
CANADA / JUDGMENT

R. v. De La Boursodiere

2015 BCCA 429

COURT

British Columbia Court of Appeal

DECIDED

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2015 BCCA 429 R. v. De La Boursodiere

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. De La Boursodiere,

2015 BCCA 429

Date: 20151014

Docket: CA40994

Between:

Regina

Respondent

And

Teresa Kathleen De La Boursodiere

Appellant

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Goepel

On appeal from: An order of the Supreme Court of British Columbia,

dated August 30, 2012 (R. v. De La Boursodiere, 2012 BCSC 1783,

Vancouver Docket 25920).

Counsel for the Appellant:

J.V. Myers

Counsel for the Respondent:

D.M. Layton

Place and Date of Hearing:

Vancouver, British Columbia

September 24, 2015

Place and Date of Judgment:

Vancouver, British Columbia

October 14, 2015

Written Reasons by:

The Honourable Mr. Justice Harris

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Goepel

Summary:

The appellant appealed a conviction of forgery and using a forged document as if it were genuine on the basis that she had received ineffective assistance from counsel at her trial. She contended her counsel disobeyed instructions to get an expert opinion on the issue of whether a signature had been forged, in particular an opinion from a Mr. Kovacs. Alternatively, she contended that the advice her counsel gave not to pursue an opinion fell below the relevant standard of representation. Held: appeal dismissed. The appellant failed to establish that counsel disobeyed her instructions. The appellant also failed to establish that the advice counsel gave her about not pursuing an opinion from Mr. Kovacs fell below the relevant standard of representation.

Reasons for Judgment of the Honourable Mr. Justice Harris:

- [1] The appellant was convicted by a judge alone of two counts of fraud under \$5,000, using a forged document as though it were genuine, contrary to s. 368(1)(a) of the Criminal Code, R.S.C. 1985, c. C-46 [Code], and forgery contrary to s. 367(a) of the Code.
- [2] The appellant appeals the two forgery-related convictions. She alleges that her trial counsel provided her with ineffective assistance in the conduct of the defence of these two counts. Specifically, she contends that her counsel disobeyed her instructions to obtain an expert opinion on the authenticity of a signature on a document she was alleged to have forged. Alternatively, she claims that her counsel provided her with professionally inadequate

advice that an opinion on that question should not be sought from an expert with whom he had consulted, a Mr. Kovacs. As a result of the ineffective assistance of counsel, the appellant contends that her conviction on these two counts arose from a miscarriage of justice in the adjudicative process and an unreliable verdict at trial. In support of her position, the appellant seeks to adduce as fresh evidence, her own affidavit, an affidavit of Mr. Kovacs, and an expert opinion from a Mr. Purdy that the signature in question was not a forgery.

Background

- [3] The appellant provided neurofeedback, homeopathy, massage and reflexology treatments to patients through a company. Three of those patients belonged to employee health plans run by Pacific Blue Cross. After a 10-day trial, the trial judge concluded that the appellant knowingly submitted false claim forms and receipts to Pacific Blue Cross, intending that it rely on those documents to pay out claims that were not eligible for reimbursement. The trial judge convicted the appellant on one count of fraud and one count of attempted fraud. Those convictions are not the subject of this appeal.
- [4] The appellant was also convicted of forging a signature of one of those patients, Ms. Kongus, on a document which purported to assign Ms. Kongus' reimbursements from Pacific Blue Cross to the appellant's company. That document was submitted together with false claim forms and receipts. The trial judge concluded that the appellant intended Pacific Blue Cross to treat that document as genuine. Accordingly, she convicted the appellant of forgery and using a forged document as though it were genuine.
- [5] At trial, neither the Crown nor the appellant led expert evidence dealing with whether the signature was a forgery. Ms. Kongus testified that she did not sign the relevant document and explained why she knew that she did not do so. The appellant testified that she saw Ms. Kongus sign the document, denied that its purpose was to assign reimbursement, and offered what purported to be an innocent explanation of the purpose of the document. The trial judge, after a thorough examination of the evidence, rejected the appellant's evidence on the basis that it lacked credibility and did not raise a reasonable doubt about whether she had forged the signature. The trial judge accepted Ms. Kongus' evidence that she did not sign the document, and concluded that the evidence established beyond a reasonable doubt that the appellant had forged the signature. On the evidence at trial, that conclusion is unassailable.
- [6] The appellant now deposes that "I instructed my trial counsel Milan Uzelac, throughout to retain an expert to examine and determine that Jennifer Kongus' signature contained in the Exhibit 4 at trial was not forged." She says further that "I offered Mr. Uzelac better copies and originals of the documents in question in hopes of assisting Mr. Kovacs or any other expert in their examination."

