

CANADA / JUDGMENT

R. v. Dergez

2025 BCCA 87

COURT

British Columbia Court of Appeal

DECIDED

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2025 BCCA 87 R. v. Dergez

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Dergez,

2025 BCCA 87

Date: 20250128

Docket: CA49877

Between:

Rex

Respondent

And

Blake Everett Dergez

Appellant

Before:

The Honourable Madam Justice Bennett

The Honourable Justice Dickson

The Honourable Justice Fleming

On appeal from: Orders of the Supreme Court of British Columbia, dated February 16, 2024 (conviction) and May 13, 2024 (sentence) (R. v. Dergez, 2024 BCSC 1365 and 2024 BCSC 1367, Vernon Dockets 55727-2; 55727-4).

Oral Reasons for Judgment

Counsel for the Appellant:

C. Matthee-Johnson

Counsel for the Respondent:

E. Purtzki

Place and Date of Hearing:

Vancouver, British Columbia

January 13, 2025

Place and Date of Judgment:

Vancouver, British Columbia

January 28, 2025

Summary:

The appellant was convicted of assault with a weapon and of uttering threats, and also plead guilty to four counts of breaching a release order. He appeals his conviction and sentence on the grounds that the judge erred in his assessment of the evidence, gave insufficient reasons, and failed to impose a sentence that was consistent with the principles of totality and proportionality. Held: The appeal is dismissed. The judge made no reviewable error in his assessment of the evidence, the reasons given were sufficient in light of the record and the submissions made at trial, and the sentence imposed was consistent with the principles of totality and proportionality.

DICKSON J.A.:

Introduction

- [1] Following an eight-day trial, Justice Wilson convicted Blake Dergez of assault with a weapon and uttering threats, based on his finding that Mr. Dergez deliberately doused a police officer with gasoline and threatened to light him on fire when the officer attempted to arrest him. He imposed a global sentence of 25 months' imprisonment, reduced to 536 days for time served, with respect to the two convictions and four counts of breaching a release order to which Mr. Dergez had entered guilty pleas.
- [2] Mr. Dergez appeals his conviction for assault with a weapon and the related sentence. The appeals were heard together. On the conviction appeal, Mr. Dergez contends that the judge erred in finding he deliberately doused the officer with gasoline based on manifestly unreliable evidence, which he misapprehended and scrutinized unevenly, and by providing insufficient reasons. On the sentence appeal, he contends that the judge erred in applying the principles of totality and proportionality, and failed to account for his medical issues and time he spent in segregation while detained awaiting trial.

[3] For the reasons that follow, I would dismiss both appeals.

Conviction Appeal

Background

- [4] Mr. Dergez was charged with seven offences in connection with a series of altercations that occurred on the evening of September 9, 2021 in Vernon. Shortly before the altercations occurred, Mr. Dergez had repeatedly shone a laser at airplanes as they flew above his position on a bench at the top of a hill in a local park. Navigation Canada and concerned citizens alerted the Vernon RCMP to the dangerous episodes of laser pointing. In response, officers were dispatched to the area to search for the perpetrator.
- [5] A group of five citizens also conducted a search for the perpetrator. When they came upon Mr. Dergez sitting on a bench at the top of the hill, they approached and verbally confronted him, prompting Mr. Dergez to leave the park. As he was leaving, he sprayed bear spray at the group members. At trial, he was acquitted of five related counts of assault with a weapon, based on his testimony that he deployed the bear spray in self-defence.
- [6] The remaining two charges were assault with a weapon and uttering threats to Constable Carey, a police officer who arrived on the scene shortly after the bear-spraying incident. A member of the citizen group, Mr. Melvin, flagged Constable Carey down, directed him toward a laneway where Mr. Dergez was walking, and identified Mr. Dergez as the person who had been pointing the laser at airplanes. Constable Carey approached Mr. Dergez, stopped his police car next to him, and told him that the police were investigating someone who was using a laser. In response, Mr. Dergez stated that he had been attacked by "four guys and a girl", at which point Constable Carey recognized Mr. Dergez and replied "You're Blake Dergez". Mr. Dergez denied it and walked away.
- [7] Constable Carey knew Mr. Dergez to be a user of methamphetamine. As he walked away, Constable Carey followed in his police car. Another officer, Constable McClellan, caught up on foot and called out to Mr. Dergez that he was under arrest, but Mr. Dergez continued walking. As he did so, Mr. Dergez removed the cap from a jerrycan that he was carrying and poured gasoline on the ground. Shortly thereafter, Constable Carey approached Mr. Dergez and placed him under arrest.
- [8] In the course of arresting Mr. Dergez, Constable Carey was covered in gasoline. One of the key issues at trial was whether the dousing was deliberate or accidental. Central to that determination were questions of witness credibility and reliability, particularly that of Constable Carey.

