IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Ellison, 2010 NSPC 78

Date: December 15, 2010
Docket: 2158721, 2158722, 2158723, 2158724, 2158725
Registry: Halifax

Between:

Her Majesty the Queen

v.

Arnell Ellison

Judge:	The Honourable Judge Castor H. Williams
Heard:	December 10, 2010, in Halifax, Nova Scotia
Oral Decision:	December 15, 2010
Charge:	CC.145(3), CC. 145(3), CC. 129(a), CC. 129(a) & CC. 145(3)
Counsel:	Tanya Carter, for the Crown Peter Nolen, for the Defence

By the Court:

Introduction

[1] The police have charged Arnell Ellison with several breaches of his interim release orders and with unlawfully and willfully obstructing and resisting police officers while in the lawful execution of their duty. Ellison denied committing any breach that would have triggered other breaches and essentially argued that, as he was arrested in his dwelling house without a warrant, any resistance or obstruction to his arrest was justified. Therefore, this case is primarily a consideration of the police power to arrest, without warrant, in a dwelling house.

Overview

[2] On March 17, 2010 at 2145 hours Cst. Nicholas Burne of the Halifax Regional Municipality Police Service made a routine compliance check at Ellison's residence to assure that he was abiding by his daily court imposed curfew between 1800 hours and 0600 hours. The officer was informed by the lone occupant, Troy Nelson, who after checking the dwelling house, that Ellison was not at home but was with his

mother at a nearby community center. Upon his checking at the community centre, the officer discovered that it was closed and he saw neither the accused nor his mother.

[3] Further, and as a following up to his investigation of the absence of Ellison on the previous night, Burne returned to the residence on March 19, 2010. Ellison and his mother, Chrisell Ellison, were present and he informed the officer that he and his mother were at the community centre the previous night and that when they were returning from the centre he did see the police but never went and spoke to them.

[4] Additionally, on March 23, 2010, Cst. Zachary Withrow and Cst. Parker McIsaac went to Ellison's dwelling door and informed him that he was "arrestable" for an alleged breach of his conditions that he allegedly committed on March 17, 2010. He responded that he had not committed any breaches and should they, in effect, wanted to arrest him they first should obtain a warrant to do so.

[5] He was irate and hostile. His mother came to the door and also discussed the situation with the police who requested her permission to enter the apartment to effect the arrest. They also informed her that if they were to obtain a warrant, the situation would become messy as they would kick down the door. She did not consent to their

entry but not wanting her door damaged, entreated Ellison to go with them. He adamantly refused to go as he felt that he had done nothing wrong. She decided to wrestle him into submission and held him in a bear hug. Shortly thereafter, upon his mother's request, his grandmother arrived on the scene to help to calm the situation and also to persuade him to accede to his arrest. They, however, had closed the door, at all times, denying the police any entry.

[6] Nonetheless, having stated that they would obtain a warrant, the officers, however, remained outside the apartment listening to the activities that they could hear happening inside and behind the closed door. They heard raised voices as if in an argument, banging noises and the sounds of falling articles as if there were a struggle coming from the apartment and they became concerned about the safety of the occupants. They did not know what was happening.

[7] Fortuitously, according to the police, the grandmother opened the door and asked them to come in to assist. Rushing into the apartment they saw the accused and his mother standing and struggling in the narrow hallway. She had him in a bear hug and they fell backwards and sideways to the floor with her legs entwined around his body and him laying on top of her facing upwards. The accused was still struggling

on the floor with his mother when the police reached them. Quickly separating them and turning the accused onto his stomach the officers handcuffed him and told him that he was under arrest. They, however, neither at that time of the arrest nor shortly thereafter told him the reason for the arrest. It was only when he had arrived at the police station and questioned about other police investigations, did they inform him that he was under arrest for the alleged breach of his release conditions.

[8] However, it would appear that when the police arrived at the residence on March 17, 2010, Troy Nelson had informed him that Ellison and his mother had gone to Dartmouth to visit his sick grandmother. Likewise, it would appear that Chrisell Ellison, who worked at the Community Centre, on March 17, 2010, left her work place at about 2130 hours with the intention of visiting her mother who, that day, underwent day surgery for an unspecified medical condition. She, however, requested a co-worker, Jessie Carvery, to close the Centre and to set the security alarm on closing which was part of, her, Chrisell Ellison's, normal duties.

