
CANADA / JUDGMENT

R. v. Martin

2010 BCSC 1086

COURT

Supreme Court of British Columbia

DECIDED

29 July 2010

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2010 BCSC 1086 R. v. Martin

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Martin,

2010 BCSC 1086

Date: 20100729

Docket: 55398-1

Registry: Chilliwack

Regina

v.

Kenneth Olaf Martin

Before: The Honourable Mr. Justice Saunders

On Appeal from the Provincial Court of British Columbia

from the Judgment of the Honourable Judge Cohen,

Pronounced on March 1, 2010 Chilliwack Registry No. 55398-1

Oral Reasons for Judgment

Counsel for the Respondent:

W. Norris

Counsel for the Accused:

D. O'Donnell

Place and Date of Hearing:

Chilliwack, B.C.

July 26, 2010

Place and Date of Judgment:

Chilliwack, B.C.

July 29, 2010

- [1] This summary conviction appeal has two components: it is an appeal from the denial of an application to withdraw a guilty plea; and, an appeal of the sentence imposed.
- [2] On October 30, 2009 the appellant, through his counsel, entered a guilty plea to a charge of assaulting a peace officer - a sheriff on duty at the Law Courts in Chilliwack - under section 270 of the Criminal Code. The Crown, following approximately 30 to 45 minutes discussion with defence counsel, had agreed to propose to the Court a suspended sentence with a 12 month probation period, and did so following a recitation, to the court, of the facts.
- [3] In the course of defence submissions on sentencing, the appellant's then-counsel, having described the appellant's background and circumstances, indicated his agreement with the Crown's submissions, stating that it would really be a joint submission on sentencing.
- [4] The appellant then took the opportunity to make a statement, which I will quote later on in these reasons. The Judge was dissatisfied with the apology offered by the appellant, and indicated that jail time would be in order.
- [5] The appellant appeared again before the trial judge on December 18, 2009, this time represented by new counsel, who applied to withdraw the guilty plea on the basis that the appellant had been assaulted by the sheriff and had acted in self-defence. Counsel apparently was acting under the misapprehension that the withdrawal of a guilty plea was available as a matter of right, as opposed to being discretionary, and presented no case law in support. The application was denied and this appeal is from that decision.
- [6] Counsel was not prepared to deal with sentencing at that December 18 hearing, and therefore sought, and received, an adjournment. The adjournment also enabled the defence to address a fact which the Crown had just recently learned of, specifically that the sheriff had been injured in his altercation with the appellant.
- [7] The parties appeared again before the trial judge on March 1, 2010. At that time, defence counsel presented a new theory - that what the appellant had intended, in pleading guilty, was in respect of what he thought was his "verbal assault" on the sheriff, which in turn had led to a physical confrontation in which he did not physically assault the sheriff, but rather was himself the victim of an assault. Counsel did concede that the appellant had been prepared on October 30 to be sentenced on the basis of the facts stated by Crown counsel.

Nevertheless, a hearing was then convened to determine the facts for sentencing purposes, in particular whether, as contended by defence counsel, the penalty should be reduced as a form of constitutional remedy, in light of the purported behaviour of the sheriff. Testimony was heard from the sheriff, who gave evidence that the appellant punched him during the altercation. An alternative version of events was put to the sheriff by defence counsel, which he denied. Testimony was also heard from the accused, who denied having punched the sheriff, but admitted to an altercation - a "tussle". The appellant acknowledged in his testimony that he was arrested following the altercation, and also that he apologized at the scene for the sheriff having been injured.

- [8] Submissions were then made as to sentencing. A pre-sentence report was reviewed, in which there were notations of the appellant's anger management issues, his tendency to engage in verbal abuse, and his self-conception as a victim.
- [9] The appellant was sentenced to 90 days in jail, plus 12 months probation. This appeal is also as to that sentence.
- [10] With respect to the guilty plea, counsel for the appellant points to the circumstances in which it was made. Reliance is placed upon section 606(1.1) of the Criminal Code, which provides:

606. Conditions for accepting guilty plea

(1.1) A court may accept a plea of guilty only if it is satisfied that the accused

- (a) is making the plea voluntarily; and
- (b) understands
 - (i) that the plea is an admission of the essential elements of the offence,
 - (ii) the nature and consequences of the plea, and
 - (iii) that the court is not bound by any agreement made between the accused and the prosecutor.

- [11] It is argued that the record of the proceedings on October 30 raises substantive concerns as to whether the requisite degree of understanding was possessed by the appellant. The appellant's former counsel had, on the appellant's instructions, waived formal reading of the information, and entered a plea of guilty on his client's behalf. There was no joint statement of facts, only a recital of the facts by Crown counsel. The contention is that these procedures could have fostered any misapprehension or misunderstanding the appellant was suffering from.
- [12] That there was such a misunderstanding is said to be evident from the appellant's statement to the court. Following defence counsel's comments on the appellant's background and circumstances, the appellant offered these comments by way of apology:

The Accused: I've been coming to this courthouse for over 4 years now, sometimes a week, every week, when I first started in Family Court. I've never had any complications in this courthouse before. I had a personal opinion about the sheriff, not about the court, and what proceeded after that was both of our faults. I should never have gotten verbal with him. He's a figure of authority, and that was my mistake and I do apologize to the court.