- [7] In her affidavit in support of this appeal, she withdrew part of the evidence she had given in respect of her s. 684 application. For that application she had deposed that: "... Prior to trial I had spoken with several graphologist's [sic] and the one most likely to use [sic] attended my lawyer's office, had looked at the documents and signature in question, cited samples of the patients [sic] handwriting and compared it with the signature provided in court on a piece of paper as a sample signature and was the known signature of the patient. The graphologist indicated the signatures were a match. I had instructed my lawyer to have this expert testify at trial. This instruction was not carried out despite numerous requests." In respect of the evidence that Mr. Kovacs had declared the signatures to be a match, she now says that she was mistaken.
- [8] Mr. Uzelac paints a different version of the facts. He categorically denies that he disobeyed instructions to secure an expert opinion, from either Mr. Kovacs or any other document expert. He says, moreover, that after meeting with Mr. Kovacs he concluded that it would not be in the appellant's best interests to finalize Mr. Kovacs' opinion and advised the appellant of the reasons why he had reached that conclusion. He states that the appellant accepted his advice.
- [9] Mr. Uzelac's evidence may be summarized as follows. The appellant assumed exclusive responsibility to locate a graphologist and to decide if she could afford to retain one. This reflected a broader division of responsibility between the appellant and trial counsel. The appellant assumed responsibility for the preparation of significant aspects of her defence because she faced significant funding issues and was anxious to save money.
- [10] The appellant kept counsel informed of her efforts to locate a graphologist. Those efforts are set out in a document provided to counsel by the appellant and exhibited to his affidavit. He understood that the appellant did not want him to retain a graphologist directly because she knew he would require a retainer to secure the experts fees.
- [11] Some time prior to May 29, 2012, the appellant gave Mr. Uzelac instructions to contact Mr. Kovacs, a forensic document examiner. She did not give Mr. Uzelac funds to retain him. Mr. Uzelac provided Mr. Kovacs with copies of several documents containing Ms. Kongas' signature including the one alleged to be a forgery. He did not identify the suspect document. Trial counsel asked whether Mr. Kovacs could offer an opinion on which one, if any, were a forgery.
- [12] On June 21, 2012, trial counsel and Mr. Kovacs met at counsel's office. The meeting lasted an hour and was not rushed. Mr. Kovacs examined the copies. The originals were exhibits at trial. Mr. Kovacs explained why it would be important to have the originals. Mr. Uzelac goes on to state:

Near the end of our discussion, without any prompting by me, Mr. Kovacs looked at Exhibit 4 and blurted out that he saw "a problem with the "J"" in Exhibit 4. He said that there was a "jog" or a discrepancy with the "J" in that document. He may have used the word "irregular". Unfortunately, the document that he identified as having the problem was precisely the document that the Crown alleged was forged

I felt that Mr. Kovacs had hit the nerve of the issue with his comment and that once he told me that he had a concern with the "J" in the signature, it was my view that we should not call him as an expert witness on behalf of the defence. In my view, it did not matter that his ultimate written opinion might be favourable to the defence, because he would have a duty and obligation to reveal at trial that he thought that there was a discrepancy with the "J" in Exhibit 4. This comment coming from our defence witness, in the absence of any expert Crown witness, would render the opinion virtually useless and, in my view, was even more detrimental to the defence than having no such opinion at all. I could virtually foresee the trial judge concluding that the "the defence's own expert says there is an irregularity in the signature in Exhibit 4".