[9] Nonetheless, when she was waiting at the bus stop, with by her son, with the sole intention of visiting her sick mother, she received a cell phone message from Carvery who apparently was unable to activate the Centre's alarm system. Returning

with her son to the Centre, Chrisell Ellison activated the alarm system and then, thinking that it was now too late, decided to abandon her intention to visit her sick mother. She and her son walked from the Centre to their nearby residence. They saw the police in their parked vehicle. But, despite the fact that Nelson informed them that the police were looking for Ellison, neither he nor his mother made any effort to speak or to report their activities to the police.

Findings of Fact and Analysis

[10] Here, in my opinion, issues of credibility and reliability arise. So, I applied the principles enunciated in ***R. v. W.(D.),*** [1991] 1 S.C.R. 742, and examined and tested each version of the event for "its consistency and harmony with the probabilities which a practical and informed person would readily recognize as reasonable in the set of circumstances disclosed by the total evidence." See: ***R. v. Killen***, [2005] N.S.J. No.41, 2005 NSPC 4 at paras.19-20.

[11] As a result, I accept and find that when Cst. Burne made his compliance check on Ellison on March 17, 2010, Ellison was not at home. Furthermore, I conclude and find that Nelson, who was the only person present, did not know precisely where Ellison was. He had checked Ellison's room called his name and then informed the

officer that Ellison was at the Community Centre with his mother. I neither accept nor find that Nelson told the officer that Ellison and his mother went to Dartmouth to visit his sick grandmother. Subsequent events, as I will discuss, made this assertion unreliable, untrustworthy and therefore untenable and of no probative value.

[12] Additionally, I find, as this is consistent with Ellison's conduct and utterances throughout, that he honestly believed that once he was outside the home in his mother's company, for any reason, he was not in violation of his release order. This, I find was also apparently the common belief as when the police made their compliance check on March 19, 2010, Ellison and his mother advised that he was with her at the Community Centre. However, I find that the exception to his curfew was not general but rather for specific itineraries, one of which was, "to visit ill relatives [in Dartmouth]."

[13] In my opinion, the viewpoint presented by the Defence that Ellison and his mother were going to visit his sick grandmother in Dartmouth, with respect, appeared to be concocted, in light of developments, to explain his absence from his home and to exonerate him. I say so when I consider that if, in fact, they were intent on visiting his grandmother who had day surgery and were concerned about her health, it made

no sense that they would abruptly change their minds because it was late after Chrisell Ellison had set the Community Centre's alarm. It was already late when they had decided to go. Further, it made no sense for Chrisell Ellison to ask and to entrust someone, who did not know the alarm code and to whom she apparently did not give the code to secure the building in her absence. Significantly, however, neither the grandmother nor Jessie Carvery testified to support these assertions. Thus, unsupported, I find that version of events to be untrustworthy, unreliable and, in my view, it had little or no probative value in deciding the issue of Ellison's absence from his home.

[14] Additionally, I find that Nelson informed both Ellison and his mother that the police, in their absence, had made their compliance check. Given that fact, I find that a reasonable person, in Ellison's position, seeing the police parked, as he claimed, and knowing the consequences of not making some contact and explaining this absence would have spoken to the police. Instead, he stood some distance away, with full knowledge of his likely jeopardy, smoked a cigarette and did not go and speak to the police. In my opinion it was a story that made no logical sense and "it was not in harmony with the preponderance of the probabilities which a practical and informed

person would readily recognize as reasonable in the set of circumstances disclosed in the total evidence and material to the facts in issue."

[15] Even so, the grandmother was present on March 23, 2010 when the police were also present and again no opportunity was taken to explain, in the then crisis situation, what had happened, if it in fact it did, as they were asserting at trial. However, given the total evidence and as I observed the witnesses as they testified and my analysis and impressions of their testimonies I conclude and find that I do not believe Ellison when he testified that on March 17, 2010, he left his home with the intention to visit his sick grandmother in Dartmouth. True, he was with his mother but I find, on the total evidence, that, at all times material, they were at the Community Centre.

[16] As a result, I am satisfied, on the facts before me and as I have found, that the Crown has proved beyond a reasonable doubt, that Ellison did violate his release conditions as charged. I find him guilty of count 2 on the Information tried before me - breach of his curfew conditions. Likewise, I find him guilty of the companion charge of "failing to keep the peace and be of good behavior" - count 1 on the Information tried before me. Convictions entered accordingly.

