

CANADA / JUDGMENT

R. v. Hirny

2024 BCSC 2187

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Hirny,

2024 BCSC 2187

Date: 20241112

Docket: 32052

Registry: Vancouver

Rex

v.

Peter Hirny

Before: The Honourable Justice Doyle

On appeal from: An order of Vancouver's Downtown Community Court, dated September 24, 2021 (Vancouver Downtown Community Court File No. 31686-1).

Oral Reasons for Judgment

Counsel for the Crown/Respondent:

D. Meagher

Counsel for the Accused/Appellant:

E. Purtzki

Place and Date of Hearing:

Vancouver, B.C.

March 4, 2024

Place and Date of Judgment:

Vancouver, B.C.

November 12, 2024

INTRODUCTION

- [1] On September 24, 2021, the appellant was convicted at trial of two counts of assaulting a peace officer contrary to s. 270(1) of the Criminal Code, R.S.C. 1985, c. C-46. One count was in relation to Cst. Karellas, the other in relation to Cst. Frech. Both convictions arose from the same incident, which occurred on December 22, 2020 in Vancouver.
- [2] Regarding Cst. Frech, the Information charged the appellant with causing him bodily harm (s. 270.011(b)). The learned trial judge acquitted the appellant of that offence. He was not satisfied beyond a reasonable doubt that bodily harm was proven, but was so satisfied that the appellant was guilty of the lesser, included s. 270(1) offence.
- [3] The primary issue at trial was whether each police officer was acting in the execution of their respective duty when the appellant was apprehended under section 28(1) of the Mental Health Act, R.S.B.C. 1996, c. 288 [MHA]. The apprehension led to a physical struggle upon which the assault convictions were based.
- [4] The focus of this appeal is the lawfulness of the apprehension.
- [5] The convictions followed a one-day trial. The Crown called four witnesses: a civilian named Tevis Torvo, and three members of the Vancouver Police Department, Csts. Karellas, Frech and Jaswal. The appellant did not testify.

THE TRIAL

- [6] The appellant's statement of argument includes a statement of facts with which the respondent takes no issue. The Crown's statement of argument notes some additional facts. Counsel on this appeal were not trial counsel.
- [7] At the hearing of this appeal, the appellant's counsel narrowed matters substantially by conceding that there was no issue with the trial judge's findings of fact.
- [8] The trial judge set out the positions of the parties and considered sections 1 and 28 of the MHA and R. v. Milino, 2009 BCSC 1802, cited by the appellant's counsel. The trial judge also noted, during submissions, his familiarity with R v. Hickey, 2013 BCPC 328, a case cited by both counsel on this appeal.
- [9] The trial judge distinguished Milino on its facts. In considering the MHA, he found:

1. The officers had received from the appellant's father information that the appellant was acting in a manner likely to endanger the father;
2. The officers made observations consistent with an assault having occurred. This included abrasions on the father's neck, consistent with the father reporting being grabbed by the neck;
3. The officers received from the father information that the appellant had a mental disorder (schizophrenia), and that his behaviour was escalating since he was not taking his medication; and
4. There "was a present danger to his father with physical evidence of the assault on him within the last hour" (para. 24).

ISSUE ON APPEAL

- [10] The parties agree that the issue on this appeal is the trial judge's application of the law to the facts he found. More particularly, on those findings, was the trial judge in error to be satisfied that the police had lawful authority to apprehend the appellant pursuant to s. 28(1) of the MHA?
- [11] The parties agree that the standard of review is correctness.

SUBMISSIONS

- [12] The appellant submits that the officers were not executing their respective duty on the basis that apprehension pursuant to s. 28(1) of the MHA was not authorized by law.
- [13] The additional submission on appeal is that the police did not consider an option alternative to arrest pursuant to s. 28(1) of the MHA, namely seeking a warrant pursuant to s. 28(3) of that Act.
- [14] The appellant relies upon Hickey at para. 28 for the proposition that the officer must consider both personal observations and information received, despite the use of the word "or" between "personal observations" and "information received" in that portion of section 28(1).
- [15] The appellant acknowledges that the officers had received information from the appellant's father that the appellant had schizophrenia, was not taking his medications and was "unwell" (statement of argument, para. 55).
- [16] The appellant submits that although the learned trial judge placed significant reliance on Cst. Frech's opinion due to that officer's experience with mental health issues, he did not approach the evidence correctly.
- [17] The crux of the submission is that the police officers' personal observations of the appellant did not establish that the appellant was a danger to himself or others, noting:

