonged to [REDACTED]. He testified that the other two young men wearing white t-shirts, who were initially investigatively detained and then released by the Toronto Police, were in fact part of the group that arrived at that location to attend the Jazz Festival with himself, [REDACTED]. He testified that he was in the driver's seat of the vehicle, rolling a marihuana joint. Mr. Khan was in the back seat, behind the driver's seat, and Mr. [REDACTED] was in the rear passenger seat of the vehicle. It was their intention to smoke the marihuana joint. When the police arrived the three of them exited the vehicle, as described by PC. Atwood. Officers Atwood and Alexander noted the aroma of marihuana inside the vehicle.

10 The position of the Crown is that there is a strong permissible inference to be drawn based on the circumstantial evidence of knowledge and control of the handgun. That it was known to be in the automobile by [REDACTED] and that they were, therefore, in possession of it.

11 The position of the defence is that the inference is so weak that it cannot be drawn at all because of the two young black men, equally dressed in white t-shirts, who left the area after they were released from investigative detention. That they and they alone may have known that the handgun was in the car. If the young person who was found in the driver's seat when P.C. Atwood

arrived at that location didn't know of its existence, what evidence is there to indicate that Mr. [REDACTED] and Mr. [REDACTED] would know of its existence?

12 Although I may be satisfied that there is a probability that Mr. [REDACTED] and especially Mr. [REDACTED], who was in possession of the keys to the vehicle, might know of the existence of the handgun in the car, I am not satisfied that the Crown has established beyond a reasonable doubt that the inference of knowledge and control of the handgun can be drawn based on the circumstantial evidence in this particular case.

13 It is equally compelling that only the two young men who left the scene after being released from investigative detention had the knowledge and control of the handgun. Combined with the scent of marihuana and Atwood's description of the location of the handgun, looking like the end of a cell phone, leaves me in a state of reasonable doubt. If the burden were one of probabilities, the Crown's onus may be satisfied. However, in these circumstances, I cannot conclude that either Mr. [REDACTED] or Mr. [REDACTED] had knowledge that the handgun was in the vehicle in which they were travelling. I accept the evidence of the young person that he did not know that the gun was in the car. The two young men who were not arrested, may have been the only people in the vehicle who knew of the handgun's existence in the vehicle. The 911 caller testified that two of the young men of the four or five that he associated with the vehicle, who were wearing white t-shirts, whether tank-tops or sleeveless, were the only two he observed speaking of or handling the handgun. It is equally a permissible inference that the two young men who were released from investigative detention and permitted to leave the location of the parking lot, were those two young men. Based on the evidence, especially of the 911 caller and the young person who testified, these two equally permissible yet competing inferences create a reasonable doubt.

14 Accordingly, I am unable to find that the Crown has satisfied the burden of proof and each of these young men will be acquitted.

B. WOLSKI J.