[17] I will now address the issue of his arrest on March 23, 2010. The police powers of arrest, without a warrant and its limitations, are specified in the ***Criminal Code*** s. 495 as follows:

> 495(1) A peace officer may arrest without warrant
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> (a) a person who has committed an indictable offence or who, on reasonable grounds, believes he has committed or is about to commit an indictable offence.
>
> (b) a person whom he finds committing a criminal offence, or
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> (c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found.
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> 495(2) A peace officer shall not arrest a person without warrant for
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> (a) an indictable offence mentioned in section 553,
>
> (b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction, or
>
> (c) an offence punishable on summary conviction,
>
> in any case where

> (d) he believes on reasonable ground that the public interest, having regard to all the circumstances including the need to
>
> (I) establish the identity of the person,
>
> (ii) secure or preserve evidence of or relating to the offence, or
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> (iii) prevent the continuation or repetition of the offence or the commission of another offence,
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> may be satisfied without so arresting the person, and
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> (e) he has no reasonable grounds to believe that, if he does not so arrest the person, the person will fail to attend court in order to be dealt with according to law.
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> 495(3) Notwithstanding subsection (2), a peace officer acting under subsection (1) is deemed to be acting lawfully and in execution of his duty for the purpose of
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> (a) any proceedings under this or any other Act of Parliament; and
>
> (b) any other proceedings, unless in any such proceedings it is alleged and established by the personal making the allegation that the peace officer did not comply with the requirements of subsection (2).

[18] If however, on the basis of s.495(2), the officer decided not to arrest a person he is authorized by s.496 to issue an appearance notice. Section 496 states:

> 496. Where, by virtue of subsection 495(2), a peace officer does not arrest a person, he may issue an appearance notice to the person if the offence is
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> (a) an indictable offence mentioned in section 553,
>
> (b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction, or
>
> (c) an offence punishable on summary conviction.

[19] In my opinion, to say that a person is "arrestable" if, in fact, it means that a person can be arrested for allegedly committing a specified offence, that arrest, in law, must comply with the statutory provisions enacted in the ***Criminal Code***. Part XVI - Compelling Appearance of Accused Before A Justice and Interim Release. Here, on the facts that I accept, I find that the police had reasonable grounds to believe that the accused had violated a condition of his release order. He was not at his home as he should have been when they made a compliance check. Furthermore, they were informed, on inquiry and investigation, that he was with his mother at a venue or location that was not specified in his release order. Consequently, they reasonably concluded that he was "arrestable" for a breach of that order.

[20] The difficulty here, if at all, is that although the police decided that he was "arrestable" they had neither sought nor received a warrant for his arrest issued by a justice or a judge. Neither had they issued an appearance notice nor issued a summons. The alleged offence had occurred a week earlier and it was a minor offence. Nonetheless, they, however, determined to arrest him, without a warrant, at his dwelling house.

[21] Be as it may, the general rule is that a peace officer may arrest, without warrant, a person who has committed or who on reasonable and probable grounds, he believes has committed or is about to commit an indictable offence or whom he finds committing any criminal offence that is either indictable or punishable on summary conviction. Section 495(1).

[22] However, a peace officer has a statutorily imposed duty not to arrest a person, without warrant, for minor offences, in circumstances where he believes, on reasonable and probable grounds, that the public interest may be satisfied by not effecting an arrest. In such circumstances, as here, the officers had to consider whether it was necessary, in the public interest, (a) to arrest Mr. Ellison to establish his identify, (b) to secure or preserve evidence of the offence, (c) to prevent the

continuation or repetition of the offence or the commission of another offence, or (d) that there were reasonable grounds to believe that he would not attend court. Section 495(2). Where the power of arrest is limited by virtue of s. 495(2) the officers may then issue an appearance notice to compel Mr. Ellison to attend court. Section 496.

[23] Here, I find that the police knew the identity of Mr. Ellison and that he resided with his mother at the local address where they had made several prior and positive compliance checks. It was late at night and Mr. Ellison was at home with his family enjoying the peace and quiet of his residence. Moreover, the police were familiar with him and the alleged offence was a week old during which time the authorities had investigated the circumstances of its commission. Thus, this was not a case of preventing the continuation of the alleged offence.

[24] Likewise, I find that there was no need to preserve any evidence of the alleged offence as the testimony of the compliance checking officer would be the evidence needed to establish a prima facie case. Furthermore, the alleged breach was a minor offence that may be prosecuted either by indictment or summary conviction. Additionally, I find that there was no evidence to conclude that the police had grounds to believe that if they did not arrest Ellison he would fail to attend court to be dealt

with according to law. Therefore, on the facts as I have found and on the applicable law, the police had a duty not to arrest, without a warrant, within the scope of s.495(2). See: ***R. v. Bunn***, [1985] M. J. No.292 (Q.B.).

