
CANADA / JUDGMENT

R. v. Anderson

2014 BCSC 1660

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2014 BCSC 1660 R. v. Anderson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Anderson,

2014 BCSC 1660

Date: 20140828

Docket: 26367

Registry: Vancouver

Between:

Regina

v.

Dustin Wade Jewell Anderson

Before: The Honourable Mr. Justice N.H. Smith

Oral Reasons for Judgment

Counsel for Crown:

L. Sarbit

R. Flannigan

Counsel for Accused:

J.W. Sherren

Place and Date of Trial/Hearing:

Vancouver, B.C.

April 28-May 2, May 5-7, 2014

July 16,17, 2014

Place and Date of Judgment:

Vancouver, B.C.

August 28, 2014

- [1] On June 15, 2011, downtown Vancouver was the site of what has become notorious as the "Stanley Cup Riot" after the Vancouver Canucks hockey team lost the seventh game of the Stanley Cup final.
- [2] The accused Dustin Wade Jewell Anderson is charged with three offences arising from that event: taking part in a riot, contrary to s. 65 of the Criminal Code, R.S.C., 1985, c. C-46 assault contrary to s. 266, and assault of a peace officer, contrary to s. 270 (1).
- [3] Mr. Anderson admits that a riot took place in the downtown core of Vancouver between approximately 7:30 p.m. on June 15, 2011 and 12:30 a.m. on June 16, 2011. Even without the admission, that fact is clearly established on the evidence. There is evidence of a chaotic and dangerous situation that included vehicles being set on fire, vandalism, looting and crowds confronting and attacking police and firefighters who were attempting to control the situation.
- [4] In addition to the testimony of police and other witnesses, I had the benefit of numerous video clips that were admitted into evidence. These had been taken by the police, media outlets and private citizens. There can be no doubt that what is seen there was a riot as that term is defined in the Criminal Code-- a tumultuous disturbance of the peace.
- [5] Mr. Anderson admits his identity as the person shown at many points in these recordings. One group of videos shows the scene near the corner of Georgia and Homer Streets just after 8 p.m. as police attempted to gain control of that intersection. Police in riot gear, including helmets and shields, formed a single line across Homer Street, with more police in regular uniforms behind them. The police were confronting, but clearly outnumbered by, a large crowd that was yelling and throwing a variety of objects at them.
- [6] In an effort to push back and disperse the crowd, the police, used a technique of periodically advancing toward the crowd, then withdrawing. Each time the police withdrew, a portion of the crowd advanced back toward them, closing the distance. Staff Sgt. Athans, was a section leader in the public safety unit, commonly referred to as the riot squad. He described the situation as "very dangerous" and the attack from the crowd "intense".

- [7] Mr. Anderson is first seen in the videos working his way toward the front of the crowd while holding up a cellular phone, apparently making his own video recording of the police. He is later seen at the front of the crowd, still apparently videoing the scene.
- [8] At this point there were large numbers of people on the sidewalk, watching the events and taking photographs and videos. Police witnesses testified that those people became part of the problem because, by their presence, they provided the rioters with an audience that encouraged their actions. They also formed a crowd that rioters could temporarily disappear into as necessary.
- [9] However, Mr. Anderson was doing more than recording from the sidelines. In the videos, he can be seen at the front of the crowd as it moved toward the police line. At one point, he walks in front of the crowd, directly toward a police officer in what appears to be a swaggering or challenging manner. At another point, when a police officer pushed him back, Mr. Anderson did not leave the scene but continued to confront the officer.
- [10] He later came into direct confrontation with Staff Sgt. Athans, who testified that, during an effort to push the crowd back, Mr. Anderson refused to move and took what S/Sgt. athans described as an "aggressive stance." He came towards S/Sgt. Athans with the cell phone in his outstretched arm, although S/Sgt. athans said he didn't know what object Mr. Anderson was holding. S/Sgt. Athans struck Mr. Anderson with his baton in the upper arm and in the leg. This incident can be clearly seen on the video.
- [11] Const. Szykowski testified that Mr. Anderson approached him aggressively and after being pushed away, picked up something off the street, threw it at him, then spit at him. That is also confirmed by the video evidence. Shortly after that, Mr. Anderson is seen attempting to pick up a section of metal fencing that some members of the crowd had been attempting to throw at the police line.
- [12] The police eventually used pepper spray on the crowd and Mr. Anderson can be seen at the front of the crowd at or near that point. Having been exposed to pepper spray, Mr. Anderson apparently decided that he needed medical treatment and that his treatment should be a high priority for emergency personnel. He appeared at the corner of Hamilton and Georgia, a block east of where he had previously been. At that location, some members of the crowd had been trying to get into a fire department medical vehicle while others were attempting to turn off a fire hydrant that was being used to extinguish a car fire.
- [13] Firefighter Kristofer Zoppa testified that he was in the driver's seat of the medical vehicle when Mr. Anderson approached, yelling and in an agitated state, seeking help because he had been pepper sprayed. Mr. Zoppa said Mr. Anderson was not exhibiting any of the signs usually associated with a severe pepper spray exposure and he asked him to move along. Mr. Anderson then went around to the other side of the vehicle and attempted to climb in.