1. The officers only dealt with the appellant for a few minutes;
 2. The appellant was responsive to questions during that few minutes; and
 3. The appellant complied with directions, including to put down a fork.
- [18] Overall, the appellant says the trial judge erred in finding that the appellant's behaviour "all pointed to a person with a mental disorder", by submitting that "simply having a mental illness and behaving in an erratic, strange or theatrical way" is not sufficient to meet the high threshold in s. 1 of the MHA.
- [19] Second, as noted, counsel on this appeal submits that s. 28(1) must be resorted to only in urgent circumstances where a warrant cannot reasonably be obtained under s. 28(3), citing Milino at para. 51. This was not a submission made at trial.
- [20] Overall, the appellant submits that, whether assessed as an unreasonable finding or an error of law, the apprehension pursuant to the MHA was not justified and that he should be acquitted.
- [21] The respondent Crown submits that the trial judge's decision was correct, and that the apprehension was lawful.
- [22] The Crown submits that s. 28(1) should be read such that "personal observations" and "information received" are not conjunctive, but rather that the totality of the circumstances must be considered. The Crown submits that is the principle expressed by Hickey. Further, the Crown submits that this is consistent with para. 36 of Milino, where Chamberlist J. cites R. v. Golub (1997), 34 O.R. (3d) 743, 1997 CanLII 6316 (C.A.).
- [23] In any event, the Crown says that the trial judge did consider the totality of the information the police received and the observations of the police. In addition to that noted above, this included the confirmation by the appellant himself that he was not taking medication because he was a free human being.
- [24] The Crown submits that Milino does not require that the police officers explore the alternative of s. 28(3), contrasting the MHA with legislation from Alberta which expressly creates that requirement. The Crown submits that this was not an issue raised at trial, and there is no evidence on that issue from the trial.

LAW

- [25] Section 28(1) and (3) of the MHA provide:

Emergency procedures

28 (1) A police officer or constable may apprehend and immediately take a person to a physician or nurse practitioner for examination if satisfied from personal observations, or information received, that the person

- (a) is acting in a manner likely to endanger that person's own safety or the safety of others, and
- (b) is apparently a person with a mental disorder.
- (3) Anyone may apply to a judge of the Provincial Court or, if no judge is available, to a justice of the peace respecting a person if there are reasonable grounds to believe that section 22 (3) (a) (ii) and (c) describes the condition of the person.

[26] Section 1 of the MHA provides:

"person with a mental disorder" means a person who has a disorder of the mind that requires treatment and seriously impairs the person's ability

- (a) to react appropriately to the person's environment, or
- (b) to associate with others;

DISCUSSION

[27] The parties have fairly, concisely and effectively presented this appeal. The issue is as stated above, and the standard of review is correctness (see *R. v. Le*, 2019 SCC 34 at para. 23 and *R. v. Shepherd*, 2009 SCC 35 at para. 20).

Section 28(3)

- [28] I will deal first with the submission by the appellant that the police must reserve the use of s. 28(1) to circumstances where a s. 28(3) warrant cannot reasonably be obtained (statement of argument, para. 51). At that same paragraph, the appellant submits that "the reviewing court must look to whether there was an 'alternative course of conduct'" available short of s. 28(1), that alternative course being a s. 28(3) apprehension order. In so doing, he relies upon a comment in *Milino* at para. 51:
- [51] I have also concluded that there was no cogent evidence at that time that could be seen as sufficient to authorize Ms. Milino's apprehension under s. 28(1). Moreover, there was the alternative course of conduct that was open to the attending officers, being to seek a warrant for the respondent's apprehension under the applicable provisions of s. 28(3). Thus I have concluded that the circumstances surrounding this case that the officers' actions as described in the evidence were not authorized by law and therefore the apprehension or arrest under the Mental Health Act was a nullity. I would also point out that although there are parallels between a protective apprehension and an arrest, there is no such thing as an "arrest" under the Mental Health Act as that term was used by the arresting officers.
- [29] I agree with the appellant that apprehension under the MHA is akin to an emergency power, and indeed, the heading of section 28 is "Emergency procedures".