[13] Mr. Uzelac goes on to depose that the appellant knew and understood the purpose of the meeting and that if Mr. Kovacs were to be retained he would have to be paid for his work. She did not give trial counsel funds to retain Mr. Kovacs. Having concluded that it would not be in his client's best interests to finalize Mr. Kovacs' opinion or call him as an expert at trial, trial counsel had a conference with his client on July 6, 2013. This meeting lasted over three hours. At it, he provided his client with details of Mr. Kovacs' comments and, in particular, the concern about the "J" and the risk that Mr. Kovacs might testify at trial that the signature was forged. Mr. Uzelac deposes:

I told her that it was my opinion that she should not call Mr. Kovacs as a witness or finalize his opinion. Ms. De La Boursodiere appeared by her conduct and statements to me to agree with my assessment. She did not ask me to meet with Mr. Kovacs again, finalizes opinion, nor asked me to obtain a second opinion from a different analyst or suggest that she would meet with them. I also told her that as the Crown did not have an expert opinion on the handwriting, we could attack the Crown's case on Exhibit 4 by pointing out that the Crown bore the burden of proof. We would also rely on her own testimony denying that she signed the document and, as well, we would rely on any headway we can make on cross examination of Ms. Kongas' ex-husband who might be familiar with her signature. Accordingly, my recommendation to her was that we not follow up with Mr. Kovacs. Ms. De La Boursodiere agreed that we should not follow up with him, finalize his opinion or call him at trial and we proceeded on that basis.

[14] Mr. Uzelac was cross-examined on his affidavit at the hearing of the appeal. He acknowledged that he could not recall the precise details of words used by Mr. Kovacs or whether Mr. Kovacs elucidated on the nature of the problem with the "J". In my view, however, the cross-examination failed to undermine in any material way the substance of the facts deposed to in the affidavit.

- [15] I also take the view that there are no material inconsistencies between Mr. Uzelac's affidavit and the affidavit filed by Mr. Kovacs. Mr. Kovacs deposes that he did not provide Mr. Uzelac with any opinion as to the authorship of the signatures that Mr. Uzelac had provided at the meeting or on other occasions. Mr. Uzelac does not suggest that he was provided with any such opinion. More importantly, Mr. Kovacs has not provided any evidence disputing Mr. Uzelac's account of the meeting that took place between them. Nor has he expressed the opinion that the disputed signature was not forged. Mr. Kovacs has explained that when he was approached to provide an opinion for the purpose of this appeal, he declined because of his health and recommended another expert.
- [16] Finally, the appellant has tendered a report from a Mr. Purdy expressing the opinion that the disputed signature was not forged.

Discussion

- [17] With this background, I now turn to address the issues on appeal. First, I consider whether we should admit the fresh evidence tendered for this appeal. The criteria for admitting such evidence are set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at p. 775. These criteria are relaxed when the evidence is directed to the integrity of the trial process. Fresh evidence will be admissible for the limited purpose of assessing an allegation of ineffective assistance of counsel if it: (1) complies with the rules of evidence; (2) is relevant; and (3) is credible: *R. v. Aulakh*, 2012 BCCA 340 at para. 64.
- [18] I would admit the fresh evidence for this limited purpose. It complies with the rules of evidence. It is relevant to examining both the performance of trial counsel and the potential prejudice to the appellant. It is also credible - at least in the limited sense described in *Palmer*.
- [19] Second, there is no dispute about the legal principles governing this appeal. Madam Justice Saunders summarized them recently in *R. v. Yellowhead*, 2015 BCCA 389 at paras. 30-36; see also *Aulakh* at paras. 40-55. There are two components of a claim of ineffective representation, performance and prejudice. The appellant must prove on a balance of probabilities that trial counsel's performance was incompetent and that this incompetence resulted in a miscarriage of justice. With respect to the performance component, the appellant must prove that counsel's representation fell outside the wide range of reasonable professional assistance. There is a strong presumption that counsel's performance was competent, and deference must be given to counsel's tactical and strategic decisions. In assessing counsel's performance the Court does not rely on hindsight. The appellant bears the onus of proving the facts alleged to constitute incompetence.
- [20] The prejudice component of the test also presents a difficult hurdle for the appellant. The appellant must establish a reasonable possibility that counsel's ineffectiveness resulted in a miscarriage of justice. There can be no miscarriage of justice unless the appellant establishes a link between the incompetence and the prejudice suffered. Prejudice can take

