

CANADA / JUDGMENT

R. v. Dancho

2024 BCCA 393

COURT

British Columbia Court of Appeal

DECIDED

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2024 BCCA 393 R. v. Dancho

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Dancho,

2024 BCCA 393

Date: 20241126

Docket: CA49541

Between:

Rex

Respondent

And

Braylon Zhao Dancho

Appellant

Before:

The Honourable Madam Justice Horsman

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated November 15, 2023 (R. v. Dancho, 2023 BCSC 2365, Vancouver Docket 34444).

The Appellant, appearing via videoconference:

B.Z. Dancho

Counsel for the Respondent:

M. Scott

Place and Date of Hearing:

Vancouver, British Columbia

November 8, 2024

Place and Date of Judgment:

Vancouver, British Columbia

November 26, 2024

Summary:

The applicant seeks an order appointing counsel under s. 684 of the Criminal Code to assist in his appeal. The appeal is from an order refusing him an extension of time to appeal his conviction of a Motor Vehicle Act offence. Held: Application dismissed. It is not in the interests of justice to order the appointment of counsel because the appeal lacks merit.

Reasons for Judgment of the Honourable Madam Justice Horsman:

- [1] The applicant, Mr. Dancho, applies for the appointment of counsel to argue his application for leave to appeal the decision of a summary conviction appeal judge. The judge refused his application for a four-year extension of time to appeal his guilty plea to an offence under the Motor Vehicle Act, R.S.B.C. 1996, c. 318. The Crown opposes Mr. Dancho's application.

Factual background

- [2] On June 1, 2019, Mr. Dancho was ticketed in Vancouver for driving without due care and attention, contrary to s. 144(1)(a) of the Motor Vehicle Act. The ticket was in the amount of \$368.
- [3] On July 4, 2019, Mr. Dancho filed a Violation Ticket Statement, agreeing that he committed the offence and asking for a reduction in the fine. His request for a fine reduction was granted, and the amount was reduced to \$100.
- [4] Pursuant to s. 14(11) of the Offence Act, R.S.B.C. 1996, c. 338, Mr. Dancho was deemed to have pleaded guilty to the offence by paying the fine. Rule 6(2) of the Criminal Rules of the Supreme Court of British Columbia, SI/97-140 [Criminal Rules], provides that a defendant has 30 days from the time of the pronouncement of the order to commence an appeal from the summary conviction court.

- [5] On July 27, 2023, four years after his guilty plea, Mr. Dancho filed a notice of application for an extension of time to appeal the conviction. On his notice of application, Mr. Dancho stated that the police officer told him there would not be any penalty points, and he only discovered this was not true when he sought to renew his driver's licence, which was a few months before he filed for an extension of time.
- [6] Before the summary conviction appeal judge, Mr. Dancho elaborated on the circumstances around his discovery of the penalty points. He stated that in the fall of 2020, he discovered there were penalty points associated with the offence, and that a further monetary penalty of approximately \$1,600 was payable as a result of those points. In November 2020, he took some steps to appeal but found it difficult to obtain information. Ultimately, he was told by staff at the Robson Square Court Registry that the ticket had been "withdrawn". Mr. Dancho stated that as a result of that advice, he abandoned his efforts to appeal.
- [7] Mr. Dancho stated that two years later, in October 2022, he discovered that the points were still on his record when he went to renew his licence. Nine months later, in July 2023, he filed his application to extend time to appeal.

The decision of the summary conviction appeal judge

- [8] In reasons indexed at 2023 BCSC 2365, the summary conviction appeal judge (the "judge") dismissed Mr. Dancho's application for an extension of time.
- [9] The judge was guided by the principles set out by this Court in *R. v. Sidhu*, 2016 BCCA 23, and *R. v. Khungay*, 2020 BCCA 269. She listed the factors relevant to her exercise of discretion as including: (1) whether the applicant had a bona fide intention to appeal before the end of the time limit for appeal; (2) when the respondent was informed of the intention; (3) whether the respondent would be unduly prejudiced by an extension; (4) whether there is merit to the appeal; and (5) whether it is in the interests of justice that an extension should be granted. The judge noted that the ultimate issue is whether, in all the circumstances of the case, justice requires that an extension of time be granted.
- [10] Applying those factors to the case before her, the judge found as follows:
- a) Mr. Dancho had not indicated any intention to appeal within the 30-day time limit for an appeal under the Rules;
 - b) he did not file the notice of application for an extension until nine months after discovering the points were on his licence;
 - c) once the application was filed, there was no material delay in notifying the Crown;
 - d) while there was no evidence of actual prejudice to the Crown, there was presumed prejudice flowing from the impact of the four-year delay on the ability of the police officer to recall the events of the ticket;