- [30] The Crown notes that unlike some other provinces, the MHA does not require the police to consider the option of seeking a warrant. The Crown notes, for example, sections 12 and 10 of Alberta's Mental Health Act, R.S.A. 2000, c. M-13, as well as the commentary at page 5 of an article cited by both parties: Robert Diab and Jolene Sanderson, Reasonable Apprehension Under Mental Health Law, 2022 48-1 Queen's Law Journal, 2022 CanLIIDocs 4557.
- [31] The Crown also notes that this is a new issue, not raised at trial, and that there was no evidence at trial directed at the police officers about their considerations, if any, of section 28(3) as a pre-condition to resorting to s. 28(1).
- [32] As recently affirmed in *Ai Kang Yi Yuan Enterprises Corp. v. 1098586 B.C. Ltd.*, 2024 BCCA 299:
- [69] This Court will not generally entertain a new issue on appeal: *R. v. Gill*, 2018 BCCA 144 at paras. 9-12; *Gorenshtein v. British Columbia (Employment Standards Tribunal)*, 2016 BCCA 457 at para. 44. Courts may depart from this rule where the court has a sufficient evidentiary record and the findings of fact to do so or where failing to do so would risk creating an injustice: *Quan v. Cusson*, 2009 SCC 62 at para. 37, quoting from *Wasauksing First Nation v. Wasausink Lands Inc.*, 184 O.A.C. 84 at para. 102, 2004 CanLII 15484 (Ont. C.A.). However, leave is required to raise a new issue and the onus lies with the applicant to establish "that the record in the court below is as complete as it would have been had the issue been raised in a timely way": *Gill* at para. 11, relying on *Zeligs v. Janes*, 2016 BCCA 280 at para. 66.
- [33] The MHA does not mandate such consideration prior to a decision to apprehend under s. 28(1), as do other provinces. The article noted above, cited by both counsel, recognizes this at page 5-6:
- British Columbia and Quebec allow for apprehensions on less onerous grounds. An officer in British Columbia need not consider the possibility of obtaining a warrant if she is "satisfied" that a person is "acting in a manner likely to endanger that person's own safety or the safety of others," and they are "apparently a person with a mental disorder".
- [34] This Court does not have any evidentiary record with respect to police consideration of s. 28(3). There is a complete absence of evidence since the issue was not contemplated at the trial.
- [35] To raise the issue at this stage would be to inject a new consideration purporting to mandate an extra step which must be taken, or considered, by an officer prior to apprehending a person pursuant to s. 28(1).
- [36] With respect to the risk of creating an injustice, there is no indication that the Court in *Milino* considered this issue in detail.

- [37] In that regard, I note the Milino Court's essential basis for upholding the trial judge's decision did not turn on any s. 28(3) "option", but instead focused on the fact that the exigent circumstances from the "information received" changed once the police made the observations they did, summarized at para. 59:
- [59] I agree with the learned trial judge that when the initial investigation of Ms. Milino as a "possibly suicidal female" proved unfounded, the previously exigent circumstances upon which they had entered the premises ceased and they ought to have left the premises. This obligation to leave would have come into effect as soon as they discovered her and through communications objectively found that she was lucid and responsive, denying any suicidal intention.
- [38] Further in this regard, I note para. 65, where the Court in Milino took care to point out that the conclusions of the trial judge, reproduced in that judgment, "was the primary issue determined by the trial judge".
- [39] In my view, the comments of the Court in Milino were obiter dicta, and do not establish the condition precedent suggested by the appellant--one not mandated by the MHA and not addressed by evidence or submissions at trial.
- [40] This Court should not, in my view, entertain this new legal issue on appeal.

Was the Trial Judge's Decision Correct?