two forms: first, that there is a reasonable possibility that but for trial counsel's incompetence, the result would have been different; or second, that counsel's incompetence resulted in an unfair process. In other words, the appellant must show that trial counsel's ineffective performance caused an unreliable verdict or an unfair trial.

- [21] I turn first to consider the submission that trial counsel disobeyed instructions to pursue an expert opinion and, more particularly, disobeyed instructions to pursue an opinion from Mr. Kovacs. In my opinion, this allegation is wholly without merit.
- [22] I accept that trial counsel and the appellant agreed to a division of labour whereby the appellant would identify potential experts and be responsible for retaining a suitable expert if one were found. The appellant did not dispute this arrangement at the hearing of the appeal, even though her affidavit evidence that she instructed counsel to retain an expert may be read as being inconsistent with it. I have no hesitation, if there is any conflict, in accepting Mr. Uzelac's evidence which is supported by the documentary evidence. That evidence establishes that the appellant did identify a number of potential experts by February 2012, including both Mr. Kovacs and Mr. Purdy. It discloses that the appellant provided those individuals with materials and had some communications with them, including receiving an estimate of fees from Mr. Purdy and others.
- [23] The appellant requested that trial counsel contact Mr. Kovacs, whom she regarded as the most likely expert that could be used. Trial counsel did precisely as instructed. He contacted Mr. Kovacs and later met with him.
- [24] I do not accept that the appellant ever gave instructions to trial counsel either to retain Mr. Kovacs or to get an opinion from him. I see no plausible basis on which to reject trial counsel's evidence on these points. That evidence is detailed and consistent with the documents detailing the appellant's efforts to locate potential experts and her contact with them. Mr. Uzelac's evidence is contradicted merely by a bald assertion. The appellant's assertion is inconsistent with the documents showing that she had indeed assumed primary responsibility for locating possible experts. The credibility of her evidence is, moreover, undermined by the retraction of her claim that Mr. Kovacs had declared the disputed signature to be a match with known signatures. This retraction was no doubt forced upon her by Mr. Kovacs' evidence that he had not expressed an opinion about the signature. Finally, the trial judge found the appellant to be utterly incredible, both generally as it related to the fraud charges, but also more specifically as it related to claims that she made about the nature and purpose of the document which was alleged to contain the forged signature. I have no hesitation in saying that I place no weight on the appellant's evidence to the extent that it is inconsistent with evidence from her trial counsel.