- e) Mr. Dancho had not pointed to exceptional circumstances that would justify setting aside his guilty plea; and
 - f) further, even if he was successful in setting aside the guilty plea, Mr. Dancho had not provided any basis to suggest that he had a defence to the merits of the underlying charge.
- [11] In concluding that an extension of time was not in the interests of justice, the judge stated:
- [18] As already stated, the final and overarching factor is whether it is in the interests of justice that the extension of time be granted. There is nothing in the material before me that suggests there is any defence to the merits of the charge; that is, any defence to the allegation that Mr. Dancho was driving without due care. So with respect to the ultimate issue, a consideration of the very lengthy delay--four years since the offence and nine months since Mr. Dancho admits he knew about the points--and the presumed prejudice that would result to the respondent as a result of the passage of time, combined with the lack of merit to the appeal, I have concluded that it is not in the interests of justice to grant the extension of time. For those reasons, I am going to dismiss the application.

The application for the appointment of counsel

- [12] Mr. Dancho filed a timely application for leave to appeal the decision of the judge dismissing his application for an extension of time. The Legal Services Society has refused Mr. Dancho's request for legal aid, not for financial reasons. He now seeks the appointment of counsel pursuant to s. 684(1) of the Criminal Code, R.S.C. 1985, c. C-46.

Legal framework

- [13] Section 684(1) of the Criminal Code provides:

684 (1) A court of appeal or a judge of that court may, at any time, assign counsel to act on behalf of an accused who is a party to an appeal or to proceedings preliminary or incidental to an appeal where, in the opinion of the court or judge, it appears desirable in the interests of justice that the accused should have legal assistance and where it appears that the accused has not sufficient means to obtain that assistance.

- [14] The requirements set out in s. 684(1) are disjunctive. It must be shown both that (1) the appellant does not have sufficient means to obtain legal assistance on the appeal, and (2) it is desirable in the interests of justice that the applicant should have legal assistance: *United States of America v. Fraser*, 2016 BCCA 79 (Chambers) at para. 10. Relevant factors informing the interests of justice include:

- a) the points to be argued on appeal;
- b) the complexity of the case;
- c) any point of general importance in the appeal;

- d) the applicant's competency to present the appeal;
- e) the need for the applicant to find facts, research law, or make argument;
- f) the nature and extent of the penalty imposed; and
- g) the merits of the appeal.

R. v. Silcoff, 2012 BCCA 463 (Chambers) at para. 23.

[15] The merits threshold on an application to appoint counsel is that there is an arguable appeal, having regard to the applicable standard of review: R. v. Donald, 2008 BCCA 316 at para. 15 (Chambers); Lin v. British Columbia (Adult Forensic Psychiatric Services), 2008 BCCA 518 at para. 17 (Chambers). Even where other factors favour the appointment of counsel, it may not be in the interests of justice to appoint counsel where the appeal has no merit: R. v. Hoskins, 2012 BCCA 51 at paras. 30-32, 38 (Chambers).

Discussion

Insufficient means to obtain legal assistance

[16] On the evidence before me, I am satisfied that Mr. Dancho does not have sufficient financial means to retain counsel for his summary conviction appeal. His affidavit evidence indicates that he has limited income, consisting of \$18,000 per year in disability assistance payments, and limited assets.

