

CANADA / JUDGMENT

R. v. Rautenberg

2020 BCCA 168

COURT

British Columbia Court of Appeal

DECIDED

3 June 2020

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2020 BCCA 168 R. v. Rautenberg

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Rautenberg,

2020 BCCA 168

Date: 20200603

Docket: CA44741

Between:

Regina

Respondent

And

Jörg Rautenberg

Appellant

Before:

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Goepel

The Honourable Madam Justice Griffin

On appeal from: An order of the Provincial Court of British Columbia, dated April 7, 2017 (R. v. Rautenberg, Surrey Docket 212518-1).

Oral Reasons for Judgment

Counsel for the Appellant

(via videoconference):

T. Magder

Counsel for the Respondent

(via videoconference):

J. Dyck

Place and Date of Hearing:

Vancouver, British Columbia

June 3, 2020

Place and Date of Judgment:

Vancouver, British Columbia

June 3, 2020

Summary:

Mr. Rautenberg appeals his convictions on the basis that he received ineffective assistance of counsel. He submits that his trial counsel failed to (1) call emergency responders as witnesses, (2) provide notice of alibi to the Crown in a timely fashion, and (3) request disclosure of the 911 call recordings of the complainant. Held: Appeal dismissed. Mr. Rautenberg acknowledges that his first complaint cannot rise to the level of ineffective assistance. Regarding the others, Mr. Rautenberg has not established a factual foundation for the claim that his counsel failed to provide notice of alibi in a timely fashion, nor has he shown that the failure to obtain the 911 call transcript amounted to ineffective assistance.

- [1] BENNETT J.A.: On April 7, 2017, Jörg Rautenberg was convicted of (1) breaking and entering and committing an indictable offence, and (2) unlawful confinement. Mr. Rautenberg appeals his convictions on the basis that he received ineffective assistance of counsel.
- [2] Mr. Rautenberg says that his counsel should have taken certain steps, set out below, which would have affected the judge's credibility assessment in his favour.
- [3] For the reasons that follow, I would dismiss the appeal.

BACKGROUND

- [4] Mr. Rautenberg was charged with breaking and entering and committing an indictable offence, unlawful confinement, and theft arising from an incident that took place on August 19, 2015. The credibility of the complainant, the appellant, and the defence witnesses was the primary issue at trial. While Mr. Rautenberg and the complainant were in agreement that on the day in question, Mr. Rautenberg attended the house where the alleged offences occurred, they offered competing versions of the events that transpired.

Testimony of Witnesses for the Crown

- [5] Mr. Eidsness, the complainant, knew Mr. Rautenberg very well. He testified that Mr. Rautenberg owned a white truck and had parked outside of his house for a number of months prior to the incident. Mr. Rautenberg also parked a camper truck on Mr. Eidsness' property, and lived in it. During this time, Mr. Rautenberg would regularly enter the house to use its amenities. At the time of the offence he had moved a short distance away.
- [6] Mr. Eidsness testified that on August 19, 2015, he was at home with his son, Vince, and his son's girlfriend, Tessa. He was sleeping in bed when he awoke to the sound of knocking coming from the front door. As he proceeded to the front door, Mr. Rautenberg kicked it in and said, "Is Vince home?" to which Mr. Eidsness replied "I don't know." Mr. Rautenberg pushed Mr. Eidsness aside, went upstairs, knocked on Vince's bedroom door, then laid on his back, and kicked the door down. Tessa was on the bed in what appeared to be an overdosed condition. Mr. Rautenberg told Mr. Eidsness to call 911, which he did, and paramedics arrived shortly after. Mr. Rautenberg subsequently left.
- [7] A half hour later, a man--who Mr. Eidsness later believed was Robbie Phillips--and a woman came to the door looking for Mr. Rautenberg. Mr. Eidsness sent them away.
- [8] Mr. Eidsness testified that a half hour later, Mr. Rautenberg returned with Robbie Phillips. The two men pushed open the door and said, "We're here to get some stuff." The men told Mr. Eidsness to stay on the couch and threatened him. They went to Vince's room, ransacked it, took some things, and left. They got into a taxi, and told Mr. Eidsness that they would be back. Mr. Eidsness said that the two returned and ransacked his living room, smashing his television and kicking a hole in the wall. They left, but again told him they would be back.
- [9] Mr. Eidsness went to a neighbour's house to call the police.
- [10] A neighbour of Mr. Eidsness testified for the Crown. She said that when she returned home from work on August 19, 2015, she saw a woman being taken away in an ambulance from Mr. Eidsness' home. After the ambulance left, she saw an unknown man and woman approach Mr. Eidsness' home. About 30 minutes later, she saw two men approach the home, and recognized one of them as the man who drove the "Jesse Moving" truck that was often parked in the driveway of Mr. Eidsness' home. She saw a taxi parked outside and later saw the police at the house. The trial judge concluded that he could not rely on her evidence.