- [14] Mr. Zoppa called for assistance of another firefighter, David Boone, who was nearby dealing with the fire hydrant. Mr. Boone said he saw Mr. Anderson with his head inside the vehicle yelling at Mr. Zoppa. Mr. Anderson also complained to Mr. Boone about having been pepper sprayed and, like Mr. Zoppa, Mr. Boone did not consider him to be in need of any immediate help.
- [15] Another firefighter, Dale Maffei, testified that he came to assist and asked Mr. Anderson to leave the area. He said Mr. Anderson replied with loud swearing and name calling. A video shows Mr. Maffei walking along the side and to the back of the truck, with Mr. Anderson following, obviously angry and shouting.
- [16] When Mr. Maffei took Mr. Anderson by the arm and began to lead him away from the truck, Mr. Anderson punched him in the head. He then circled Mr. Maffei for a few seconds in a manner that appeared to be challenging him to a further fight. An excited reaction from other members of the crowd can be heard on the video when the punch is thrown. Mr. Maffei said the punch produced cuts on the nose eyebrow and broke the sunglasses he was wearing. The marks on his face were present for about 10 days.
- [17] Approximately 45 minutes to an hour later, Mr. Anderson was at the intersection of Robson and Hamilton. Windows of a liquor store had been broken and members of a crowd, chanting "we want booze", were attempting to get into the store. A few members of the public were trying to protect the property.
- [18] Police in riot gear formed a line across the intersection on Hamilton Street, but were not confronting the crowd that was besieging the liquor store. Acting Sgt. McDougall, who was in charge of that squad, testified they had been dealing with the crowd for about an hour as they worked their way up Hamilton Street from Georgia Street. He said they were exhausted and unable to do more than hold their line while waiting for reinforcements to arrive.
- [19] Mr. Anderson approached Sgt. McDougall, yelling that he had been pepper sprayed while displaying the stains on his shirt and a wound on his hand to someone who was recording the scene. He confronted Sgt. McDougall, yelling "hit me, goof," followed by an obscenity. Mr. Anderson then swung a bag he was carrying, hitting the inside of Sgt. McDougall's riot shield. A few seconds later he transferred the bag from his left to his right hand and took a more pronounced swing with the bag, which Sgt. McDougall blocked with his shield.
- [20] Mr. Anderson then began to walk west on Robson street, pushing from behind a man who was protecting the liquor store. That apparently inspired the crowd to begin chanting "fight, fight." Facing that man moments later, Mr. Anderson adopted a fighting stance, with his fists clenched, but no punches were thrown.

- [21] Some of the video taken at Robson and Hamilton was taken by Greg Potocky who said that, on learning of the riot, he came downtown with the express purpose of making recordings that might assist the police in identifying rioters. He testified that, even before the incident with acting Sgt. McDougall, Mr. Anderson had stood out to him as an instigator, chanting, yelling and throwing objects at the police line. In the video that he posted online, Mr. Potocky circled Mr. Anderson as someone he hoped could be identified.
- [22] After the events at Robson and Hamilton, Mr. Anderson made his way to the intersection of Georgia and Richards, where Constables McLelland and Hooper were part of a group that had set up a three-sided box to control the intersection.
- [23] A video shows they were asking people to move back, and most were complying. However, Mr. Anderson walked up to Const. McClelland, still complaining about pepper spray and challenging Const. McClelland to hit him. He attempted to reach over Const. McClelland's riot shield, then pushed the front of the shield.
- [24] When Const. Hooper approached and asked Mr. Anderson to move back, he replied "are you going to hit me?" and continued to argue, refusing demands that he move back, until a passerby intervened and encourage him to move away.
- [25] A little later, a block further to the west, Const. Ermolaev was in front of the Bay department store, when Mr. Anderson approached him, showing the signs of the pepper spray on his shirt and loudly swearing at him until he was led away by another person in the crowd. Const. Ermolaev testified that he was concerned about Mr. Anderson's confrontational approach, believing he wanted to start a fight.