[25] However, I should also point out that pursuant to s. 495(3) the officers could still lawfully exercise their power of arrest under s.495(1) even if they did not comply with their duty under s.495(2). Thus, in such circumstances, any wilful resistance or obstruction to the arrest would be done while the officers were in the lawful execution of their duty. See: ***R. v. McKibbon,*** [1973] B.C.J. No.766 (C.A.). ***Bunn***, *supra.*

[26] Notwithstanding this latter proposition, however, in my opinion, the issue here for me to determine is whether, in the set of circumstances, as presented, it could be said that the officers were acting according to law and thus in the lawful execution of their duty.

[27] I find that the officers' testimony on this point is critical. First, Cst. Zachary Withrow testified he heard screaming and yelling and items smashed as if a fight was on. The grandmother, who looked concerned, opened the door and asked them to come inside to assist. She said, "Come in." Sgt. Graham and Cst Parker McIsaac entered ahead of him and he saw Ellison fighting on the ground with his mother. Also,

he saw his two colleagues separating the still struggling parties and heard Sgt. Graham telling the accused that he was under arrest. However, it was he, Cst. Withrow, who informed Ellison, when at the police station, some time later, that the arrest was for the earlier alleged breach of his interim release conditions.

[28] Secondly, Cst. Parker McIsaac testified that he also heard a commotion inside and that the grandmother came and invited them in by saying, “Come in.” He saw Ellison and his mother in an altercation. He and Sgt. Graham were the first to reach the parties. Ellison was agitated and angry and he was on the floor with him laying on the top of his mother when Graham arrested him. They rolled Ellison over and he was aggressive and combative and yelling and screaming at his mother.

[29] Thirdly, Sgt. Gordon Graham testified that the grandmother opened the door and said, “Come in.” He was the first to enter. He saw Ellison and his mother standing with her holding on to him. He saw them fall to the ground and he then grabbed Ellison and told him that he was under arrest. Graham gave Ellison no explanation for his arrest. He was of the view that another officer must have explained the arrest. Ellison was laying on his back on his mother who was holding him and

Graham rolled him over onto his stomach with his arms at his sides and they pulled the still struggling Ellison to his feet.

[30] The issue, however is whether the officers had legal authority to enter Mr. Ellison's home to arrest him for the alleged breach of his release conditions, without a warrant. On the evidence that I accept and find, the police arrived at his door and told him that they came to arrest him for the earlier alleged breach of conditions. He denied any wrong doing and told them to get a warrant for his arrest and slammed the door shut in their faces. His mother came to the door and discussed the matter with them and refused them entry into the home and also closed the door. The grandmother, who opened the door was an invitee and it can reasonably be inferred from the evidence that she only wanted the police to enter the dwelling for the purpose of assisting to calm down the situation that was caused by their intended purpose and presence outside the apartment's door.

[31] In ***R. v. Feeney***, [1997] 2 S.C.R.13 at para .47 Justice Sopinka for the majority held that the common law power of arrest, without a warrant, after a forced entry into a dwelling house, with the exception of "hot pursuit" or limited "exigent circumstances," offended the ***Canadian Charter of Rights and Freedoms,*** s.8. In response to this decision the police's authority to enter a dwelling house for the

purpose of arresting or apprehending a person, without a warrant, is particularized in the ***Criminal Code***, s. 529.3 as follows:

> 529.3(1) Without limiting or restricting any power a peace officer may have to enter a dwelling-house under this or any other Act or law, the peace officer may enter the dwelling-house for the purpose of arresting or apprehending a person, without a warrant referred to in section 529 or 529.1 authorizing the entry, if the peace officer has reasonable grounds to believe that the person is present in the dwelling-house, and the conditions for obtaining a warrant under section 529.1 exist but by reason of exigent circumstances it would be impracticable to obtain a warrant.
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> 529.3(2) For the purposes of subsection (1), exigent circumstances include circumstances in which the peace officer
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> (a) has reasonable grounds to suspect that entry into the dwelling-house is necessary to prevent imminent bodily harm or death to any person; or
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> (b) has reasonable grounds to believe that evidence relating to the commission of an indictable offence is present in the dwelling-house and that entry into the dwelling-house is necessary to prevent the imminent loss or imminent destruction of evidence.

