

CANADA / JUDGMENT

R. v. Myles

2020 BCCA 143

COURT

British Columbia Court of Appeal

DECIDED

8 May 2020

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2020 BCCA 143 R. v. Myles

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Myles,

2020 BCCA 143

Date: 20200508

Docket: CA46639

Between:

Regina

Respondent

And

Nathan Clifford Kenneth Myles

Appellant

Before:

The Honourable Mr. Justice Fitch

(In Chambers)

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

October 11, 2019 (conviction) (R. v. Myles, 2019 BCSC 2333,

Duncan Docket 41763-2), and January 15, 2020 (sentence) (R. v. Myles,

2020 BCSC 564, Duncan Docket 41763-2).

Oral Reasons for Judgment

The Appellant, appearing in person

(via teleconference):

N.C.K. Myles

Counsel for the Respondent

(via teleconference):

D.M. Layton, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia

May 1, 2020

Place and Date of Judgment:

Vancouver, British Columbia

May 8, 2020

Summary:

Appointment of counsel application on appeals from conviction and sentence. Held: Application dismissed. The appellant argued that a concession had previously been made by the Crown on his bail pending appeal application that the appeal from conviction is not frivolous. In light of this concession, the appellant submits it is not open to the Crown to submit in response to this application that the appeal is not arguable. A review of the record shows that the Crown did not make this concession. Whether the merit components of the test for bail pending appeal and for the appointment of counsel are the same, is best left for another day.

- [1] FITCH J.A. (via teleconference): The appellant applies pursuant to s. 684 of the Criminal Code, R.S.C. 1985, c. C-46 [Code], for an order appointing counsel to act on his behalf on his appeals from conviction and sentence.
- [2] By way of background, the appellant was convicted by a Supreme Court judge sitting without a jury of 13 offences, including: three counts of unauthorized possession of a firearm in a vehicle (s. 94(1)); one count of possessing a firearm with a defaced serial number (s. 108(1)(b)); three counts of possessing a firearm while prohibited from doing so (s. 117.01(1)); one count of possessing ammunition while prohibited from doing so (s. 117.01(1)); two counts of careless storage of a firearm (s. 86(1)); and three counts of possessing property knowing it to have been obtained by the commission of an indictable offence (s. 355(b)).
- [3] Reasons for conviction, which were delivered orally on October 11, 2019, are indexed as 2019 BCSC 2333.

- [4] On January 15, 2020, the appellant was sentenced to a total period of incarceration of 21 months. He was given credit for 255 days for time spent in pre-sentence custody. The Crown asked for a global sentence in the range of 28-31 months' imprisonment. Counsel for the appellant sought a global sentence of 12 months' imprisonment.
- [5] Reasons for sentence are indexed as 2020 BCSC 564.
- [6] The appellant's notice of appeal from conviction and sentence was filed on time.
- [7] His application for bail pending appeal was dismissed on March 31, 2020. Oral reasons for judgment are indexed as 2020 BCCA 105 (Chambers).
- [8] The appellant applied for legal aid. By letter dated February 18, 2020, he was advised by the Legal Services Society ("LSS") that his application for legal aid for the conviction appeal had been denied.
- [9] The denial was reconsidered by LSS. The reconsideration request was treated as an application for funding in connection with both the conviction and sentence appeals.
- [10] By letter dated April 9, 2020, LSS confirmed with the appellant that legal aid for the appeals against conviction and sentence had been denied. The refusals were not for financial reasons.
- [11] In processing the appellant's application, LSS considered whether the judge made an error in principle in her approach to the assessment of the credibility of the two key witnesses at trial--the investigating officer, Constable Laing, and the appellant--and whether the judge's factual findings were tainted by palpable and overriding error. In addition, LSS considered whether the verdicts were unreasonable or unsupported by the evidence. With respect to the sentence appeal, LSS considered whether the judge committed an error in principle in her reasons for sentence and whether the sentence she imposed was demonstrably unfit.
- [12] In support of his application, the appellant deposes that he has no assets and has debts totaling \$10,000. I am satisfied that the appellant does not have the financial wherewithal to pursue the appeals on his own.
- [13] The appellant has a high school education. He presented on the application as an intelligent and articulate man. It is regrettable that the obvious capabilities he possesses have been derailed by a long-standing problem with substance abuse. Having said this, I accept that the appellant would be hard pressed to effectively argue either appeal.
- [14] This application therefore turns largely on my assessment of whether the appellant has identified an arguable ground of appeal on either the conviction or sentence appeal sufficient to warrant the expenditure of public funds. It is to that issue I now turn.
- [15] In addition to the appellant's affidavit and the Crown's memorandum of argument, the following materials have been filed in support of this application: the judge's reasons for conviction and sentence and the transcript of the closing submissions of counsel at trial.