- [9] According to Constable Carey, Mr. Dergez deliberately doused him with gasoline and threatened to set him on fire as he went to arrest him. Constable Carey testified that he took the threat seriously given his knowledge that Mr. Dergez was a methamphetamine-user and, as such, likely to be carrying matches. In response to the dousing and the threat, he said that he slammed Mr. Dergez onto the ground and punched him repeatedly to bring him under control.
- [10] According to Mr. Dergez, who testified on his own behalf, he did not threaten Constable Carey. He said that the gasoline dousing was an inadvertent consequence of Constable Carey spinning him around and tackling him when he made the arrest.
- [11] Several witnesses also testified regarding the circumstances leading up to and surrounding the arrest, including Constable McClellan, Sergeant Fayle, and members of the citizen group. In addition, a body of audio and video evidence was adduced, including cellphone videos taken by civilians and video and audio taken from Constable Carey's police car.
- [12] The trial and a voir dire proceeded concurrently. On the voir dire, Mr. Dergez argued that his Charter rights were breached when Constable Carey punched him, and he applied for a stay of proceeding based on abuse of process in connection with alleged police misconduct. The alleged misconduct in issue included Constable Carey having spoken with witnesses before they provided statements and viewing a cellphone video overnight while under cross-examination. It also included various omissions and alleged contradictions in the notes, narratives, and testimony of the police witnesses.

Reasons for Judgment

- [13] Justice Wilson's reasons for conviction are indexed as R. v. Dergez, 2024 BCSC 1365.
- [14] After outlining the factual and procedural background, the judge summarized the evidence of Constable Carey, Constable McClellan, Sergeant Fayle, and Mr. Dergez regarding Constable Carey's arrest of Mr. Dergez. He rejected Mr. Dergez's claims that he walked away from Constable Carey because Constable Carey had not taken his complaint of having been attacked by the citizen group seriously and left because he needed to get away from his pursuers: at para. 63. In explaining why he rejected Mr. Dergez's account on these points, the judge stated:
- [64] By this point, Mr. Dergez had left four of the five people behind and he had seen the other, Mr. Melvin, flag down a police vehicle. It would have been obvious to Mr. Dergez at this point that he was no longer being pursued and that the group of five people were dealing with the police, as opposed to pursuing him directly.
- [15] The judge found that Mr. Dergez walked away from Constable Carey because he knew that "he had been recognized", "was in breach of his release orders", and "was going to be arrested": at para. 65. He also found that Constable Carey did not appreciate that Mr. Dergez was carrying an open jerrycan when he went to arrest him, when Constable Carey realized he was covered in gasoline "the situation had become potentially a life or death situation",

and Mr. Dergez was not cooperating "at the moment Constable Carey realized he was covered in gasoline and in the seconds that preceded it": at paras. 70-71.