[32] Under the current law, to enter Ellison's apartment to arrest him, without a warrant, the officers were required to have reasonable grounds to believe that he was present in his apartment and that the conditions for obtaining a warrant under s.529.1 existed. Additionally, they were required to establish that it was impractical, because of exigent circumstances, to obtain a warrant.

[33] On the evidence, I find that Ellison had identified himself and was at home. He, however, had refused to go with the police without an arrest warrant. He remained inside his home and, at that point in time, was not found committing any criminal offence. The police, if they desired to do so, could have obtained a warrant under s.529.1 as grounds existed to arrest him without a warrant under s. 495(1) (a) or (b).

[34] Furthermore, I find that there was no "hot pursuit" to engage the common law right to enter his home. I find that the police recognized and acknowledged this factor as they sought his mother's permission to enter the home to effect the arrest. She, however, refused them entry.

[35] The Crown, however, averred that the officers were invited into the dwelling by the grandmother who was herself an invitee. But, even if that invitation to enter is upheld, on the evidence, I find that the purpose of the invitation was for them to assist to calm down whatever was occurring inside. Thus, this implied invitation, I find was for a limited purpose. Significantly, I find that it did not and could not, in my view, authorize, in law, a warrantless arrest, inside the dwelling house, unless the police found someone committing a criminal offence or were in "hot pursuit."

[36] Additionally, the Crown asserted that there were exigent circumstances in that hearing noises inside the home the police feared for the safety of the occupants. Thus, they were acting to prevent imminent bodily harm or death to any occupant. However, on the evidence, there was no forced entry to suggest any urgency on the part of the police manifesting any concern to prevent any imminent bodily harm to the occupants. They remained outside listening until they were invited inside, ostensibly to calm a situation. Moreover, they were not informed by the grandmother, who invited them in, that there was a danger of imminent bodily harm to anyone. When they entered what they saw and quickly determined was merely an altercation between the accused and his mother who was wrestling with him. She had him in a bear hug and he was struggling to free himself. There was no imminent bodily harm and, in fact, no bodily harm resulted from the struggle. They separated the struggling parties and, without further or any investigation or explanation, promptly arrested Ellison who was attempting to get free from his mother's grip.

[37] On that evidence, as I have found, the Crown maintained that, although the police never told Ellison why they did, at that point in time arrest him, it was obvious to him that he was being arrested for the earlier alleged breach as presently, inside his

home, he had committed no criminal offence. However, in my opinion, on the facts that I accept and find, this assertion, with respect, confuses and stretches arbitrarily the limits of the police authority to arrest, without warrant, in a dwelling house. I find that Ellison, in law, was not committing any criminal offence before or at the time of his arrest in his dwelling house. Moreover, the police had neither obtained nor possessed a warrant issued under s.529.1. Furthermore, I find that it was not, in the circumstances, impractical for them to obtain an arrest warrant before they entered the dwelling. When he told them that he was not accompanying them without an arrest warrant they responded that they would obtain one. He was not going anywhere. Thus, there were no exigent circumstances and, there certainly was no "hot pursuit." Therefore, I find that the common law authority and the added legal authority under s.529.3 were not engaged. Hence, in my opinion, Ellison's apprehension and arrest, in his dwelling house, without a warrant, for a prior alleged breach of his undertaking was not according to law.

[38] It should be noted, however, that the purpose of the officers' entry into the dwelling house was important. If the intention and purpose of the entry were to arrest, without a warrant, Ellison for the earlier alleged breach, as distinct to the request by the grandmother to assist to calm the situation, they had no legal authority to arrest

him, inside his dwelling house, for the alleged prior breach, without a warrant. Simply put, I find that they had not complied with all the required legal prerequisites. See: ***R. v. Phillips,*** [2006] N.S.J. No.565 (C.A.).

[39] As a result, I conclude and find, that in the circumstances, as presented, Ellison's arrest, inside his dwelling house, without a warrant, for the prior alleged breach is not supported in law. In short, I find that the officers were merely invitees in the home for a limited purpose and were not, in law, authorized to arrest Ellison, in his home, without a warrant, unless he was committing a criminal offence that all agree and I find that he was not. Consequently, I am not satisfied and cannot find, beyond a reasonable doubt, on the facts, as I have found, that Ellison, unlawfully or willfully resisted or obstructed the police in the lawful execution of their duty. See also; ***R. v. Collier***, [2001] N.S.J. No. 256, 2001 NSPC 15.

[40] As a result, I find him not guilty of counts 3, 4, and 5 on the Information tried before me. Acquittals will be entered accordingly.