The interests of justice

- [17] The focus of arguments at the hearing of this application was on the merits of Mr. Dancho's proposed appeal. The merits must be assessed through the lens of the scope of the statutory right of appeal, and the nature of the decision under appeal.
- [18] Sections 101 and 102 of the Offence Act provide that a defendant may appeal to the BC Supreme Court from a conviction. Pursuant to s. 104 of the Offence Act, a defendant must give notice of the appeal in the manner, and within the time, prescribed by the Criminal Rules. As I have noted, Rule 6(2) of the Criminal Rules provides a 30-day time limit for an appeal from a summary conviction court. Rule 6(25) provides that the court "extend or shorten the time provided in Rule 6 for the giving of any notice or the doing of any act".
- [19] Pursuant to s. 109 of the Offence Act, ss. 683-689, except s. 686(5), of the Criminal Code apply to an appeal under s. 102. Section 686(1)(a)(iii) provides the court with jurisdiction to set aside a conviction where there was a "miscarriage of justice".
- [20] Section 124(1) of the Offence Act provides that a defendant may, with leave of a justice, bring an appeal to this Court "on any ground that involves a question of law alone" from a decision of a summary conviction appeal court under s. 102.

- [21] The Crown argues that the main obstacle to the appointment of counsel in this case is that the proposed appeal lacks merit. The Crown says that Mr. Dancho has not identified a question of law alone that would warrant this Court granting leave to appeal. The Crown emphasizes the highly deferential standard of review that applies to the judge's exercise of discretion not to extend time. Unless the refusal to grant the extension was based on a "misapprehension of some legal principle", an appeal from the decision does not raise a question of law alone: *R. v. Aldarkazanli*, 1999 BCCA 96 at para. 11 (Chambers). The Crown says Mr. Dancho has not identified any misapprehension of a legal principle by the judge. Rather, the judge applied well-settled legal principles to the circumstances before her, and exercised case-specific discretion in dismissing Mr. Dancho's application for an extension of time.
- [22] Mr. Dancho's submissions on this application may be summarized as follows:
- a) Mr. Dancho was incorrectly advised by court staff in November 2020 that the ticket had been withdrawn. This administrative error has had a cascading series of impacts on Mr. Dancho that have impeded his ability to pursue a timely appeal. Mr. Dancho has diagnosed cognitive impairments that affect his executive functioning and comprehension. The barriers he faces in accessing the justice system provide context for his failure to move more quickly in pursuing his appeal.
 - b) Upon discovering in October 2022 that the penalty points remained on his licence, Mr. Dancho formed the immediate intention to appeal. He was not aware of the time limits for appeal. He moved as quickly as might reasonably have been expected, but suffered from persistent anxiety and stress in his effort to navigate the system. The fact that it took Mr. Dancho nine months to file an appeal is due to systemic factors.
 - c) The judge expressed skepticism over Mr. Dancho's current claim that he was not aware that a violation ticket would result in penalty points because he had received penalty points for a previous infraction in 2008 for driving without due care and attention. However, the judge did not have evidence before her that Mr. Dancho was made aware of penalty points associated with the 2008 infraction. Mr. Dancho says he was out of the country at the relevant time. Furthermore, the judge was incorrect in assuming that the legislative regime was the same in 2008 as it was in 2023 when, in fact, the 2008 infraction would not have given rise to penalty points against Mr. Dancho.
 - d) The judge applied an inconsistent memory standard. She found it reasonable to assume that Mr. Dancho would remember penalty points associated with the 2008 infraction, while at the same time presuming prejudice from the police officer's expected inability to recall the details of the 2019 infraction. This "memory error" amounted to discriminatory treatment.
 - e) The issues raised on Mr. Dancho's proposed appeal are complex. The case exposes fundamental issues about access to justice, and the impact of administrative errors on persons with cognitive impairments. Without the assistance of counsel, Mr. Dancho would be left having to rely on Artificial Intelligence ("A.I.") to assist his legal research, which will

lead to errors in the information he provides to the Court. The limits of A.I. demonstrate the essential role of counsel in presenting the legal issues within their proper jurisprudential context.