Testimony of Mr. Rautenberg

- [11] Mr. Rautenberg testified that he had lived in a motor home on the premises of Mr. Eidsness for some time before eventually moving a few blocks away. He was often in the house using the facilities and socializing. He described his relationship with both Mr. Eidsness and his son Vince as being good.

- [12] He confirmed that his truck, which was often parked at Mr. Eidsness' house, had "Jesse Moving" on the side.
- [13] Mr. Rautenberg said that on August 19, 2015, he attended Mr. Eidsness' residence in the morning. He testified that he knocked on the door, and that Mr. Eidsness opened it for him. He denied kicking it in. According to his evidence, he walked in, closed the door, went upstairs, and asked Mr. Eidsness if Vince was home. Having been told that he was, Mr. Rautenberg knocked on the door to Vince's bedroom but received no answer. He proceeded to kick the door. At some point, he put pressure on the door and caused it to rip in half "by accident." He weaved his hand through the hole and opened the lock from the inside.
- [14] Upon entering the room, Mr. Rautenberg observed Tessa on the bed. She had blue lips and appeared to have overdosed. He assisted her, while Mr. Eidsness called for help. Emergency Medical Services ("EMS") personnel attended the scene. Mr. Rautenberg provided his name and left. He did not return. In his evidence, he went back to his place of residence, told his girlfriend that he had saved somebody's life, and then visited one Thomas Tustin, or "Trailer Tom."
- [15] Mr. Rautenberg testified that he had never spoken with Mr. Tustin about giving a police statement or testifying for him. He said he asked his girlfriend, Mandy Haley, to phone Mr. Tustin. She did, and made arrangements for Mr. Tustin to go to court. Mr. Rautenberg said that he did not raise the issue with Mr. Tustin himself, despite having regular contact with him while on bail, because he had not spoken with his lawyer to receive advice on the issue.
- [16] Mr. Rautenberg's alleged reason for being at Mr. Eidsness' residence on the morning of August 19, 2015, was to provide Vince with a warning.

Other Testimony

- [17] Mr. Tustin testified on behalf of Mr. Rautenberg. He is a long-time friend. He confirmed that he often worked on a certain vehicle with Mr. Rautenberg, but could not say for sure that the two worked on it on August 19, 2015. He had been called by Ms. Haley to come to court the day he testified.
- [18] Ms. Haley testified that she had been with Mr. Rautenberg at Mr. Tustin's place when they were working on the vehicle, and that Mr. Rautenberg could not have committed the offences. In her evidence, she did not call Mr. Tustin until the day of trial as she thought Mr. Rautenberg had taken care of it already.

TRIAL JUDGMENT

- [19] The trial judge began by noting that his analysis was to be guided by the principles articulated in *R. v. W.(D.)*, [1991] 1 S.C.R. 742.

- [20] He held that Mr. Eidsness' version of the events was internally and externally consistent. It did not change throughout the trial process. By contrast, Mr. Rautenberg's testimony was troubling. While certain parts had a ring of truth to them, several inconsistencies were a cause for concern.
- [21] The judge found Mr. Tustin's testimony to be admissible evidence of alibi. However, he could only give that evidence limited weight due to issues with its reliability. Mr. Tustin had no recollection of Mr. Rautenberg telling him that he had saved a woman's life, and he was unable to say with any degree of certainty that Mr. Rautenberg was with him on any particular day. The evidence therefore failed to ground a defence of alibi or raise a reasonable doubt as to whether the Crown had established identity. The notice and verification of the alibi evidence raised further reliability concerns. As noted above, Mr. Tustin was first contacted only hours before the trial's conclusion.
- [22] In the result, the judge found that Mr. Rautenberg broke the outside door and the upstairs inside door of the residence and that the acts were intentional. He accepted Mr. Eidsness' identification evidence. Accordingly, Mr. Rautenberg was guilty of breaking and entering and committing mischief, contrary to s. 348(1)(b) of the Criminal Code. The judge also believed the act of damaging the fan and the television amounted to mischief. In this regard, he was satisfied that it was Mr. Rautenberg who had returned to the residence later on in the day.
- [23] With respect to the unlawful confinement charge, the judge similarly found Mr. Rautenberg guilty. Mr. Eidsness clearly identified Mr. Rautenberg and testified that Mr. Rautenberg threatened him, told him not to move, and told him to stay put. He described complying with those threats. The acts therefore met the requirements of an unlawful confinement, as described in *R. v. Fagg*, 2014 BCSC 2632 at paras. 38-41. While no weapons or physical violence was used by Mr. Rautenberg to capture the compliance of Mr. Eidsness, words and gestures had the same effect.
- [24] The judge acquitted Mr. Rautenberg on count three of the information charging him with theft.