[13] The trial judge remarked that there would be jail time; the accused reacted, and this led to the following exchange:

The Court: Sir, sit down.

The Accused: (Indiscernable - away from microphone).

The Court: Sir, that is the reason you're getting jail. The reason is that you have not obviously learned your lesson.

The Accused: I -

The Court: That apology was the least apologetic apology I've ever seen. It throws the blame on the sheriff, not on you.

The Accused: I was assaulted by that sheriff, your Honour.

The Court: And it is not accepted as an apology, sir, and there will be some jail time.

[14] It is argued on the appellant's behalf that the limited nature of the "apology" offered to the court ought to have alerted the trial judge to the possibility that the appellant did not agree that he had committed an assault and did not have the requisite level of understanding of admitting to the essential elements of the offence.

[15] Further, it is argued, relying on *R. v. Adgey*, [1975] 2 S.C.R. 426, that the substance of the appellant's testimony during the March 1 hearing also ought to have alerted the trial judge to the real possibility that the appellant - who was denying that a physical assault had taken place - had never really intended to plead guilty at all, physical assault being an essential element. Therefore, it is argued, the trial judge, to avoid a miscarriage of justice, ought to have exercised his discretion to allow the guilty plea to be withdrawn.

[16] I note that the duty of a trial judge under section 606(1.1) is qualified by subsection 1.2:

(1.2) The failure of the court to fully inquire whether the conditions set out in subsection (1.1) are met does not affect the validity of the plea.

[17] The circumstances in which this plea was accepted include the facts that the appellant was represented by counsel; that counsel was instructed to waive the reading of the indictment, and to enter a plea on the appellant's behalf; that no exception was taken, by the appellant or his counsel, to the statement of facts given by the Crown; and that no contrary version of events was put forward by the appellant in his statement to the Court.

- [18] Moreover - and in the circumstances of this particular case, I regard this as being a most significant factor - there is no evidence before me that the plaintiff did in fact actually misunderstand the substance - that is, the essential elements - of the offence he was pleading to. On the December 18 application to withdraw the plea, no evidence was adduced, either from the appellant or from his then-former counsel, as to the substance of the discussions with the Crown prior to the plea agreement being reached. Neither was there any subsequent effort to adduce new evidence to that effect at the March 1 proceeding, nor on this appeal.
- [19] In my view, the substance of the appellant's statement to the court at the initial October 30 proceedings cannot reasonably be read as indicating or even implying a real possibility of a substantive misunderstanding on his part. Furthermore, while the appellant, in his testimony of March 1, did explicitly deny having thrown punches at the sheriff, it is clear from the record that the trial judge disbelieved him; the trial judge appears, rather, to have viewed this testimony as having been yet another example of the appellant's failure to take real responsibility for his actions. This court is in no position to reach a contrary view of the appellant's credibility.
- [20] I have no reason to believe that there was any actual misunderstanding on the appellant's part at the October 30 hearing. Counsel's assertion, during the December 18 hearing, that the application to withdraw the plea was going to be based not on a substantive misunderstanding, but on "self-defence", if anything belies the appellant's current position.
- [21] Counsel for the appellant relies upon the decision of this court in *R. v. M.J.Z.W.*, 2009 BCSC 1126. I note that in that case, there was new evidence placed before the court on appeal, which did suggest that the appellant had not in fact understood fully the nature and consequences of the plea process. The materials before the court in that case indicated the possibility of parental pressure (the accused being a young offender); uncertainty as to the precise charge the accused was pleading to; and a misunderstanding on his part as to the range of possible or likely consequences. None of these purported factors were dispelled by the record, leading the court to find there to be a substantial concern that the plea had not been informed or voluntary. As noted, no such evidence is before me in this case. The appeal judge remarks at paragraph 20 of that judgment:

"The court relied implicitly on the presence of lawyers as a guarantee of voluntariness and informed consent. I think it generally should feel entitled to do so."

I see no reason to take a different course on the evidence before me; see also *R. v. Melanson*, [1983] N.S.J. No. 453 (N.S.C.A.) para. 8.

- [22] With respect to sentencing, I see no grounds for reducing the sentence of ninety days in custody. In my view, a custodial sentence is entirely appropriate in respect of assaults on a peace officer. I cannot find that the sentence was demonstrably unfit or a marked departure from sentences imposed in generally comparable cases. If anything, from the range of authorities cited by the Crown, the sentence appears to be well within the norm.
- [23] The trial judge heard the testimony of both the accused and his victim, the sheriff. He was aware of what the appellant contends were the mitigating factors of the stress the appellant was under, and the physicality of his contact with the sheriff. I find no legal error to have been committed by the trial judge in his assessment of the evidence throughout, and in all respects he appears to have exercised his discretion judicially.
- [24] The appellant contends that the trial judge fell into error by drawing inferences adverse to the appellant in the assessment of the pre-sentence report, and that this was treated by the trial judge as an aggravating factor. In my view, this submission is not supported by a review of the transcript. The trial judge invited the appellant to make a statement to the Court before sentence was imposed, and the trial judge appears to have concluded from the appellant's demeanour as well as the contents of his remarks that the negative comments in the pre-sentencing report had accurately assessed his character and disposition.
- [25] These appeals are dismissed. The appellant will be returned to custody to serve the duration of his sentence, to be calculated by British Columbia Corrections.

The Honourable Mr. Justice A. Saunders

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