- [25] I also do not accept that the appellant provided trial counsel with general instructions to procure an expert opinion, if not from Mr. Kovacs then from some other expert. This claim is inconsistent with both the division of labour between counsel and his client, and with the documentary evidence that discloses the steps that the appellant took to identify potential experts. I see no basis upon which to reject trial counsel's evidence that he did not receive instructions to pursue an opinion from any other expert.
- [26] The evidence shows that the appellant had been in contact with Mr. Purdy and received an indication of his hourly rate and an estimate of the cost of a report. The appellant provides no evidence of her communication with Mr. Purdy, of any preliminary views he may have expressed, or any steps that she may have taken either to retain him or to request that trial counsel contact him to discuss the possibility of getting an opinion. She does not say that at any time she requested or instructed her counsel to pursue a possible opinion from Mr. Purdy.
- [27] Accordingly, the appellant has failed to discharge her burden to prove the facts underlying her claim that trial counsel disobeyed her instructions to get an opinion from Mr. Kovacs or another expert. I would reject this ground of appeal.
- [28] Before turning to the second ground of appeal, I have two brief observations about this first ground of appeal. Alleging ineffective assistance of counsel on the basis that representation has fallen below the relevant standard is one thing. Alleging ineffective assistance of counsel on the basis that counsel has disobeyed instructions is another. This allegation is a direct attack on the integrity of counsel. This attack which is wholly without merit deserves to be unequivocally condemned.
- [29] Second, while there is nothing wrong with a division of labour between counsel and client in an effort to contain costs, such an approach is fraught with risk unless the arrangement is clearly and unambiguously documented. A failure to document the arrangement risks misunderstandings over the respective roles of counsel and client. It also provides an opportunity for an unscrupulous client to blame counsel if things go wrong.
- [30] The appellant's second ground of appeal is that trial counsel's advice not to finalize an opinion from Mr. Kovacs fell below the relevant standard. As a result, (and overlooking the obvious inconsistency with her evidence that she instructed counsel to finalize the opinion) she argues that her acceptance of his advice to not proceed further with Mr. Kovacs was not properly informed. I disagree.
- [31] However Mr. Kovacs' concern was expressed, it is clear that he told trial counsel that he saw a problem or a discrepancy with the "J" on the allegedly forged document. He made this comment without knowing which document was suspect. Trial counsel then made a judgment call. Even if Mr. Kovacs might ultimately give a favourable opinion, there was a risk that at trial he might have had to acknowledge that there was a problem with the formation of the "J" and a discrepancy between it and other signatures. Trial counsel concluded that it was not in his client's best interests to run this risk. This judgment call was

informed by his knowledge that the Crown did not have an opinion of its own and carried the burden of proving beyond a reasonable doubt that the signature was forged. It was also informed by his judgment that cross-examination of Ms. Kongus and her former husband might be sufficient to raise a reasonable doubt about whether the signature was forged. Ms. Kongus had signed a number of documents in the appellant's office and it was a reasonable judgment call that in all the circumstances Ms. Kongus might admit that she could not be certain that she had not signed the disputed document.

- [32] Much was made by the appellant of the fact that Mr. Kovacs had referred to some of the copies of the documents that had initially been sent to him as being of poor quality and that he would want access to the original documents if he were to give an opinion. I see nothing in the evidence that supports the proposition that the existence of the "problem" with the letter "J" arose as a result of the quality of the copy of the document examined by Mr. Kovacs. In other words, I see nothing to suggest that that same problem would not also have existed on an examination of the original document.
- [33] Moreover, looking at the matter objectively, even if trial counsel did not turn his mind to this point at the time, learning more about the potential problems with the allegedly forged signature could have placed trial counsel in a difficult position if his client were to deny, as it was apparent that she would, that she had forged the signature and testify that she saw Ms. Kongas sign the document.
- [34] Trial counsel had succeeded in getting a preliminary sense from Mr. Kovacs of what his opinion might be without having to retain him or reimburse him for his services. Mr. Kovacs had carefully reviewed the documents over the course of the meeting that lasted for an hour. He did not provide an opinion and was not asked for one; however his unprompted remarks that there was a "problem", "discrepancy", or "irregularity" associated with a "jog" in the "J" of the signature, reasonably rang alarm bells. In my view, trial counsel's decision not to dig a further hole for himself and his client by seeking further elucidation of the implications of the potential problem does not fall outside the wide range of reasonable professional assistance. Nor was it incompetent to decide that it was in his client's best interests not to pursue a formal opinion from Mr. Kovacs.
- [35] The context in which trial counsel provided his advice to the appellant was that it was her responsibility to decide whether to pursue the matter further. It was up to her to find the money to do so, or to pursue an opinion from someone else.
- [36] In my view, Mr. Uzelac had a difficult call to make in the circumstances as they stood. He foresaw that proceeding further with Mr. Kovacs could well prove detrimental to the defence at trial if Mr. Kovacs was called to give an opinion, even assuming it to be favourable. In the absence of a Crown opinion, he concluded that the prospects of raising a reasonable doubt were best if he relied on his cross-examination of the lay witnesses and his own client's evidence. His concern was not to risk undermining the defence if Mr. Kovacs' concerns should emerge at trial.