- [16] The central issue to be resolved at trial was whether the appellant was driving a red Chevrolet Cavalier vehicle on January 2, 2019. Firearms, ammunition and stolen property were found in the trunk of that vehicle. I am advised that no issue was taken at trial (and no issue is taken on appeal) with the constitutionality of the roadside search that led to the discovery of the firearms, ammunition, and stolen property.
- [17] Cst. Laing testified that he had at least three previous dealings with the appellant, including on December 18, 2018, when he saw the appellant get into a red Chevrolet Cavalier. On this earlier occasion, Cst. Laing observed the appellant for a period of time the trial judge said was between 30 and 45 seconds. Cst. Laing noted that the appellant had distinctive long hair.
- [18] Cst. Laing testified that on January 2, 2019, he was driving an unmarked police vehicle eastbound in a rural residential area near Chemainus, British Columbia, on Vancouver Island. He passed a burgundy sedan that was on the north side of the highway, with the nose of the vehicle pointing out onto the highway. He testified that the appellant was seated in the driver's seat of the burgundy sedan. He knew the appellant was to be served with a notice of driving prohibition. After he passed the burgundy sedan, he watched it pull out onto the highway and follow him. When Cst. Laing looked back, he noticed that the burgundy sedan did not have a front license plate and that it had pulled over and parked on the south side of the highway.
- [19] Cst. Laing requested backup. He advised the dispatcher that he "believed" the driver of the vehicle was the appellant. After stopping his police vehicle and putting on a police vest, he made a U-turn to head back to where the burgundy sedan had been parked. When he arrived, he said the appellant was standing about 300 feet away from the vehicle. As I understand it, the Cavalier was parked in front of the appellant's residence.
- [20] Cst. Laing testified that the appellant began walking back towards the vehicle. The trial judge understood Cst. Laing to testify that a minute or a minute and a half had passed since he first saw the appellant that day.
- [21] Cst. Laing served the appellant with the notice of driving prohibition and issued him a traffic violation ticket. Cst. Laing continued to investigate, focusing on the potential misuse of the vehicle's rear license plate.
- [22] The trunk of the vehicle was eventually opened by a tow truck driver. It is unclear to me whether the tow truck driver decided on his own volition to open the trunk of the vehicle at the roadside, or whether he was directed to do so by Cst. Laing. As no issue was taken at trial (and no issue is taken on appeal) with the constitutionality of the roadside search, my uncertainty on this issue is not material to the resolution of this application.
- [23] As I understand it, at least one of the firearms was in plain view once the trunk of the vehicle was opened. A warrant to search the vehicle was then obtained. The following items were found inside the trunk: a .22 calibre semi-automatic rifle with an effaced serial number, which had a round in the chamber and an attached magazine containing 59 rounds of

ammunition; a bolt action rifle; a 16-gauge shotgun with a round in the chamber; 16-gauge shotgun shells; a .45-calibre bullet; and a crossbow. Stolen identification documents in the names of three people were found elsewhere in the vehicle.