- [41] At para. 21 of his reasons for judgment ("Reasons"), the trial judge summarizes the facts in Milino, then distinguishes it at para. 22 based in part on his finding that that in the appellant's case, "the entry to the apartment here was through the front door by the father and the main owner and/or tenant of the apartment. Nor was Milino presenting as manic in her speech and behaviour as Mr. Hirny was".
- [42] At para. 24 of the Reasons, the trial judge noted that the appellant's father--"an older gentleman" (Reasons, para. 6)--told the police that the appellant was acting in a manner likely to endanger him, and the police observations of the father "seems to me to confirm there was an alleged assault in his home". That evidence was referred to at para. 4, with the father approaching the officers, appearing distressed, telling them his son had choked him and displaying red blotches on his neck and holding his neck. The parties agreed at trial that the father's evidence was used not for its truth, but for what was in the police officers' minds as they engaged with the appellant.
- [43] At paras. 25 and 26, the trial judge stated:
- [25] The apparent explanation by the accused further confirms a likely disorder as it was one that was not coherent. The behaviour observed, his erratic movements of arms and his speech, emphatic and theatrical and with an experienced officer describing the speech as manic, all point to a person with a mental disorder. Officers are, however, not medical professionals. They must rely upon their training and and experience, and the evidence of

these experienced officers satisfy me that they had sufficient grounds to believe that Mr. Hirny was suffering from a disorder of the mind at the time for which he needed treatment and it seriously impaired his ability to associate with others, certainly with his father, and to react appropriately to his environment, and that was particularly when the officers entered the residence to explain to him why they were there.

- [26] The officers have to consider all of the information given to them as well as observed, and they did that. A reasonable person in the position of the officers with the information they had and having seen what they saw and heard would, in my view, reach the same conclusion. That is s. 28 of the Mental Health Act's purpose is to allow an individual in the accused's situation to be taken for help.
- [44] In addition to the information from the father cited at para. 24 of the Reasons, paras. 5 and 6 note additional evidence that the father initially gave the police that the appellant had been living with him for approximately a year, that he had acted out and that he was afraid of the appellant.
- [45] In addition to what the appellant's father told the police, the appellant confirmed that he was not taking medication.
- [46] The trial judge discussed Milino at para. 22, noting that Ms. Milino was asleep in her bed, there was no allegation of a recent assault, and the conversation with her was calm and cogent.
- [47] In that case, the police became involved when a "concerned citizen" advised that Ms. Milino was possibly suicidal, having told that concerned citizen that she was going to kill herself. Queries revealed two prior MHA files, one a suicide attempt.
- [48] On arrival, and obtaining no response to loud knocking, the police entered the residence. Finding Ms. Milino asleep in bed, they awoke her. At para. 48, Chamberlist J. noted that she was "reacting appropriately to her environment and was able to associate with others", and he notes at para. 58 that other than police alleged erratic behaviour of laughing and then crying, there was nothing to indicate her doing anything dangerous to herself.
- [49] Chamberlist J. summarized at para. 59 that "when the initial investigation of Ms. Milino as a 'possibly suicidal female' proved unfounded, the previously exigent circumstances upon which they had entered the premises ceased". He found that should have ended the matter.
- [50] In short, in Milino, the information received of exigent circumstances was overcome by the contrary observations of the police on arrival.