- [16] The judge concluded that "Constable Carey's use of physical force in order to detain Mr. Dergez was justified": at para. 76. In reaching this conclusion, he noted that Constable Carey could be heard on the audio telling Sergeant Fayle after the arrest that he had "whaled on Mr. Dergez" and admitted under cross-examination that "wailed" means "an unstoppable barrage of blows": at para. 77. However, the judge found, "based on all of the evidence, both oral and on the video, Constable Carey's description of what he did overstates his actions: that is, there were two and perhaps three blows at separate times, but there was no unstoppable barrage": at para. 77.
- [17] In addressing the abuse of process application, the judge reviewed the salient legal principles and Mr. Dergez's arguments. He accepted that there were inconsistencies between Constable Carey's recollection, his notes, and what was shown in the videos, and described Constable McClellan's notes as "sparse": at paras. 83-87. However, he concluded, while Constable Carey and Constable McClellan's recollections "did not accord exactly with what was shown on the videos", he did not accept that either was attempting to mislead him. He also concluded that their evidence was "not materially different from what is depicted in the videos, and in particular from the video taken by Mr. Melvin's cellphone" and that both officers "attempted to accurately summarize the events as they saw them": at paras. 89, 92.
- [18] The judge went on to conclude that "[w]hile there were aspects of the police conduct, and in particular Constable Carey reviewing evidence during cross-examination and speaking to the witnesses before giving their statements, that are not ideal, the nature of that conduct was not such that a judicial stay would be warranted": at para. 101. Then he turned to the substantive charges that Mr. Dergez faced involving the five civilians and Constable Carey.
- [19] After acquitting Mr. Dergez on the five counts of assault with a weapon relating to the bear spray incident, the judge dealt with the two charges relating to Constable Carey. In doing so, he outlined the essential elements of the offences and noted that as Mr. Dergez testified, the principles in *R. v. W.(D.)*, [1991] 1 S.C.R. 742 applied: at para. 141. He also summarized the evidence of Constable Carey, Constable McClellan and Mr. Dergez regarding the circumstances of the arrest.
- [20] The judge accepted Constable Carey's evidence that Mr. Dergez threatened to light him on fire, which he noted was corroborated by the audio from the police vehicle: at para. 147. He also noted that the threat posed by gasoline is the possibility of ignition, and stated that "[i]t would serve no purpose for Mr. Dergez to try to create a barrier between he and the police as he attempted to flee, unless there was an intention to convey the risk or threat of fire": at para. 148. In the result, he was satisfied beyond a reasonable doubt that Mr. Dergez threatened to set Constable Carey on fire and found him guilty on that charge.
- [21] As to the charge of assaulting Constable Carey with a weapon, the judge said this:

- [150] The remaining issue is whether Mr. Dergez deliberately sloshed gasoline onto Constable Carey prior to issuing his threat, or whether it was simply the consequence of Constable Carey spinning Mr. Dergez around when he grabbed his shoulder. Put another way, did Mr. Dergez simply take advantage of a fortuitous set of events when he issued the threat to set Constable Carey on fire, or did he deliberately throw gasoline to start with?
- [151] I find that Mr. Dergez deliberately threw gasoline on Constable Carey. Constable Carey's evidence is that he felt the first splash before there was any contact with Mr. Dergez. That evidence remained consistent throughout cross-examination and I accept his evidence in this regard. I also accept Constable Carey's evidence that there were two distinct events when gasoline struck his body.
- [152] On Mr. Dergez's version, Constable Carey may have been covered in gasoline when he was spun around by Constable Carey, but I am satisfied from Constable Carey's evidence, and indeed the evidence of others, that the amount of gasoline on Constable Carey would not have been consistent with incidental spillage as a result of having been spun around.
- [153] I find that Mr. Dergez knew that he was about to get arrested and threw gasoline on Constable Carey, as he tried to use the gasoline and the threat of fire as a means to effect escape. The sole purpose of pouring the gasoline was to create a barrier to facilitate the escape and the threat of fire. I find that Mr. Dergez first threw gasoline on Constable Carey before Constable Carey made physical contact with Mr. Dergez, and the second time was after Constable Carey put his hands on Mr. Dergez's shoulder.
- [22] Based on the foregoing analysis, the judge found Mr. Dergez guilty of assaulting Constable Carey with a weapon.

Discussion

Did the judge err in finding that Mr. Dergez deliberately doused Constable Carey with gasoline and convicting him on that basis?

- [23] Mr. Dergez contends that the judge erred in finding the evidence of Constables Carey and McClellan was not materially different from the video evidence (at para. 89), and that Constable Carey's evidence regarding feeling the first splash of gasoline before physically contacting Mr. Dergez remained consistent throughout cross-examination (at para. 151). In his submission, it is apparent from a review of the video and the cross-examination that neither finding was justified. Therefore, he says, they must reflect related material misapprehensions and an uneven scrutiny of the evidence. It follows, he submits, that his conviction for assaulting Constable Carey with a weapon should be overturned.
- [24] In support of his submission, Mr. Dergez invites us to review the video evidence, which he says depicts events that differ palpably and materially from the descriptions of Constables Carey and McClellan. In particular, he says, their testimony was riddled with inconsistencies, both internally and in relation to their notes and other evidence. For example, he says, under cross-examination Constable Carey contradicted himself on when

the first dousing occurred and conceded after reviewing a video that it did not support aspects of his testimony. In addition, among other things, Constable McClellan also conceded that her memory of events shifted after reviewing the video evidence.