I. count one

- [26] Mr. Anderson admits that what took place in downtown Vancouver on June 15, 2011 was a riot. The question is whether the crown has proved beyond a reasonable doubt that Mr. Anderson participated in it.
- [27] The relevant sections are ss. 63-65
63. (1) An unlawful assembly is an assembly of three or more persons who, with intent to carry out any common purpose, assemble in such a manner or so conduct themselves when they are assembled as to cause persons in the neighbourhood of the assembly to fear, on reasonable grounds, that they
- (a) will disturb the peace tumultuously; or
- (b) will by that assembly needlessly and without reasonable cause provoke other persons to disturb the peace tumultuously.
64. A riot is an unlawful assembly that has begun to disturb the peace tumultuously.

65. (1) Everyone who takes part in a riot is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

[28] To take part in a Riot is to "contribute to the excitement, fervor, intimidation and dangerousness of the unlawful assembly". R v Loewen (1992), 75 ccc (3rd) 184 (B.C.C.A.) at para. 8. The accused must be shown not only to have physically participated in the events, but to have intended to take part in a riot or to have acted recklessly in taking part. A frequently cited passage from R. v. Brien, [1993] N.W.T.J. No. 116, para. 38

38 The further element of participation in the riot, once existence of the riot has been proved beyond a reasonable doubt, together with proof likewise of the required objective mens rea as to that fact, will require proof not only of the actus reus of participation (by word or deed or other manner) but the necessary mens rea as to that. I agree with counsel for the applicants, as I understand his submissions, that in this respect the requirement is one of subjective, as distinct from objective, mens rea. And by this, I mean that the accused person must be shown not only to have acted as a participant, but also to have intended to "take part" in the riot (or to have been so reckless as to have acted as if he or she did so intend).

[29] The general test for recklessness was referred to by the Court of Appeal in R. v. Schepannek, 2012 B.C.C.A. 368 at para. 16

The test of recklessness, as described in R. v. Sansregret (1985), 18 C.C.C. (3d) 223, was referred to by the judge:

It is found in the attitude of one who, aware that there is danger and that his conduct could bring about the result prohibited by the common law, nevertheless persists, despite the risk. It is, in other words, the conduct of one who sees the risk and who takes the chance. It is in this sense that the term "recklessness" is used in the criminal law ...

The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in rule for blindness it is justified by the accused's fault in deliberately failing to inquire when he knows there is reason for inquiry.

[30] The accused's subjective intent will usually have to be inferred from his conduct and the surrounding circumstances. R. v. Brien, para. 35.

[31] The actions of the accused must be considered in the context of all the surrounding events. Actions that may seem relatively minor in isolation may contribute to the general disorder. This has been discussed by the provincial court in a number of cases arising from the same riot that is at issue here.

[32] In R v. Patillo, 2012 BCPC 299, Bagnall, J. said at paras. 40 and 41

40 Why is this offence considered to be so serious? During a riot, the rule of law is suspended by virtue of the actions of the rioters. Citizens nearby and further afield cannot feel, and indeed are not, physically safe. The extraordinary call on emergency services of all kinds can result in there being no assistance available for anyone else in the community. Property of all sorts, locked and secured in the ordinary way, is not safe from the crowd. By sheer force of numbers, the rioters can break through any security device and loot and destroy at will.

41 Participation in a riot includes a vast range of behaviours. A riot will only end when those involved do what they should have done in the first place: stop and leave the area. As long as there are observers, who by their very presence are encouraging the destruction, people watching, sometimes cheering, and frequently taking photographs, the riot will continue.

[33] In *R v. Kozak-Welschlau*, Judge Dhillon said at para 55:

I wish to note that in looking at the discrete acts of Mr. Kozak, there is a risk in minimizing his specific offending behaviour as short-lived and less impactful, such as that he did not ignite the vehicles, but threw trash on them and was acting immaturely in and around them while they burned. But the fallacy of that argument is that each active rioter is not judged by his acts alone, but in concert with the act in the context of a riot is like one drop of water that, unchecked, can grow in number until it becomes a tsunami of destruction that can overpower, overtake, destroy, and devastate a community.

[34] In *R v. Hill*, 2014 BCPC 0145, Judge Giardini said a deliberate decision to remain in the area while witnessing police efforts to clear it constituted participation in a riot at para. 106

Mr. Hill was in the downtown core for approximately three hours. During that time he witnessed a number of actions the police took to disperse the crowd, this included use of tear gas, police officers in line formation moving the crowd down W. Georgia Street, police officers on horseback, and police officers in vans. These attempts by police were all clearly aimed at trying to disperse the crowd. I find the police officers' attempts to clear the area were not lost on Mr. Hill, but, if they were, it was because he was wilfully blind to what was going on around him. I am therefore satisfied that Mr. Hill's stubborn refusal to leave the area of the riot shows he subjectively intended to take part in the riot.