- [24] Sebastian Zivny testified that he sold the Cavalier to the appellant in mid-December 2018. The bill of sale for this transaction was found in the Cavalier in a pencil case along with some of the appellant's other documents including his birth certificate. In addition, the appellant's recognizance papers and a prisoner's cash envelope were found inside the pencil case.
- [25] There was evidence at trial that the appellant had been arrested on December 29, 2018. He was not released from custody until the next day. The appellant testified that he was in withdrawal from heroin at the time and went to the hospital for treatment immediately after being released. When he returned to his residence, he discovered that all of his personal possessions had been stolen.
- [26] The appellant denied getting into the vehicle on December 18, 2018, and being the driver of the vehicle on January 2, 2019. He testified that he purchased the Cavalier because he was behind on rent and thought he could fix up the vehicle and offer it to his landlord, thereby cancelling his debt for rent.
- [27] The appellant acknowledged that the vehicle was towed on December 23, 2018. He also acknowledged retrieving the Cavalier from the tow yard. He testified that he did so because he was the only person in the residence who had the money required to retrieve the car from the impound lot.
- [28] The judge directed herself in accordance with the analytical framework set out in *R. v. W. (D.)*, [1991] 1 S.C.R. 742. She rejected the appellant's evidence stating, "I do not believe his evidence, nor am I left in reasonable doubt by it." She concluded that his version of events was, in some respects, "contrived" and "entirely unbelievable." She gave reasons for rejecting the appellant's evidence. She noted that his evidence regarding the rent he owed, and his related reason for the vehicle transaction, was inconsistent with evidence he gave in cross-examination that he paid to have the vehicle released from the tow yard because he was the only person in the residence who had any money. She noted that the appellant had purchased the Cavalier. She noted that the appellant's personal possessions were in the Cavalier which was parked in front of the residence he was living in at the material time. She noted that he was standing in relatively close proximity to the Cavalier when Cst. Laing drove back to where it was parked. In the end, she concluded that the appellant's personal possessions were in the Cavalier because he owned it.
- [29] By contrast, she found Cst. Laing to be a forthright and honest witness. She was aware of discrepancies between Cst. Laing's trial testimony and the version of events he put forward in the Information to Obtain a Search Warrant.

- [30] Based on all the circumstances, including Cst. Laing's prior dealings with the appellant and his recognition evidence, she concluded that the appellant was driving the vehicle at the material time. It appears to have been conceded at trial that if a finding was made that the appellant was driving the Cavalier before the roadside search, he was in possession of the contents of the vehicle.
- [31] Although not specifically mentioned by the judge in her reasons for conviction, it is noteworthy that the appellant testified that he discovered on December 30, 2018, that all of his personal possessions had been stolen after he had been released from custody and returned to his residence from the hospital. The appellant's version of events does not appear to account for the fact that some of the documents found in the pencil case in the Cavalier only came into his possession on his release from custody on December 30, 2018. They could not have been stolen before he arrived back at the residence. A powerful inference available to the trial judge--and to a reviewing court in determining whether the verdicts were unreasonable--was that these documents could only have been put in the Cavalier by the appellant.
- [32] In her reasons for sentence, the judge noted the appellant's horrendous record, which includes five previous convictions for unlawful possession of explosives and firearms and possession contrary to a prohibition order, and offences of violence.
- [33] The judge noted the appellant's disadvantaged background and his desire to become a productive member of society. She listed as aggravating factors that the appellant was subject to five separate firearms prohibition orders when the offences in the case at bar were committed. In addition, he was on bail when the offences were committed, having been released from custody only a few days earlier. Referencing *R. v. Radjenovic*, 2011 BCSC 1225 at para. 9, *aff'd* 2013 BCCA 522, leave to appeal *ref'd* [2014] S.C.C.A. No. 121, and *R. v. Holt*, 2015 BCCA 302 at para. 18, she concluded that she was obliged to give primary consideration to the sentencing objectives of general deterrence and denunciation.
- [34] The judge indicated in her reasons for sentence that she was taking the totality principle into account. On the three counts of unauthorized possession of a firearm in a motor vehicle, the judge imposed concurrent terms of incarceration of 15 months. On the four counts of being in possession of firearms and ammunition while subject to prohibition orders, the judge imposed six-month sentences, concurrent to each other but consecutive to the 15 months imposed on the three counts mentioned above. Concurrent sentences were imposed on the remaining counts.
- [35] I turn now to the Code provision that authorizes the appointment of counsel on appeal, and the principles that govern the resolution of this application.