THE ISSUES

- [25] Mr. Rautenberg appeals his convictions on the sole basis that he was provided with ineffective assistance of counsel, which resulted in a miscarriage of justice. The ground of appeal is based on trial counsel's alleged failure to:
1. call the emergency responders who attended the residence as witnesses;
 2. provide alibi notice to Crown counsel in a timely fashion; and
 3. request disclosure of the 911 call recordings of Mr. Eidsness.

FRESH EVIDENCE APPLICATION

[26] This Court may admit fresh evidence pursuant to s. 683 of the Criminal Code, R.S.C. 1985, c. C-46:

683 (1) For the purposes of an appeal under this Part, the court of appeal may, where it considers it in the interests of justice,

(d) receive the evidence, if tendered, of any witness, including the appellant, who is a competent but not compellable witness;

[27] To support the ineffective assistance of counsel submission, Mr. Rautenberg filed an affidavit outlining the basis for his complaint. His former counsel filed a responding affidavit.

[28] Mr. Rautenberg deposes that he asked his counsel for a copy of the particulars, but did not receive it; that he only saw his counsel once, five minutes before the trial started; that months prior to the trial he told his counsel he had an alibi, and that he believed his girlfriend, Ms. Haley, told him the same; that his counsel did not obtain the recordings of Mr. Eidsness' calls to 911, including one call where he reported that two unknown males had broken into his house; and that the personnel from EMS were not called to testify that the door was not broken when they entered the house in response to the 911 call regarding the overdose victim.

[29] Mr. Rautenberg has not supplied the Court with any notes, interviews or statements from the EMS personnel verifying that the front door was not kicked in. The 911 recording is no longer available.

[30] The police report, prepared by the attending officer, says:

Complainant/victim Eidsness, Randolph called Police to report two unknown males kicked in his door and were looking for his son, Vince Eidsness.

Possible suspect identified as Rautenberg, Jorg.

[31] In response, trial counsel deposed that Mr. Rautenberg did not request a copy of the particulars until after he had discharged him as counsel. Trial counsel had returned the particulars to the Crown further to the disclosure undertaking. He deposed that he reviewed the particulars in detail prior to Mr. Rautenberg's bail hearing and on several occasions thereafter.

[32] Trial counsel deposed that he saw or spoke with Mr. Rautenberg many times, and that Mr. Rautenberg called him on an almost daily basis.

[33] Trial counsel deposed that he did not hear of the alibi witness, Mr. Tustin, until the first day of the trial. Had he been aware that there was an alibi witness, he would have notified the Crown, as per his obligation to do so.

- [34] Trial counsel deposed that on his reading of the police report, it did not stand out as an inconsistent statement in terms of what was said by Mr. Eidsness when he called the police, since he identified Mr. Rautenberg as a suspect when the police later attended.
- [35] In relation to the EMS personnel, trial counsel advised that he contacted one of the EMS responders and spoke with him. The responder could not recall his attendance and did not have any notes of his attendance at the residence.