- [51] The findings of the trial judge in this case are clearly distinct from the Milino findings. This includes the initial report of an assault and observation of injuries consistent with the alleged assault. His father, with whom the appellant lived for about one year, also reported the appellant's recent behaviour, medical diagnosis, and that he was not taking medications. The appellant confirmed when questioned by the police that he was not taking medication for schizophrenia.
- [52] The appellant submits that the trial judge's findings at para. 25 do not establish a "person with a mental disorder" pursuant to s. 1 of the MHA, since the appellant did respond, complied by putting down the fork and that the interaction was only seven or eight minutes long. The Crown submits that the appellant is parsing the circumstances, interpreting each in isolation.
- [53] I agree with the appellant that the s. 28(1) powers of the police must be exercised with restraint. The assertion of grounds to enforce that provision must be assiduously guarded to avoid potential abuse. A person with established mental health issues cannot be subject to arrest at whim based upon those issues.
- [54] In my view, it is clear that the information received and police observations must be viewed in their totality. In Milino, that totality did not warrant apprehension pursuant to s. 28(1).
- [55] In Hickey, the Court found that the totality of the information received and police observations did satisfy the test for apprehension. At para. 32, the Court found that the facts were "quite distinct" from the facts in Milino, and the Court details those at paras. 37 to 39, which included information from the accused's mental health nurse and an encounter that day with an enforcement officer.
- [56] In Hickey, the Court found there to be extremely strong grounds that the accused met the section 1 definition of a "person with a mental disorder" (para. 39), and that although the officers' later observations of the accused as "disheveled, sweaty and overly quiet were perhaps in themselves insufficient to warrant an apprehension", the "observations were, if not confirmatory of the information indicating the accused was in a precarious mental state, were of such a nature to justify an apprehension of the accused when coupled with the information provided" (para. 40).
- [57] In this case, the trial judge considered the totality of the information received from the father combined with the observations of the police. The trial judge concluded that the police had grounds to apprehend, and that a reasonable person would be satisfied there were grounds to apprehend.
- [58] As noted earlier, the appellant does not take issue with the trial judge's findings of fact.

- [59] The father, who appeared to be an older man, approached the police on Granville Street, apparently in upset or some distress. He reported being assaulted by his son, the appellant, within the past hour. He reported being choked and thrown to the ground. The police observed injuries (red blotches) to his neck, and that he was holding his neck. The father told the police the appellant had moved in with him about a year prior, was schizophrenic, was not taking his medication, and that the appellant's behaviour was escalating.
- [60] The officers attended the residence and made observations.
- [61] The trial judge, who heard the evidence, gave significant weight to the evidence of Cst. Frech given his experience with mental health issues both on and off the job (Reasons, para. 14).
- [62] The trial judge found that it was clear the officers had information that the appellant was acting in a manner likely to endanger his father, and that it was further clear that there was a "present danger" to his father (para. 24).
- [63] The trial judge relied upon the evidence of the "experienced officer" as set out at para. 25.
- [64] With further regard to the information received, the appellant's father was not a mental health nurse, but he was the father and the two of them had lived with each other for approximately one year. The appellant himself told the police that he was not taking medication and had the right not to do so. These are all factors which the police were entitled to consider when looking at the totality of the circumstances.
- [65] Unlike Milino, and as noted by the trial judge, the observations of the injuries to the father seemed to confirm that there was an alleged assault in the father's home and that the behaviour of the appellant had been escalating (para. 24).
- [66] I have already referenced the findings of the learned trial judge, including those found in paras. 23, 24 and 25.
- [67] The trial judge concluded that the officers were satisfied that they had grounds to apprehend the appellant pursuant to s. 28(1), and that a reasonable person in their position would reach the same conclusion (para. 26).
- [68] The appellant contends at para. 61 of his statement of argument that when the trial judge set out at para. 25 that the matters cited "all pointed to a person with a mental disorder", the trial judge missed the link, and that "simply having a mental illness and behaving in an erratic, strange, or theatrical way does not necessarily meet the high threshold in s. 1 of the MHA".
- [69] The Crown concedes that the observations alone may not have made out the required grounds. However, the Crown notes that those observations corroborated the information the police received from the father (unlike in Milino).
- [70] With respect, the trial judge did not simply find that the apprehension was justified based simply on the appellant having a mental disorder and his behaviour upon police arrival.

- [71] I find it clear that the trial judge considered the totality of the information received and the observations made. He found the appellant to be a present danger to his father with physical evidence of the assault on the father within the past hour. Having heard the testimony at trial, the trial judge put significant weight on Cst. Frech's evidence.
- [72] With regard to the suggestion that an option was to just allow the appellant to leave voluntarily, the trial judge had earlier noted Cst. Frech's evidence in cross-examination (p. 52, l. 44 to p. 53, l. 5), referred to at para. 19 in the Reasons, where the trial judge stated Cst. Frech's "evidence was that he would have been concerned that [the appellant] would come back".
- [73] In conclusion, I agree with the determination of the trial judge, and find that he did not commit any error of law in finding that the apprehension in this case was lawful.
- [74] The appeal is dismissed.
- "Doyle J."

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