CANADA / JUDGMENT

R. v. Frigon

2020 BCCA 171

COURT
British Columbia Court of Appeal

DECIDED
18 June 2020

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2020 BCCA 171 R. v. Frigon

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Frigon,

2020 BCCA 171

Date: 20200618

Docket: CA45289

Between:

Regina

Respondent

And

Joseph Wilfred Frigon

Appellant

Before:

The Honourable Madam Justice Bennett

(In Chambers)

On appeal from: Orders of the Provincial Court of British Columbia, dated

January 10, 2018 (conviction) and May 8, 2018 (sentence)

(R. v. Frigon, Nelson Docket 25063-1).

Counsel for the Appellant

(via teleconference):

J. Narwal

Counsel for the Respondent

(via teleconference):

A. MacKay

Place and Date of Hearing:

Vancouver, British Columbia

June 8, 2020

Place and Date of Judgment:

Vancouver, British Columbia

June 18, 2020

Summary:

The Crown applies in camera to unredact an affidavit sworn by trial counsel in response to allegations of ineffective assistance. Held: Application granted. The redacted portions address the allegations advanced by the appellant, and fall within the bounds of his waiver of solicitor/client privilege.

Reasons for Judgment of the Honourable Madam Justice Bennett:

[1] As a ground of appeal against conviction, Joseph Frigon has alleged ineffective assistance of counsel. His former counsel has filed an affidavit in response to those filed by Mr. Frigon, in accordance with this Court's Practice Directive Ineffective Assistance of Trial Counsel (Criminal Practice Directive, 12 November 2013).

[2] The affidavit has been filed and sealed, and a redacted version has been filed and served on Crown counsel.

[3] Pursuant to the Practice Directive, the Crown has made an application to unredact the affidavit of trial counsel. A hearing in camera was held with only new appellate defence counsel and counsel for the former trial lawyer in attendance.

[4] I have concluded that the redacted information responds directly to issues raised by Mr. Frigon, and I order that the redactions be removed in their entirety.

Background

[5] For the purpose of this application, it is not necessary to delve deeply into the facts. In brief, Mr. Frigon and William Graff were involved in a bar fight in Cranbrook, B.C. The issue at trial was who started the fight, and whether Mr. Frigon had acted in self-defence. The trial judge concluded that Mr. Frigon started the fight and convicted him of assault causing bodily harm. He raises a number of grounds of appeal, one being that his counsel provided ineffective assistance.

[6] The affidavit of trial counsel has redactions in paragraphs four, five, eight, and 15. The redacted information pertains to communications between counsel and Mr. Frigon.

Legal framework

[7] As adopted in R. v. Hamzehali, 2017 BCCA 290 at para. 47, this Court in R. v. Li (1993), 36 B.C.A.C. 181 (C.A.) offered the following guidance in setting out the scope and purpose of the waiver of solicitor/client privilege where ineffective assistance of counsel is raised:

[48] There are few legal principles more important than the protection of privileged communications. The law is summarized in Rule IV of the Canadian Bar Association's Code of Professional Ethics, which states:

The lawyer has a duty to hold in strict confidence all information acquired in the course of the professional relationship concerning the business and affairs of his client, and he should not divulge any such information unless he is expressly or impliedly authorized by his client or required by law to do so.

[49] Further, in Descôteaux v. Mierzwinski, , [1982] 1 S.C.R. 860 at 870, Lamer J. (as he then was) said:

It is not necessary to demonstrate the existence of a person's right to have communications with his lawyer kept confidential. Its existence has been affirmed numerous times and was recently reconfirmed by this Court in Solosky v. The Queen, , [1980] 1 S.C.R. 821, where Dickson J. stated (at p. 839):

One may depart from the current concept of privilege and approach the case on the broader basis that (i) the right to communicate in confidence with one's legal advisor is a fundamental civil and legal right, founded upon the unique relationship of solicitor and client, and (ii) a person confined to prison retains all of his civil rights, other than those expressly or impliedly taken from him by law. [Emphasis in original.]