Legal Framework

- [36] The evidence tendered does not relate to a factual matter in terms of an element of the offence. It addresses whether something went wrong in the trial process itself and, therefore, amounted to a miscarriage of justice. The usual test for the admission of fresh evidence is found in *Palmer v. The Queen*, [1980] 1 S.C.R. 759; however, where, as here, the evidence does not address a factual matter, the test is not as strictly applied.
- [37] This Court has applied the *Palmer* test in the context of allegations of ineffective assistance of counsel, but in a modified form. In *R v. Dunbar, Pollard, Leiding and Kravit*, 2003 BCCA 667, this Court said:
- [35] The most significant modification of the *Palmer* principles, where the fresh evidence goes to the integrity of the trial process, is the relaxation of the due diligence criteria: *R. v. Appleton* (2001), 156 C.C.C. (3d) 321, 55 O.R. (3d) 321 ¶16-17 (C.A.).
- [36] Where the fresh evidence goes to the integrity of the trial process, appellate courts also have not rigidly adhered to the procedure for admitting fresh evidence on appeal set out in *R. v. Stolar*, [1988] 1 S.C.R. 480, 62 C.R. (3d) 313, 40 C.C.C. (3d) 1: see, e.g., *Joanisse*, supra at 43-44; *R. v. W.W.*, (1995), 25 O.R. (3d) 161, 100 C.C.C. (3d) 225 at 233-34 (C.A.); *R. v. Peterson* (1996), , 27 O.R. (3d) 739, 106 C.C.C. (3d) 64 at 80 (C.A.); *R. v. Dean* (1997), 95 B.C.A.C. 278, 39 B.C.L.R. (3d) 287 ¶73. In each of these cases, the court admitted fresh evidence so that it could properly evaluate the integrity of the trial process. This inquiry differs from the usual situation contemplated in *Stolar* where the fresh evidence goes to a substantive issue at trial and a ruling that it is admissible means, according to the fourth *Palmer* criterion, that the fresh evidence could reasonably be expected to have affected the result at trial. Instead, where the fresh evidence is adduced to challenge the integrity of the trial process, the fresh evidence can be admitted and the question of whether a miscarriage of justice occurred then assessed to determine whether a new trial is required.
- [37] Although the due diligence factor and strict *Stolar* procedure may be disregarded in the context of the present case, the other *Palmer* criteria remain applicable. In particular, the relevance of the fresh evidence and its credibility are important factors to consider: *R. v. Hector* (2000), 146 C.C.C. (3d) 81 ¶20-21, 132 O.A.C. 152 [Hector]; *Joanisse*, supra at 48-49. In addition, it is clear that the fresh evidence must be otherwise admissible in the sense that it complies with the generally applicable rules of evidence: *R. v. O'Brien*, [1978], 1 S.C.R. 591, 35 C.C.C. (2d) 209 at 216-17; *W.W.*, supra at 234; *R. v. Gumbly* (1996), 112 C.C.C. (3d) 61 at

71-72, 155 N.S.R. (2d) 117 (C.A.); *R. v. P.(T.)* (2002), 165 C.C.C. (3d) 281, 4 C.R. (6th) 369, 59 O.R. (3d) 577 at 582 (C.A.). Evidence comprised of hearsay, speculation, opinion or mere argument is no more admissible as fresh evidence on appeal than it is at trial: *R. v. Teneycke* (1996), 77 B.C.A.C. 138, 108 C.C.C. (3d) 53 ¶18; *R. v. I.B.* (2001), N.B.R. (2d) 195, [2001] N.B.J. No. 199 ¶8 (C.A.).

[38] This approach was reaffirmed in *R. v. Aulakh*, 2012 BCCA 340, and *R. v. Hamzehali*, 2017 BCCA 290.

[39] What is meant by a miscarriage of justice was discussed in *R. v. Davey*, 2012 SCC 75:

[50] In his concurring opinion in *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, LeBel J. considered the scope of the miscarriages of justice contemplated by s. 686(1)(a)(iii). He concluded, at para. 69, that when considering whether an irregularity that occurred during a trial rises to the level of a miscarriage of justice, "[t]he essential question in that regard is whether the irregularity was severe enough to render the trial unfair or to create the appearance of unfairness."

[40] The way to approach the admissibility issue is to determine whether, based on the fresh evidence, there was a miscarriage of justice as a result of counsel's conduct in the context of the applicable legal framework. If so, the evidence should be admitted and the appeal allowed.

[41] The test for assessing the effectiveness of counsel is set out in *R. v. G.D.B.*, 2000 SCC 22:

[26] The approach to an ineffectiveness claim is explained in *Strickland v. Washington*, 466 U.S. 668 (1984), per O'Connor J. The reasons contain a performance component and a prejudice component. For an appeal to succeed, it must be established, first, that counsel's acts or omissions constituted incompetence and second, that a miscarriage of justice resulted.

[27] Incompetence is determined by a reasonableness standard. The analysis proceeds upon a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. The onus is on the appellant to establish the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The wisdom of hindsight has no place in this assessment.

[28] Miscarriages of justice may take many forms in this context. In some instances, counsel's performance may have resulted in procedural unfairness. In others, the reliability of the trial's result may have been compromised.

[29] In those cases where it is apparent that no prejudice has occurred, it will usually be undesirable for appellate courts to consider the performance component of the analysis. The object of an ineffectiveness claim is not to grade counsel's performance or professional conduct. The latter is left to the profession's self-governing body. If it is appropriate to dispose of an ineffectiveness claim on the ground of no prejudice having occurred, that is the course to follow (*Strickland*, *supra*, at p. 697).

