
CANADA / JUDGMENT

R. v. Green

2014 BCSC 1451

COURT

Supreme Court of British Columbia

DECIDED

30 July 2014

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2014 BCSC 1451 R. v. Green

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Green,

2014 BCSC 1451

Date: 20140730

Docket: 21888

Registry: Smithers

Between:

Larry Harvey Green

Appellant

And

Her Majesty the Queen

Respondent

Before: The Honourable Madam Justice Hyslop

On appeal from: A decision of the Provincial Court of British Columbia, dated July 20, 2011 (R. v. Green, Smithers Registry No. 21888-1, unreported).

Reasons for Judgment

Counsel for the Appellant:

G.E. Greene

Counsel for the Crown:

J. Doulis

Place and Date of Hearing:

Smithers, B.C.

June 13, 2014

Place and Date of Judgment:

Smithers, B.C.

July 30, 2014

[1] On July 20, 2011, the appellant was convicted of:

Count 1

Larry Harvey GREEN, on or about the 10th day of June, 2010, at or near Hazelton, in the Province of British Columbia, did resist a peace officer, Constable Peter Fritsch, in the execution of that peace officer's duty, contrary to Section 129(a) of the Criminal Code.

Count 2

Larry Harvey GREEN, on or about the 10th day of June, 2010, at or near Hazelton, in the Province of British Columbia, did assault Constable Peter Fritsch, a peace officer engaged in the execution of that peace officer's duty, contrary to Section 129(a) of the Criminal Code.

[2] This is a summary appeal of the learned provincial court judge's conviction of the appellant.

[3] The standard of review on a summary conviction appeal is whether the findings of fact could have reasonably been reached by the learned trial judge. The appeal should be allowed only if the decision cannot be supported by the evidence, it is wrong in law, it is clearly unreasonable, or there was a miscarriage of justice: s. 686 of the Criminal Code of Canada (the "Code").

[4] The appeal court must re-examine and re-weigh the evidence and its effect, but it is not entitled to substitute its view of the facts in the place of the trier of fact: R. v. Yebes, [1987] 36 C.C.C. (3d) 417.

[5] The test is whether the verdict is one that a properly instructed jury acting judicially could render: R. v. Gagnon, 2006 SCC 17.

[6] In Gagnon, the court made this observation as to the evidence and the witnesses at trial:

[10] There is general agreement on the test applicable to a review of a finding of credibility by a trial judge: the appeal court must defer to the conclusions of the trial judge unless a palpable or overriding error can be shown. It is not enough that there is a difference of opinion with

the trial judge (*Schwartz v. Canada*, [1996] 1 S.C.R. 254, at paras. 32-33; *H.L. v. Canada* (Attorney General), [2005] 1 S.C.R. 401, 2005 SCC 25, at para. 74). A succinct description of the overall approach appears in *R. v. Burke*, [1996] 1 S.C.R. 474, at para. 4, where this Court stated that "it is only where the Court has considered all of the evidence before the trier of fact and determined that a conviction cannot be reasonably supported by that evidence that the court can ... overturn the trial court's verdict". With respect to the credibility of witnesses, the same standard applies. In *R. v. Lavoie*, [2003] Q.J. No. 1474 (QL), at para. 37, Nuss J.A. of the Quebec Court of Appeal stated that a trial judge's assessment of the credibility of witnesses "will not be disturbed unless it can be demonstrated that he committed a palpable and overriding error" (citing *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33).

ISSUE AT TRIAL

- [7] The issue before the learned trial judge was whether Mr. Green's actions were based on a mistake of fact or a mistake of law.
- [8] The facts are not seriously in dispute. The appellant, in the early hours of June 10, 2011, arrived home to find his daughter, Terri-Lyn Wesley, intoxicated, covered in blood, passed out on the floor, and with cuts on her body. The appellant wiped the blood from her face, got her up and had her change her clothing.
- [9] The appellant called 9-1-1. Police and ambulance were dispatched to the appellant's Hazelton residence.
- [10] The first person to reach the appellant's residence was Constable Dooks, who was in uniform and travelling in a marked police car. The appellant was observed by Constable Dooks in the living room of his residence. He banged on the door of Mr. Green's residence. Within minutes, Constable Dooks was joined by Constable Fritsch. The officers repeatedly knocked on the door, seeking to enter the appellant's residence, screaming and identifying themselves as police, threatening to kick in the door.
- [11] The appellant came to the door, opened it and tried to close it behind him. Terri-Lyn was observed in the house at the top of the stairs. The flesh on her arms was cut, blood was observed on part of the wall and the stairs were covered in blood. Terri-Lyn was moaning.
- [12] The appellant told the officers that they were not needed and tried to close the door. Constable Dooks pushed the door open and went in.
- [13] The appellant agreed in his evidence that there was blood on the walls and carpet and that Terri-Lyn's injuries were "life-threatening". The learned trial judge found that the constables were at the appellant's residence in the execution of their duty and in response to a 9-1-1 call, and that they found Terri-Lyn in serious distress.

