

NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Smith*, 2006 NSCA 95

Date: 20060726

Docket: CAC 258593

Registry: Halifax

Between:

James William Smith

Appellant

v.

Her Majesty The Queen

Respondent

Judge: Honourable Justice Linda Lee Oland

Appeal Heard: May 10, 2006

Subject: *Criminal Code of Canada, ss. 86(2), 95(2)(a) and 96(a);
Sufficiency of Reasons; Sentencing*

Summary: The police entered a townhouse residence by breaking down the door at 3:00 a.m. A search warrant had authorized this unannounced entry at night. The only person on the premises was the appellant. A few feet away from him, the police found a loaded handgun outside one of the bedrooms. Their search did not turn up any evidence to suggest that another person lived there. At trial, the witness for the defence testified that it was he, not the appellant, who had rented the residence, that the appellant also lived there for several months, that the witness had purchased the gun on the street, and that he had left it on the premises that night while the appellant was asleep. The trial judge found the appellant guilty of careless storage of a firearm, possession of a prohibited or restricted firearm, and possession of a weapon obtained by commission of an offence. The appellant's prior criminal record of over 40 convictions includes an assault ten years ago, but since then only driving offences and no prior firearms charges. The judge sentenced him to three years in a federal institution. The appellant appealed his convictions and sought leave to appeal, and if granted, appealed his sentence.

- Issues:**
1. Whether the trial judge erred in dismissing the appellant's *Charter* application seeking exclusion of evidence (the gun) at trial;
 2. Whether he erred in his assessment of the evidence in convicting the appellant; and
 3. Whether he erred in imposing sentence.

Result: Appeals on each of the *Charter* application and the convictions dismissed. As to the *Charter* application, the trial judge correctly identified the test to be applied by a reviewing judge on the issuance of a search warrant, and his reasons were adequate. As to the conviction, the trial judge did not materially misapprehend the evidence nor fail to appreciate important evidence. He did not believe the witness for the defence. His reasons were sufficient and his verdict was not unreasonable.

Leave to appeal the sentence allowed, but the appeal against sentence was dismissed. Per Saunders, J.A. (Hamilton, J.A. concurring): in view of the circumstances of this case, including the minimum sentence and the appellant's criminal record, the sentence imposed was not demonstrably unfit and did not warrant intervention. Per Oland, J.A. dissenting: in view of the jurisprudence on sentencing for such firearms offences, the sentence was clearly excessive and an appropriate sentence would be two years' imprisonment.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 24 pages.