- [25] Mr. Dergez contends that the evidence of Constables Carey and McClellan was so manifestly inconsistent and unreliable that it was incapable of supporting the conviction. In other words, he says, the judge erred in concluding that he deliberately doused Constable Carey with gasoline based on their evidence given its serious flaws. While he also contends that the judge scrutinized the evidence unevenly, he makes no separate and specific submissions under this ground of appeal.
- [26] I am not persuaded by Mr. Dergez's submissions. I see no error in the judge's assessment of the evidence or his related findings of fact.
- [27] It is true that Constable Carey conceded on cross-examination that it was possible he "had a hand" on Mr. Dergez before he felt the first splash of gasoline when he went to arrest him. In the face of that testimony, it would have been more precise for the judge to observe that his evidence remained largely consistent throughout cross-examination on the question of when he felt the first splash. However, in my view, any imprecision in language used by the judge on this point does not reveal or even suggest a palpable mischaracterization or misapprehension of Constable Carey's evidence. On the contrary, in my view, when his lengthy and detailed reasons are read as a whole, it is clear that the judge well understood and considered the entire body of evidence. That evidence was capable of supporting his factual findings. It is not the role of this Court to make its own findings of fact.
- [28] I would not give effect to this ground of appeal.

Did the judge provide insufficient reasons for convicting Mr. Dergez of assaulting Constable Carey with a weapon?

- [29] Mr. Dergez also contends that the judge provided insufficient reasons for the conviction and dismissal of the abuse of process application. In his submission, the reasons for judgment fail to illuminate the reasoning path that the judge followed in reaching his key determinations, particularly in connection with Constable Carey's credibility and reliability. Rather, he says, the reasons amount to little more than conclusory statements and fail to explain how the judge reached those determinations given the many inconsistencies in Constable Carey's testimony, internally and in relation to the other evidence.
- [30] I see no merit in this submission.
- [31] Reasons for judgment must be read as a whole, in the context of the issues raised at trial and informed by the positions of the parties: *R. v. Pastro*, 2021 BCCA 149 at para. 53. Read in this manner, it is abundantly clear from his reasons why the judge dismissed the abuse of process application and convicted Mr. Dergez of assaulting Constable Carey with gasoline. He grappled with the live issues, including the credibility and reliability of Constable Carey's testimony, which he assessed based on the entire body of evidence, including the videos, the

testimony of other witnesses, and the surrounding circumstances. For example, among other things, the judge noted Constable Carey's claim that Mr. Dergez threatened to light him on fire was corroborated by the video evidence and acknowledged that Constable Carey's testimony did not align precisely with his notes and the videos. He also found that the amount of gasoline on Constable Carey was not consistent with incidental spillage as a result of Mr. Dergez having been spun around, as he claimed.

[32] I would not give effect to this ground of appeal.

Conclusion

[33] I would dismiss the conviction appeal.

Sentence Appeal

Background

[34] Justice Wilson's reasons for sentence are indexed as R. v. Dergez, 2024 BCSC 1367.

[35] When Mr. Dergez was arrested on September 9, 2021, he was living in the community on a release order. Following his February 16, 2024 conviction for assaulting and threatening Constable Carey and his guilty pleas to four counts of breaching conditions of release, the Crown sought a global sentence of three years' imprisonment, comprised of 31 months on the assault with a weapon count, to be served consecutive to four months for the uttering threats count, together with one-month consecutive on one of the breach charges, followed by one-month concurrent on the remaining three. Mr. Dergez sought a sentence of time-served.

[36] When Mr. Dergez was sentenced for the offences in question on this appeal, he had already served a total of five years and two months in pre-trial custody for various unrelated matters and been sentenced on two of them by Justices Ker and Ross, respectively. However, at the time of sentencing, those sentences had expired.

[37] Although Mr. Dergez had been in custody since the September 9, 2021 offence date, much of the "dead time" credit he had accumulated throughout the years had been used up and applied to previously imposed sentences. For that reason, it was common ground that only 214 days remained to be credited when he was sentenced for these offences. His attempts to have all of his matters heard by a single justice were unsuccessful.

