
CANADA / JUDGMENT

R. v. Belcourt

2012 BCSC 2134

COURT

Supreme Court of British Columbia

DECIDED

25 October 2012

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2012 BCSC 2134 R. v. Belcourt

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Belcourt,

2012 BCSC 2134

Date: 20121025

Docket: 149245-4

Registry: Victoria

Regina

v.

Andrew Jonathon Belcourt and Samuel McGrath

Before: The Honourable Mr. Justice Macaulay

Oral Ruling Re After-the-Fact Conduct

Re Exclusion of Evidence

Counsel for Crown:

C.A. Murray, Q.C., P. Weir

Counsel for Accused Belcourt:

T.J. Russell

Counsel for Accused McGrath:

M.J.B. Munro

Place and Date of Trial/Hearing:

Victoria, B.C.

October 24, 2012

Place and Date of Judgment:

Victoria, B.C.

October 25, 2012

[1] THE COURT: The accused, Belcourt, seeks to exclude some of the evidence of the witness, Max Deleeuw, as inadmissible evidence of after-the-fact conduct. He says that the proposed evidence has no, or at least very little, relevance to any issue in the case. He further says that the prejudicial impact of the evidence outweighs any limited probative value.

[2] Belcourt describes the evidence at issue as follows:

1. Belcourt's stated purpose for a trip up Island during the day following the shooting of Hankel, namely, to get rid of the alleged murder weapon, that is, to "bury the gun";
2. Belcourt's demeanour when he allegedly made admissions to Deleeuw about the shooting of Hankel; and
3. Belcourt's desire to fire off more rounds using the alleged murder weapon.

The Crown does not intend to lead evidence from Deleeuw about the third topic so I need not address that other than to say it is difficult to imagine how the particular evidence would be relevant.

[3] The Crown says that the other proposed evidence goes to live issues and is, accordingly, relevant. The Crown theory of the case is that the two accused broke into the Hankel apartment, roughed him up, robbed him and shot him. Both accused pleaded guilty at the beginning of the trial to robbery using a firearm as well as to break and enter and commit robbery but not guilty to second degree murder. According to the Crown, the jury will have to decide who used the gun, and in what circumstances, to shoot Hankel.

[4] The Crown says that Belcourt's admissions after the fact to Deleeuw about his involvement in the shooting are admissible against him. The defence does not contest that point. The Crown further says that the jury must decide whether Belcourt made the alleged admission and, if so, whether it is true. Demeanour, according to the Crown, is a part of the narrative and a factor for the jury to consider in determining whether the admission is true.

[5] As to Belcourt's plan to bury the gun, the Crown says that it is relevant to the question of which accused exercised control over the weapon at the material time. The Crown theory is that McGrath bought the weapon from one of Belcourt's relatives but that Belcourt exercised control over it and was the shooter.

- [6] Belcourt says, in reply, that the overall evidence will likely satisfy the jury that Belcourt was the shooter and, as I understand it, that there will be a defence of accident. Be that as it may, the first question is whether the proposed evidence is, as the Crown submits, relevant to an issue or issues that the jury must decide. In my view, the issues identified by the Crown are live issues at this point in the trial. Whether they will cease to be by the end of the trial is a matter best left until then to decide in the course of determining what final instructions to give to the jury.
- [7] In *R. v. White*, 2011 SCC 13, the Supreme Court of Canada revisited the principles that govern the admissibility of evidence of after-the-fact conduct and the appropriate jury instruction to give if the evidence is admissible. I summarize the facts as follows. The accused and the victim had a physical altercation during which the accused fired a loaded handgun into the chest of the victim and killed him instantly. The accused fled the scene and was later arrested. Identity was at issue throughout the Crown's case, but by the end of the trial, the accused advanced the defence of accident and effectively admitted manslaughter, leaving only the question of intent as a live issue. The Crown argued that the accused's conduct in fleeing without hesitation was inconsistent with an accident. The defence contended that the final jury charge was inadequate.
- [8] The central issue on appeal to the Supreme Court was whether the trial judge should have given a specific direction that the flight had no probative value on the question of intent. The majority held that the trial judge's warning to the jury that it may consider but should be careful with the evidence and, further, that it may not be of much assistance in assessing the precise state of mind of the accused at the time of firing was adequate. The majority went on to say that, assuming the charge was in error, the error was harmless and should be saved by the curative provision, s. 686(1)(b)(iii) of the Criminal Code. The minority agreed that there was no error in the charge.
- [9] White reaffirms the law that after-the-fact conduct may constitute circumstantial evidence of guilt. The relevance and probative value or weight to be assigned to it must necessarily be assessed on a case-by-case basis. As the majority stated in *White* at paragraph 22:

it is still permissible for the prosecution to introduce evidence of after-the-fact conduct in support of an inference that the accused had behaved as a person who is guilty of the offence alleged -- provided that, as with all circumstantial evidence, its relevance to that inference can be demonstrated.

The court warned, however, of limits to the above proposition. The introduction of such evidence, for example, as consciousness of guilt carries substantial risk and the jury must be cautioned as to other explanations for the accused's action and that they should reserve final judgment about the meaning of the conduct until all evidence has been considered in the ordinary course of deliberations.

[10] White also addresses the discretion of the court to exclude admissible evidence on the basis that it is more prejudicial than probative. I follow the majority view in White that the test for relevance does not change for the purpose of this consideration. I do not accept that the proposed demeanour evidence in this case has a prejudicial impact outweighing its probative value. Accordingly, the jury should be trusted, with a warning, to properly weigh the relevant evidence.

[11] Finally, I must also apply the distinction between a limiting instruction and caution or a warning. The majority in White states at paragraph 60:

In my view, a limiting instruction is only appropriate when the evidence is not relevant to one or more live issues, is subject to a specific exclusionary rule or is explicitly found by the trial judge to be more prejudicial than probative. Otherwise, judicial experience about the risks associated with certain types of evidence should be communicated to the jury by way of a caution.

The minority found the trial judge's caution adequate and did not specifically address the circumstances in which a limiting instruction is necessary.

[12] I conclude that a mid-trial warning or caution is necessary respecting the proposed evidence and acknowledge that it may become necessary to give a limiting instruction at the end of trial if, at that point, any of the evidence is no longer relevant to a live issue. Depending on the cumulative effect of any similar evidence from other witnesses, it may also be necessary to add to the caution in my final jury instructions depending on the issues that remain.

"M.D. Macaulay, J."

The Honourable Mr. Justice Macaulay

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