- [36] Section 684 of the Code permits a justice to appoint legal counsel on an appeal or on a matter preliminary or incidental to an appeal where it appears desirable in the interests of justice that the appellant have legal assistance and it appears that the appellant does not have sufficient means to obtain that assistance.
- [37] The considerations on an application under s. 684 of the Code were summarized in *R. v. Silcoff*, 2012 BCCA 463 (MacKenzie J.A. in Chambers):
- [21] Appointment of counsel under s. 684 is subject to a two-part test, generally considered in the following order:
1. The accused must have insufficient means to obtain legal assistance; and
 2. Appointment of counsel must be in the interests of justice.
- [22] applicants should generally be able to show that 1) they cannot afford to retain counsel for the appeal; and 2) they applied to the Legal Services Society for legal aid and were refused.
- [23] The factors to be considered under the requirement of "interests of justice" were summarized in *International Forest Products Ltd. v. Wolfe*, 2001 BCCA 632 at para. 6 and 13, 94 B.C.L.R. (3d) 67 (Levine J.A. in Chambers). They are as follows:
- a. The points to be argued on appeal;
 - b. The complexity of the case;
 - c. Any point of general importance in the appeal;
 - d. The applicant's competency to present the appeal;
 - e. The need for counsel to find facts, research law or make argument;
 - f. The nature and extent of the penalty imposed; and
 - g. The merits of the appeal.
- [24] As to the merits of the appeal, the threshold requirement is an arguable appeal: *R. v. Donald*, 2008 BCCA 316 at para. 15, 258 B.C.A.C. 117 (Saunders J.A. in Chambers).
- [25] In determining whether an appeal is arguable, regard must be had to the applicable standard of review on the proposed appeal: *Lin v. British Columbia (Adult Forensic Psychiatric Services)*, 2008 BCCA 518 at paras. 17-18 (Frankel J.A. in Chambers).
- [26] Even where other factors favour the appointment of counsel, it will not be in the interests of justice to appoint counsel where an appeal has no merit: *R. v. Hoskins*, 2012 BCCA 51 at paras. 30-32, 315 B.C.A.C. 238 (Garson J.A. in Chambers).

- [27] The Court may consider the opinion of the Legal Services Society that an appeal has no prospect of success, however, the opinion of the Legal Services Society is only one factor: *R. v. Chan*, 2001 BCCA 138 at para. 8 (Finch J.A., as he was then, in Chambers); *R. v. Butler*, 2006 BCCA 476 at paras. 7 and 10 (Rowles J.A. in Chambers).
- [38] The appellant raises a number of grounds in support of the appeal from conviction. They are not easily summarized. Among other things, the appellant alleges that: the verdicts are unreasonable; the judge erred in principle in her approach to credibility assessment; the judge's factual findings reflect palpable and overriding error; the judge misapprehended the evidence in ways that had a material impact on the outcome; the appellant's arrest constituted a violation of his right not to be arbitrarily detained under s. 9 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11; the trial was unfair; and the conviction is the product of a miscarriage of justice.
- [39] The appellant emphasizes, in particular, his contention that Cst. Laing was shown to have lied under oath and that the judge failed to have regard to this and to other inconsistencies in Cst. Laing's evidence in making her findings of fact and credibility.
- [40] On the appeal from sentence, the appellant says that the Crown relied on dissimilar cases in support of its suggested sentencing range. He also submits that the sentence is excessive. He does not point to any particular error in principle in the judge's reasons for sentence.
- [41] In support of the appointment of counsel application on the appeal from conviction, the appellant submits that the Crown conceded in responding to his unsuccessful application for bail pending appeal that his grounds of appeal are "not frivolous." He points to this passage from the oral reasons for judgment of the Chambers Judge summarizing the position of the Crown on his bail application:
- [21] the Crown concedes that Mr. Myles has met his burden under s. 679(3)(a) to show that the appeal from conviction is not frivolous, although it says the grounds for challenging the verdict do not rise much above that. I agree with that assessment, based on the material before me.
- [42] I note that the Chambers Judge made these additional comments about the merits of the conviction appeal:
- [26] It will be for a division of this Court to determine the merits of the appeal from conviction and whether the convictions should be upheld or set aside. However, based on my review of the reasons below and the transcript excerpts provided by the appellant, I do not consider the appeal from conviction to be strong. If there is overriding and palpable error here, it is not obvious from the face of the material before me. (I do not have access to the evidence called at trial.) A trial judge has considerable latitude in making her credibility findings. And she is not obliged, in her reasons, to detail every piece of evidence she has considered or evidentiary frailty she has reconciled: *R. v. M. E-H.*, 2015 BCCA 54 at para. 68.

[Emphasis added.]

[43] Based on what he says was a concession made by the Crown on the bail application that his appeal from conviction is not frivolous, the appellant says it is not open to the Crown on this application to submit that the conviction appeal is not arguable.

[44] I have read the Crown's memorandum of argument filed on the appellant's application for bail pending appeal and listened to the digital audio recording system (DARS) recording of that hearing. I am satisfied that the Crown did not concede on the bail application that the appellant had demonstrated that his appeal from conviction was "not frivolous." In its memorandum of argument on the bail application, the Crown said this:

In the circumstances, the [Crown] says that the grounds of appeal as presently framed are weak, and may even rise to the level of frivolous. The grounds of appeal appear to be essentially a request that the Court of Appeal substitute its assessment of witness credibility for that of the trial judge. Given how difficult it is to displace a trial judge's credibility findings on appeal, in light of the high degree of deference they are owed, these are weak grounds of appeal: *R. v. Gagnon*, 2006 SCC 17 at para. 20.