- [14] The learned trial judge found that the appellant tried to close the door and the police told the appellant that they were the police and that Terri-Lyn needed help. The appellant said the ambulance is on their way and they did not need to go into the house.
- [15] Constable Dooks then told Constable Fritsch to remove the appellant from the steps of the house and he went into the house to assist Terri-Lyn. He observed what he had seen outside the house and, in addition, when Terri-Lyn pulled off her hoodie, he saw a puncture wound in her abdomen surrounded by swelling, she was moaning and appeared intoxicated. The ambulance arrived.
- [16] Constable Dooks quickly scanned the rest of the house to ensure no danger and told Constable Fritsch to arrest the appellant for obstruction, as he could hear the appellant outside the house being resistant. The ambulance attendants eventually went into Mr. Green's residence and found that Terri-Lyn had left. She was eventually located and taken by ambulance to the hospital.
- [17] At this point in time, Constable Dooks was unsure as to whether Terri-Lyn had injured herself or had been injured by another person. He secured the residence and then followed the ambulance to the hospital.
- [18] Before this occurred, Constable Fritsch took the appellant to the lawn of the residence. The appellant said he needed to get to his vehicle. Constable Fritsch told him to stay put as he wished to ask him some questions. The appellant told Constable Fritsch that nothing happened here, the ambulance was on its way and he needed to get into his vehicle. The appellant was attempting to move a log on the driveway and again said the ambulance was on its way.
- [19] Constable Fritsch told the appellant several times that he was being arrested for obstructing a peace officer. Despite this, the appellant continued to walk toward his vehicle. When Constable Fritsch asked the appellant to cooperate, and when he tried to take his right wrist, the appellant pulled away and said "Why am I being arrested?" He was told again why he was being arrested.
- [20] Constable Fritsch attempted to control the appellant's left arm and the appellant swung and slapped Constable Fritsch on the left side of his head. Constable Fritsch grabbed the appellant's upper arm and pulled him down. The appellant reached out and grabbed Constable Fritsch's vest and tore it. Constable Fritsch had the appellant on the ground, on his back, and held him there putting his knee on his chest. Constable Dooks then arrived and the appellant was told again a number of times that he was under arrest and asked to cooperate. Constable Dooks was then able to handcuff the appellant.
- [21] The learned trial judge found that the appellant, at no time, stated to the police officers that he needed to move his vehicle for the ambulance, or needed to move a log for that purpose. This, she found, was not communicated to the police officers.

- [22] The learned trial judge correctly stated the law as follows:
- [47] The case of *R. v. Godoy*, [1999] 1 S.C.R. 311, is to the effect that the common law duties of the police include the protection of life, which includes responding to 9-1-1 calls. They may enter a private residence in the course of responding to such a call as long as this does not involve the unjustified use of police powers.
- [49] The police, in my view, had the positive obligation to enter the house to ensure her safety and to provide assistance. The police were not mistaken that there were exigent circumstances here.
- [23] Counsel for the appellant agrees Godoy is a correct statement of the law.
- [24] The learned trial judge found that the appellant obstructed the police in the execution of their duty when the appellant tried to close the door and keep the officers from entering his residence.
- [25] The learned trial judge found that the appellant resisted arrest and assaulted Constable Fritsch by slapping him and grabbing and tearing his vest.
- [26] The appellant referred the learned trial judge to the following caselaw: *R. v. Plamondon*, [1997] B.C.J. No. 2757 (B.C.C.A.); *R. v. Landry*, [1986] 1 S.C.R. 145 (S.C.C.); *R. v. Nelson*, [1992] O.J. No. 747 (Ont. C.A.); *R. v. Born With a Tooth*, [1992] A.J. No. 802 (Alta. C.A.); and *R. v. N.C.*, [1997] O.J. No. 2302 (Ont. C.J.).
- [27] Except for *Landry*, the appellant referred me to the same caselaw. The learned trial judge found that these cases did not help her in determining whether the appellant was guilty or not guilty. She said this:
- [55] I have considered these decisions, and I do not find that there is anything in these decisions which assists in determining this case. The issue is: was there an honest mistake of fact or mixed fact and law? If there was, or if I have a reasonable doubt as to whether there may have been, then Mr. Green is entitled to an acquittal.
- [56] In this case, I find that I do not have any reasonable doubt about whether he was under a mistake of fact. In my view, he was not mistaken about any of the facts upon which a right of entry of the police was based and which gave rise to the police being in the execution of their duty. He agreed that he considered Terri-Lyn's injuries to be life-threatening and that it was a serious and urgent situation. Those were the facts. The fact of her being in distress, of her having cut herself, of the presence of blood were all -- none of those facts that Mr. Green was mistaken about, and he agreed that he considered it to be a life-threatening and urgent situation. His mistake was as to whether the police had a right of entry, and he believed that they did not and that as a homeowner he was entitled to close the door and to decide who it was who should help. He was wrong in this. In my view, this was not a mistake of fact or of mixed fact and law; it was a mistake of law. It was a mistake as to what his right as a homeowner was as a matter of law and what the police obligation as a matter of law was in

terms of entering the residence,

ISSUES DEFINED BY THE APPELLANT AND RESPONDENT

[28] The appellant defines the issues and states:

1. the learned trial judge erred in finding that the intention of the appellant was sufficient to create a finding of guilt on the basis that the "status of the police" was an error of law by the appellant.
2. The appellant says that the learned trial judge erred in requiring the appellant to "measure a question of law", in an emergency situation where there was simply no time to "weigh to a nicety the exact measure of his necessary defensive action".