- [37] It may be that other counsel might have gone some distance further with Mr. Kovacs to find out whether his concerns could be fully allayed, but I cannot conclude that Mr. Uzelac's decision was unreasonable in light of all of the uncertainties, risks and imponderable contingencies associated with a trial. Not least among those uncertainties was the assessment the trial judge would make of the appellant's credibility and whether her evidence on these material points would be sufficient to raise a reasonable doubt about whether the signature was forged. In the event, the appellant's case foundered because the judge found her evidence on all the issues at trial to lack any credibility. She found, for example, the appellant's explanation of the purpose of the suspect document to be manifestly absurd.
- [38] Mr. Uzelac's decision was quintessentially a judgment call trial counsel has to make. It is not to be assessed with the benefit of hindsight. I am satisfied that his judgment call and his advice to the appellant have not been shown to fall below the standard of reasonable professional representation that a client is entitled to expect. I would reject this ground of appeal.
- [39] I turn finally to consider the question of prejudice. I assume for the purpose of this discussion that had the appellant been able to file a favourable opinion there is a reasonable possibility that the verdict might have been different on the forgery charges. I make this assumption because it is possible that the trial judge could have found that Ms. Kongas was honestly mistaken in her belief that she had not signed the document. The trial judge could reach that conclusion without having to accept the appellant's evidence.
- [40] Even on this assumption, the appellant has not demonstrated prejudice that can be attributed to any ineffective assistance of counsel. First, even if counsel had recommended taking further steps to get an opinion from Mr. Kovacs, there is no evidence that Mr. Kovacs' opinion would have been favourable. I am not prepared to assume that just because Mr. Purdy's opinion was favourable, so too would have been Mr. Kovacs'. The appellant has not demonstrated that counsel's advice deprived her of an opinion from Mr. Kovacs that would have been to her benefit. Nor has she demonstrated that the opinion would have raised a reasonable possibility that the opinion would have raised a reasonable doubt on the forgery count if the concerns expressed by Mr. Kovacs about the problem in "J" had emerged at trial.
- [41] Second, nothing in trial counsel's advice about not pursuing an opinion from Mr. Kovacs deprived the appellant of the opportunity to continue with her efforts to locate another expert who might give a favourable opinion uncontaminated by Mr. Kovacs' concerns. More particularly, nothing in trial counsel's advice prevented the appellant from turning to Mr. Purdy, whom she had contacted earlier, and seeking his opinion on the authenticity of the signature. Presumably, Mr. Purdy's opinion at that time would have been the same as the opinion tendered for this appeal. The appellant was responsible for seeking out potential experts and retaining them. Trial counsel's advice respecting Mr. Kovacs did not cause the appellant to fail to seek an opinion from Mr. Purdy.

- [42] At the end of her factum, the appellant submits that even if this Court finds that trial counsel was not ineffective, we should still admit the fresh evidence under the basic test in *R. v. Stolar*, [1988] 1 S.C.R. 480. I assume that the appellant is primarily referring to Mr. Purdy's expert report. I would reject this argument.
- [43] Clearly, the appellant is now using the fresh evidence to attack a legal issue that was adjudicated at trial. Thus, the due diligence requirement from *Palmer* and *Stolar* is relevant: Aulakh at para. 64. The appellant is correct that the due diligence criterion is not applied as strictly in criminal cases as in civil cases. However, this is of no assistance to the appellant as she cannot meet a relaxed due diligence requirement. She took on the responsibility of identifying and retaining a document examiner. On her own initiative she contacted Mr. Purdy and received from him price quotes and detailed information about what he would require to conduct an analysis. She led no evidence explaining why she could not have obtained Mr. Purdy's opinion before trial.
- [44] I would dismiss the appeal.
- "The Honourable Mr. Justice Harris"
- I agree:
- "The Honourable Madam Justice Newbury"
- I agree:
- "The Honourable Mr. Justice Goepel"

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