[35] Counsel for Mr. Anderson argues that the offence of participating in a riot is a specific intent offence. In this context, as I understand the argument, counsel suggests the crown must prove beyond a reasonable doubt that Mr. Anderson not only intended to do the physical actions that are said to amount to participation, but that he intended to do them as part of a riot and not for some other purpose.

[36] Counsel argues that Mr. Anderson was, at first, merely recording the scene as many others were doing. After he was struck and pepper sprayed, he was simply venting his anger as an individual and not intentionally participating in any collective or group action.

[37] This proposition is said to arise from the analysis in Brien, but was specifically rejected by Bagnall, J. of the provincial court in another Stanley cup riot case, *R. v. Kirkwood*, 2013 BCPC 0084, Judge Bagnall referred to s. 63 of the code, which refers to an unlawful assembly, at para. 21

21 The problem with Mr. Waddington's submission is this. One need not have been part of the unlawful assembly which ultimately became a riot to participate in the riot. The modifying clause in s. 63, with intent to carry out a common purpose, does not apply to s. 64 and s. 65. The Crown need not prove that intent under those sections. As I believe is clear from the cases that I have referred to and quoted from at length, the intention associated with s. 65 is a simple one: to take part in or to participate in a riot. There is no explicit or implicit "objective further to the immediate one at hand," in the words of the Supreme Court of Canada in *R. v. Daley*.

[38] I respectfully agree with and adopt that analysis.

[39] In any event, I find Mr. Anderson's participation in the riot began before he was struck with a police baton and before he was pepper-sprayed. In the early stages of the events on Homer Street, Mr. Anderson was not merely a passive observer. He placed himself at the front of the crowd that was confronting the police and that moved toward the police line as the police moved back. He refused to leave the scene when police were obviously attempting to clear the area. In his dealings with individual police officers, he displayed a clearly confrontational attitude and demeanour. There is also clear evidence that on at least one occasion he participated in the throwing of in the throwing of objects at the police.

[40] In summary, I agree with the crown that the evidence shows Anderson obstructed the police and contributed to the general disorder by repeatedly approaching police, throwing objects towards them, spitting and yelling at them, failing to abide by police dispersal tactics, and disobeying police direction to leave. He could not possibly have been unaware of the fact that what was going on around him was a riot and, in the absence of any other evidence, his actions give rise to no possible inference other than that he intended to participate.

[41] After Mr. Anderson was pepper sprayed, he was clearly angry about it. He approached the firefighters on Hamilton Street seeking medical attention. I will deal with that incident later, but at this point the evidence shows that it was made clear to him that they were not going to provide treatment in the circumstances. His angry reaction and confrontational approach, in the presence of what was already a dangerous crowd, contributed to the danger of the situation, as did his interference with firefighters who were trying to perform other duties. If Mr. Anderson did not, at that point, subjectively intend to participate in the riot, he was at least reckless.

- [42] In relation to the events at Robson and Hamilton, I accept and place considerable weight on the evidence of Mr. Potocky, who identified Mr. Anderson as an active participant in and instigator of the riot. This is not simply a "dock identification", made long after the fact with the accused prominently seated in the courtroom. Mr. Potocky made a point of drawing attention to Mr. Anderson in the recording he made and published at the time.
- [43] Leaving aside for the moment the question of Mr. Anderson's alleged assault on Sgt. McDougall, his confrontational approach and abusive language, captured on video, contributed to the general atmosphere of disorder and danger, as did his conflict with the man protecting the liquor store.
- [44] The same can be said of his subsequent interactions with the police in the area of Georgia and Richards and again in front of the Bay. These included his refusal to move back when Const. Hooper specifically asked him to and his challenges to the police to hit him.
- [45] On all of the evidence, I am satisfied beyond a reasonable doubt that Mr. Anderson participated in a riot, as alleged in count one.

II. Count 2

[46] Count 2 alleges assault on Mr. Maffei.

265. (1) A person commits an assault when

- (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
- (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose;

[47] Counsel for Mr. Anderson argues that Mr. Maffei took him by the arm, thereby assuming control over his movements, and began to propel him away from the fire vehicle and toward the crowd. In the circumstances, counsel says Mr. Anderson was entitled to force Mr. Maffei to release him and the blow to Mr. Maffei's head was struck in self-defence.