- f) Mr. Dancho has a strong case for setting aside the guilty plea on the basis that it resulted in a miscarriage of justice because it was uninformed. Specifically, when Mr. Dancho entered the guilty plea he was not aware of the collateral consequences in the form of penalty points on his licence. This resulted in subjective prejudice because there is a reasonable possibility he would not have pleaded guilty to the ticket if he had been fully informed: *R. v. Wong*, 2018 SCC 25; Khungay.
 - g) The judge erred in considering the merits of his potential defence to the ticket in exercising her discretion because the framework for setting aside the guilty plea simply asks whether there is a reasonable possibility that he would have not have pleaded guilty if he had been fully informed. Even if Mr. Dancho stood only a remote chance of succeeding at trial, this does not undermine his entitlement to have the guilty verdict set aside: *Wong* at para. 20.
- [23] While I accept Mr. Dancho's articulate explanation of the difficulties he has faced in navigating the legal system, I am not persuaded that his grounds of appeal are meritorious. Most of the arguments he advances were addressed by the summary trial judge, who found them either unpersuasive or deserving of little weight.
- [24] For the purpose of her analysis, the judge accepted Mr. Dancho's representations that he did not proceed with his appeal in 2020 because of the mistaken advice he received that the ticket had been "withdrawn". However, the judge found that Mr. Dancho's delay following his discovery that the points remained on his licence to be unduly lengthy. Mr. Dancho's complaint that the judge did not accept his explanation for this nine-month delay does not constitute an error of law. Similarly, Mr. Dancho's arguments around the judge's treatment of his 2008 driving infraction, including the "memory error" that he alleges, amount to a challenge to the judge's findings of fact. In any event, the 2008 violation ticket appears to have played a minimal role in the judge's analysis. The crux of the judge's analysis is set out in para. 18 of her reasons, quoted above.
- [25] Mr. Dancho's criticism of the judge's consideration of the merits of his defence to the underlying charge reflects, in my view, a misreading of the judge's decision. Her discussion of the criterion of the merits of the appeal focussed on the framework for setting aside a guilty plea. The judge noted, correctly, that: (1) Mr. Dancho would have to establish that allowing the guilty plea to stand would result in a miscarriage of justice; (2) for a guilty plea to be validly entered it must be voluntary, informed, and unequivocal; and (3) an accused must be aware of the nature of the allegations, and the effect and legal consequences of the plea, including the collateral consequences: at para. 16. The judge noted that the form signed by Mr. Dancho indicated on its face that he was agreeing that he committed the offence, and she found it hard to believe in all the circumstances that Mr. Dancho would not have been aware that there were penalty points associated with the guilty plea: at para. 17. I

take this to mean that the judge assessed the merits of Mr. Dancho's appeal to be weak.

- [26] The judge's reference to the apparent absence of any defence to the underlying charge of driving without due care and attention appears in the context of her discussion of the criterion of the interests of justice. The interests of justice is an overarching factor that asks "whether in all the circumstances, and considering the factors to be applied on an application for an extension of time, does the justice of the case require that an extension of time be granted": Sidhu at para. 12; R. v. M.A.G., 2002 BCCA 413 at para. 35. In addressing whether it would be in the interests of justice to grant Mr. Dancho a four-year extension of time to appeal his conviction under the Motor Vehicle Act, it was open to the judge to consider whether his proposed appeal was likely to be of any utility even if he was successful in setting aside the guilty plea.
- [27] For these reasons I am not persuaded that Mr. Dancho's appeal is meritorious. I agree with the Crown that the judge applied well-settled legal principles to the circumstances before her, and exercised case-specific discretion in dismissing Mr. Dancho's application for an extension of time.
- [28] As to the other factors relevant to the interests of justice, on this application the Crown does not dispute that the violation ticket had the consequences that Mr. Dancho suggests; that is, it led to penalty points on his licence, which in turn resulted in a monetary penalty. I accept that the nature and extent of such consequences would be significant for Mr. Dancho, given his financial circumstances. I also accept that he has found it challenging to pursue this proceeding in light of his cognitive difficulties. However, the legal issues are not complex. The cases that govern applications to extend time are cited in the judge's reasons, and the law is well-settled. Mr. Dancho appears very capable of advancing the necessary arguments without the assistance of counsel. Most importantly, I do not consider it to be in the interests of justice to make an order appointing counsel where the proposed appeal has no merit.

Disposition

- [29] The application to appoint counsel is dismissed.

"The Honourable Madam Justice Horsman"

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