[Emphasis added.]

[45] In oral argument on the bail application, the Crown reiterated its position that the appeal from conviction "may be frivolous", but made clear that it was resting its opposition to the bail application on grounds that the appellant had not established that he would surrender himself into custody in accordance with the terms of a release order, or that his detention was not necessary in the public interest.

[46] Against this background, I would not give effect to the appellant's submission that the Crown is foreclosed on this application from submitting that his appeal from conviction is not arguable. I am satisfied that the Crown did not concede on the bail application that the conviction appeal is arguable. Further, the Chambers Judge on the bail application made no clear finding that the conviction appeal is arguable.

[47] In coming to this conclusion, I do not wish to be taken as accepting the proposition that conceding an appeal is "not frivolous" on an application for bail pending appeal precludes the Crown from taking the position on a subsequent application for the appointment of counsel that the appeal lacks sufficient merit to warrant the allocation of public funds. Further, I do not wish to be taken as accepting the further proposition embedded in the appellant's submission that the merit components of the test for bail pending appeal and for the appointment of counsel are the same. While I have not conducted a thorough review of the jurisprudence on this point, other judges have at least implicitly expressed doubt that the merit test is the same in both contexts: see *R. v. Adams*, 2016 ONCA 413 at paras. 18, 23, 29, 31 (Watt J.A. in Chambers). As the issue does not squarely arise in this case, I would defer its resolution to another day.

- [48] The thrust of the appellant's appeal from conviction amounts to an attack on the findings of fact and credibility made by the trial judge. Given the deferential standard of review that would apply and the evidence upon which the judge reached her conclusions, I see no merit in the notion that a division of this Court might be persuaded to intervene with those findings. Further, I see no error in principle in the approach of the judge to her findings of fact and credibility. In my respectful view, it is not arguable that the verdicts are unreasonable, either in the sense that no reasonable fact-finder properly instructed in the law could have convicted (*R. v. Yebes*, [1987] 2 S.C.R. 168), or in the sense that a factual finding essential to the verdicts was contradicted by evidence relied on by the trial judge in support of that finding or incompatible with evidence that was neither contradicted nor rejected (*R. v. R.P.*, 2012 SCC 22). In my view, there was an abundance of evidence upon which the judge could arrive at the verdicts rendered.
- [49] The appellant proposes arguing on the appeal from conviction that the judge misapprehended the evidence about the length of time that passed between when Cst. Laing first saw the Cavalier and when he returned to where the Cavalier had been parked on the south side of the highway. The judge said that a minute to a minute and a half passed between these two events. The appellant submits that Cst. Laing actually testified that 30-45 seconds passed between these two events and that he could not, as Cst. Laing testified, have been standing 300 feet away from the vehicle when Cst. Laing arrived back on the scene. The alleged misapprehension is not confirmed by any transcripts before me on this application. In any event, even accepting the appellant's position on this point, I am not persuaded, in the context of all of the evidence against the appellant, there is merit to the appellant's suggestion that the alleged misapprehension was material to the reasoning process of the judge.
- [50] On the materials before me, I see no merit in the appellant's other grounds of appeal from conviction. While clearly not determinative, I am fortified in the conclusion I have reached by the assessment of LSS that the conviction and sentence appeals did not meet their funding criteria.
- [51] In short, given the standard of review that would apply, I am not persuaded that either appeal has been shown to be arguable.
- [52] In the absence of demonstrable merit, I am not persuaded that the interests of justice favour the appointment of counsel on the appeal from conviction.
- [53] I have come to the same conclusion with respect to the appeal from sentence. In light of the seriousness of the offence, the circumstances in which it was committed and the appellant's criminal record, I see no basis upon which a division of this Court could come to the conclusion that the sentence imposed was materially tainted by error in principle or demonstrably unfit. In the result, I am not persuaded that the interests of justice favour the appointment of counsel on the appeal from sentence.

[54] For the foregoing reasons, and on the basis of the information put before me, I would dismiss the appointment of counsel application in relation to both the conviction and sentence appeals.

"The Honourable Mr. Justice Fitch"

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