[48] Under the provisions of the criminal code in force at the time, there were two sections potentially relevant to Mr. Anderson's claim of self defence

34. (1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.
37. (1) Everyone is justified in using force to defend himself or any one under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it.

- (2) Nothing in this section shall be deemed to justify the wilful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent.
- [49] Mr. Anderson did not testify, so there is no direct evidence that he felt threatened or considered himself to be in danger. If the defence is to succeed, it can only do so if the circumstances revealed in the video and other evidence and the inferences that can be drawn from that evidence give rise to a reasonable doubt.
- [50] Mr. Anderson cannot rely on s. 34. Even accepting, for the purpose of this argument, that Mr. Maffei's taking of Mr. Anderson's arm constituted an assault, I find that Mr. Anderson, by his aggressive conduct toward the firefighters clearly provoked it.
- [51] The defence under s. 37 is broader than the defence under s. 34, but still includes an element of proportionality. The only elements of the defence under s. 37 are that the accused use force to defend himself and that the force used was no more than necessary. *R. v. Grandin*, (2001) Vancouver Registry No. CA026536 (B.C.C.A.) at paras. 36 to 39.
- [52] Although there is no absolute duty on the accused to retreat from an assault, the existence of the opportunity to retreat is a relevant factor in considering whether excessive force was used. *R. v. Richter*, 2014 B.C.C.A. 244, at para. 27. The extent to which the accused was actually in danger is also a relevant factor, *R. v. Minion*, tab 16 para. 9, as is the question of whether the accused honestly believed himself to be the victim of an assault, *Grandin*, para 64
- [53] However, as the Court of Appeal said in *R. v. Claus*, [1992] B.C.J. No. 1533 at para. 17
- Acknowledging that the force reasonably believed to be necessary in self-defence cannot always be measured with nicety in the agony of the moment, it must also be clear that the law does not allow for deliberate punishment rooted only in anger and drunkenness.
- [54] Mr. Anderson was angry that he was not being provided medical attention. He made his anger known in an aggressive, if not threatening manner. He had been asked by uniformed firefighters to leave, but had refused to do so. There was clearly a riot going on and firefighters made clear to him, in word and action, that they had more pressing concerns.
- [55] The action taken by Mr. Maffei was an extension of the previous verbal efforts to get Mr. Anderson away from the fire vehicle. He did not strike Mr. Anderson or threaten to do so, nor is there any evidence that his grip on Mr. Anderson's arm caused any pain. In the circumstances, Mr. Anderson could not possibly have considered himself to be in any physical danger from Mr. Maffei and, even if he did, all he needed to do to protect himself was to walk away as he was asked to do.
- [56] Instead, he hit Mr. Maffei in the head, then by his actions suggested an eagerness to continue the fight.

[57] The evidence is overwhelming that Mr. Anderson's punch to Mr. Maffei's head was not an action in self-defence, but was an escalation of the aggression and anger he had previously displayed toward Mr. Maffei and his colleagues.

[58] I find Mr. Anderson guilty on count 2

III. count 3

[59] In count 3, Mr. Anderson is charged with assaulting acting sgt. McDougall.

270. (1) Every one commits an offence who

(a) assaults a public officer or peace officer engaged in the execution of his duty or a person acting in aid of such an officer;

[60] The Crown must establish that Anderson assaulted McDougall, that McDougall was a peace officer and was engaged in the execution of his duty at the time of the assault. *R. v. Plamondon*, [1997] B.C.J. 2757 (C.A.) at para. 29. Of course, the Crown must also establish that Mr. Anderson knew McDougall was a police officer in the execution of his duty.

[61] Counsel for Mr. Anderson concedes that, in swinging a bag at Sgt. McDougall and hitting his shield, he committed an assault, although counsel argues there was no evidence of intent to injure. That argument may be relevant on sentencing, but is not relevant on conviction. Counsel also concedes that McDougall was a police officer on duty at the time.

[62] Mr. Anderson's knowledge that McDougal was a police officer can be inferred from the obvious fact that he was in uniform and wearing full riot gear while police were in the process of attempting to control an ongoing riot. It is also clear that Mr. Anderson was angry about being pepper sprayed by other police officers and it must be inferred that he singled out MacDougall as a target of his anger precisely because McDougal was a police officer.

[63] All of the necessary elements of the offence have been proved beyond a reasonable doubt and I find Mr. Anderson guilty on count 3.

[64] In summary, I find Mr. Anderson guilty on all 3 counts in the indictment.

"N. Smith, J."

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