[29] The respondent defines the issues in this appeal and states:

Ground 1: The trial judge did not err by finding the Appellant intended to obstruct and assault the officers.

Ground 2: The Judge did not err in finding the appellant's mistaken belief he had a right to resist the officer in an emergency situation was a "mistake of law."

[30] The appellant, in his statement of argument, states that the learned trial judge stated that as the appellant was dealing with a life-threatening situation "he was entitled to defend his home" and "decide who it was who should help". The learned trial judge did not make this finding in her reasons for the conviction or in her reasons in sentencing.

[31] The appellant argues that the trial judge underscored her error when she stated at the sentencing hearing:

[3] I think I made it clear in my decision that the circumstances were such, that while I found that you did not make a mistake of fact, you genuinely believed that you did not think the police were generally very helpful and they were not really helping you, and you did not think they were entitled to be in your residence.

[4] That did not give you a defence here but, given what was happening in this situation, I do not think that you were making an effort to get in the way of the police or to assault them, and that you genuinely thought that they were not entitled to arrest you.

[32] The trial judge's statements in paras. 3 and 4 are statements in her reasons for sentence. These statements are made expressing her understanding of the appellant's actions, which are recognized in the nominal sentence she gave the appellant.

[33] The appellant argues that the caselaw presented to the trial judge and further caselaw presented at this appeal is similar to the appellant's situation, which is that his belief was mixed fact and law. I reiterate, the trial judge found that the appellant knew exactly what the facts were and that was Terri-Lyn was in a life-threatening situation. I do not intend on going over each case presented by the appellant.

- [34] Crown counsel did a very good job on analyzing each case on which the appellant relied. Her analysis is correct. As an example, in *Plamondon*, the police officer exceeded her jurisdiction in going into the accused's home.
- [35] The balance of the caselaw referred to by the appellant relate to the accuseds' apprehension of facts. In *Nelson*, did the victim have a knife? In *Born With a Tooth*, it was the role of a trespasser in the protection of property by the accused. In *N.C.*, it was the actions taken by an accused in the protection of a person.
- [36] The most instructive case is that of *R. v. MacDonald*, 2014 SCC 3. Mr. MacDonald had a license and a registration certificate allowing possession of his handgun in a dwelling place. He took the handgun to Halifax, Nova Scotia, believing that his Alberta issued license and registration allowed him to possess it in Nova Scotia. The police, in investigating a noise complaint, attended Mr. MacDonald's residence and believed they saw something "black and shiny". The policeman pushed the door open, saw a handgun and, after a struggle, Mr. MacDonald was disarmed of the handgun. He was charged under s. 95 of the Code. He was convicted at trial, which was overturned by the Nova Scotia Court of Appeal on the basis that it was a mistake of fact and the Crown was obliged to prove that Mr. MacDonald knew his license did not extend to Nova Scotia.
- [37] The conviction was restored. The court stated at paras. 57-58:
- Mr. MacDonald's subjective belief that he could possess the firearm in Halifax is therefore nothing other than a mistake of law.
- [58] I therefore find that a requirement that an accused knew or was wilfully blind to the fact that his possession was unauthorized would be grounded on the acceptance of mistake of law as a defence to a charge under s. 95(1). It is trite law that, except in the case of an officially induced error, a mistake of law is no defence in our criminal justice system. Section 19 of the Code states:
19. Ignorance of the law by a person who commits an offence is not an excuse for committing that offence.
- [38] Interestingly, the court said this at para. 61:
- I nevertheless appreciate the Court of Appeal's concern that Mr. MacDonald may a result of this conviction be sentenced to a mandatory three-year term of imprisonment despite the fact that, in ordinary circumstances, his mistake of law would be a mitigating factor to be considered in fashioning a sentence that is proportionate to his crime
- [39] The learned trial judge in sentencing the appellant accepted the appellant's mistake of law as a mitigating factor in sentencing.

[40] There was some argument about colour of right. As I understood the appellant's argument, he was not arguing that the appellant had a colour of right, but rather he used cases involving colour of right to show that people make emergency judgments and, in particular, the appellant in this case in defending his home and rescuing his daughter.

[41] I dismiss the appeal.

"H.C. Hyslop J."

HYSLOP J.

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Prepared on 29 October 2026 · Esheria