[38] At the sentencing hearing, Mr. Dergez argued that the totality principle applied to his previously imposed sentences because, considered cumulatively, a sentence of five years and two-months' imprisonment (the total period he had served in pre-trial custody) would be "crushing" and beyond what would have been imposed for an offence of this kind.

Sentencing Reasons

- [39] After summarizing the parties' position, the judge reviewed the aggravating and mitigating factors. The aggravating factors included the seriousness of the offences, their significant impact on Constable Carey, and the fact they were committed shortly after Mr. Dergez had been released on bail. They also included his lengthy and related criminal record. The mitigating factors included Mr. Dergez's difficult upbringing, substance abuse issues, and underlying mental health challenges.
- [40] The judge observed that the parties agreed the range of sentence for assaulting a police officer is one to five years, as established by this Court in *R. v. Leclerc*, 2017 BCCA 228 at para. 48. He also described the principles of totality and proportionality, citing *R. v. C.A.M.*, [1996] 1 S.C.R. 500 and *R. v. Potts*, 2011 BCCA 9.
- [41] The judge rejected Mr. Dergez's submission that he could consider the totality principle as it related to the previously imposed sentences of Ker and Ross J.J. Rather, he stated, as a matter of principle, totality does not apply in circumstances where previous sentences have already been completed, citing *R. v. Sidwell*, 2015 MBCA 56. That said, he was "mindful of the time Mr. Dergez has spent in custody", and noted that Mr. Dergez was entitled to credit for pre-trial detention that had not been used on other matters: at para. 61.
- [42] The judge concluded that a fit sentence for the assault of Constable Carey was 24 months' imprisonment. He imposed four months consecutive on the uttering threats charge, one-month consecutive on one of the breach counts, and concurrent one-month sentences on the remaining three, which led to a global sentence of 29 months. Taking into account the totality principle, he reduced that sentence to 25 months' imprisonment. In the result, after applying 214 days of credit, he imposed an actual sentence of 536 days.

Discussion

- [43] On appeal, Mr. Dergez repeats the position taken below, namely, that when he applied the totality principle the judge should have accounted for his previously imposed sentences. He acknowledges that this position conflicts with existing authority, but says that given the closeness of the other matters in time and his unsuccessful efforts to have them heard by the same judge, in fairness the judge should have made an exception to the usual approach in the circumstances of this case. In addition, he says, the judge failed to consider the fact that he spent 136 days in segregation prior to the sentencing, and that he suffered from untreated medical problems. All things considered, he submits that we should reduce his sentence to time-served, followed by a period of non-reporting probation.
- [44] I do not accept these submissions.
- [45] As the judge recognized, the totality principle applies: 1) where an offender is being sentenced for several offences at the same time; and/or 2) where an offender is already serving a sentence for another offence at the time sentence is imposed: *R. v. Johnson*, 2012

ONCA 339 at para. 19; R. v. Marshall, 2021 ONCA 28 at para. 9. Where the offender is already serving another sentence, appellate courts have consistently held that the totality principle only applies to considering the unexpired portion of the sentence that has yet to be served and not in respect of any expired portion of the sentence: Sidwell; R. v. Park, 2016 MBCA 107; R. v. Roberts, 2019 NLCA 43, R. v. Tamoikin, 2020 NSCA 43; R. v. R.S., 2024 SKCA 97. This is because the application of the totality principle is a forward-looking exercise that requires a judge to determine whether the aggregate length of the future incarceration would be unduly long or harsh in the circumstances; Sidwell at para. 31; Park at para. 10. However, these considerations do not apply when the previous sentences have been completely served: Park at para. 10.

[46] In my view, the judge made no error in imposing a sentence in line with the foregoing authorities. Moreover, the sentence he imposed was proportionate and fit. As to Mr. Dergez's submission that his time in segregation and his medical issues were unaddressed, the relevant facts were not before the judge and are not before this Court. It follows that I see no error in the judge's approach in the circumstances of the case.

Conclusion

[47] I would grant leave to appeal the sentence and dismiss the appeal.

[48] BENNETT J.A.: I agree.

[49] FLEMING J.A.: I agree.

[50] BENNETT J.A.: The appeal against conviction is dismissed. Leave to appeal is granted, but the sentence appeal is dismissed.

"The Honourable Justice Dickson"

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