[50] The law, however, permits Mr. Brooks to defend himself against attacks upon his character and integrity. This right extends to disclosing confidential communications from his client if it is necessary to answer the allegations made against him. This is not an unlimited right. In this respect, see R. v. Dunbar and Logan (1982), , 68 C.C.C. (2d) 13 (Ont C.A.), where Martin J.A. said, at p. 39:

Dean Wigmore states that when the client alleges a breach of duty by the attorney the privilege is waived as to all communications relevant to that issue: 8 Wigmore on Evidence, (McNaughton Rev.), p. 638. In McCormick on Evidence, 2nd ed., the author states at p. 191:

As to what is a controversy between lawyer and client the decisions do not limit their holdings to litigation between them, but have said that whenever the client, even in litigation between third persons, makes an imputation against the good faith of his attorney in respect to his professional services, the curtain of privilege drops so far as necessary to enable the lawyer to defend his conduct. [Emphasis in original.]

[51] Martin J.A. concluded at p. 41:

I see no valid reason why Bray's [the accused] imputations against his former lawyers on cross-examination should not constitute a waiver of the privilege so far as it is necessary to enable them to defend themselves against the imputations. [Emphasis in Li.]

[8] The release of privileged information to Crown counsel in the context of an allegation of ineffective assistance of counsel is conducted within the parameters of judicial oversight: Hamzehali at para. 51. Thus, when trial counsel are unsure if their client's waiver of privilege covers certain content of their own responding affidavit, it is incumbent upon the parties to appear before a justice of the Court for a ruling on the issue. This protects both trial counsel and the appellant.

[9] On the other hand, trial counsel are entitled to defend themselves when their competence and reputation are challenged. Quibbles about the extent of the waiver are not encouraged.

Positions of the parties

[10] Mr. Frigon does not dispute that I have jurisdiction to make the order sought by the Crown, but submits that it would be better left for the division of the Court hearing the appeal to decide if the redacted material should be disclosed. He further submits that the waiver he filed, along with his affidavit and factum, does not widen the waiver of the redacted communication with his counsel. He says that the redacted information is not "necessary" to respond to the allegation of ineffectiveness.

[11] Ms. MacKay, appearing for trial counsel, submits that the allegations relate to whether trial counsel sought or took instructions, and the extent of his communications with Mr. Frigon. She says that Mr. Frigon cannot argue that his counsel was ineffective, and at the same time block him from responding to the very matters that he has raised.

Discussion

[12] The first submission of Mr. Frigon is that I should defer jurisdiction to the division hearing this appeal. The difficulty is that the Crown takes the position that it cannot properly respond to the application to adduce fresh evidence or to the ground of appeal relating to ineffective assistance of counsel without a ruling on the content of trial counsel's affidavit. Furthermore, if cross-examination is permitted, trial counsel will not know what he can or cannot say.

[13] The Practice Directive contemplates that the case management judge can decide the issue of redactions to move the appeal forward in an orderly manner. In my view, this is not a case where it is preferable to defer the issue to the division of the Court.

[14] In his affidavit sworn February 24, 2020, Mr. Frigon says, at para. 24:

I do not recall [trial counsel] ever speaking with me about the thirteen points referred to in paragraphs 11-23 above. I do not recall [trial counsel] giving me advice, nor do I recall him seeking my instructions, in relation to these matters including whether to ask certain questions, object to questions by the Crown, inquire about further disclosure, to hire any expert witnesses, or any other matters referred to above.

[15] He makes specific allegations at paras. 12, 19, 21 and 22 of his affidavit.

[16] Turning now to trial counsel's responding affidavit, the redacted information at paragraphs four and five, in my view, directly responds to the allegations of non-communication and obtaining instructions on specific matters. While it sets out the basic trial strategy, it also addresses what instructions and communications occurred in response to that strategy, which is now under attack. These paragraphs are plainly in response to the allegations found at para. 24 of Mr. Frigon's affidavit, reproduced above.

[17] Paragraph eight is also responsive to the allegations that trial counsel did not obtain instructions nor communicate with Mr. Frigon.

[18] Finally, para. 15 addresses whether Mr. Graff had a criminal record--an issue raised in para. 11 of Mr. Frigon's affidavit. The redacted portion relates to instructions given by Mr. Frigon on the issue, and is, as I read it to be, clearly covered by the waiver.

[19] Overall, I am of the view that the affidavit provided by trial counsel is in accordance with the waiver of solicitor/client privilege that flows from Mr. Frigon's affidavit and the arguments raised on appeal. It is limited to the matters necessary to defend against the allegations advanced.

[20] I would allow the application by the Crown and order that the redactions be removed. The original affidavit in its entirety is to be provided to Crown counsel conducting the appeal. The affidavit filed with the Court will be unsealed.

[21] In addition, the order made during the hearing banning access to the recording of the application is set aside.

"The Honourable Madam Justice Bennett"

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