- [42] This Court applied those principles in Dunbar:
- [24] The appellant bears the onus of proving both the performance and prejudice components of an ineffective representation claim: G.D.B., supra ¶27; Joannis, supra at 59-60. Therefore, the appellant must establish, on a balance of probabilities, both that the representation provided by trial counsel was incompetent and that the incompetent representation resulted in a miscarriage of justice. The appellant must draw the link between the alleged incompetence and the prejudice suffered: R. v. Delisle, (1999), 133 C.C.C. (3d) 541, 25 C.R. (5th) 198 (Que. C.A.) [Delisle cited to C.C.C.].
- [25] In G.B.D., supra, the Supreme Court of Canada directed appellate courts to focus initial attention on the prejudice, or "miscarriage of justice" component of the ineffective representation claim. Where the appellant fails to establish that prejudice has occurred, it is undesirable for appellate courts to embark on the performance component of the analysis: G.D.B., supra 29. In such cases, it may not be necessary for the court even to consider the admissibility of fresh evidence which goes to the performance issue: R. v. Persad (2001), 82 C.R.R. (2d) 373, [2001] O.J. No. 1589 ¶6-7 (C.A.).
- [43] The meaning of the "prejudice component" was summarized in Dunbar as follows:
- [26] The prejudice component requires the appellant to show that the incompetence of trial counsel resulted in a miscarriage of justice. Doherty J.A. discussed the meaning of "miscarriage of justice" in this context in Joannis, supra at 64. He explained that a miscarriage of justice can result where the appellant establishes a reasonable probability that but for counsel's errors, the result of the proceedings would have been different. A reasonable probability is one that is "sufficient to undermine confidence in the outcome" and "lies somewhere between a mere possibility and a likelihood": Joannis, supra at 62; R. v. Strauss (1995), 61 B.C.A.C. 241, 100 C.C.C. (3d) 303 at 319. Alternatively, a reliable outcome may still constitute a miscarriage of justice where the process through which that verdict was reached was unfair: Joannis, supra at 62; D.B. v. British Columbia (Director of Child, Family & Community Services), supra ¶63-64.

DISCUSSION

- [44] The affidavit of counsel and the affidavit of Mr. Rautenberg are diametrically opposed on some of the issues. Neither party has sought to cross-examine the other. In R. v. Plehanov, 2019 BCCA 462 at para. 16, this Court concluded that in such a circumstance, with the burden being on the appellant, the Court cannot find the factual foundation for the allegation of ineffectiveness.
- [45] Addressing first the EMS responders' evidence, Mr. Rautenberg acknowledges in his factum that the failure to call this evidence would not be tantamount to ineffective assistance. Indeed, Mr. Rautenberg provided no evidence that the evidence would assist him. I would therefore not give effect to this ground of appeal.

- [46] As for the alibi issue, counsel deposed that he did not learn of Mr. Tustin until the trial. Had he been aware of the witness, he would have provided notice of alibi to the Crown.
- [47] Mr. Rautenberg has provided different versions of events in relation to Mr. Tustin. He testified that he had not spoken to his counsel about Mr. Tustin. His belief that Ms. Haley had spoken to him is not supported by Ms. Haley's trial testimony, and she did not file an affidavit. Mr. Tustin's evidence was equivocal at best.
- [48] In my view, Mr. Rautenberg has not established a factual foundation for his complaint regarding counsel's failure to provide alibi notice to the Crown. Additionally, the evidence did not assist in any event; thus, there was no prejudice regardless if notice had been provided.
- [49] The final question relates to the 911 call. The content of the summary--being that Mr. Eidsness reported two unknown males had kicked down his door--is not a clear prior inconsistent statement by Mr. Eidsness. It is a summary of hearsay provided by the investigating officer to whom Mr. Eidsness identified Mr. Rautenberg as one of the men at the time. Indeed, Mr. Eidsness identified Mr. Rautenberg as a suspect when the police arrived on the scene. The issue was whether Mr. Eidsness was truthful when he identified Mr. Rautenberg as the perpetrator.
- [50] Unfortunately, the 911 call has been deleted pursuant to police policy; however, in my view, given the content of the Report to Crown Counsel narrative, the failure to obtain the transcript of the call in these circumstances falls far short of ineffective assistance. While it would have been preferable to obtain the 911 call transcript, failure to do so in this case does not, in my view, amount to ineffective assistance.
- [51] I would not give effect to the submissions in relation to the ineffective assistance of counsel ground of appeal. Accordingly, I would not admit the fresh evidence beyond considering it for the purpose of assessing that argument.
- [52] I would dismiss the appeal.
- [53] GOEPEL J.A.: I agree.
- [54] GRIFFIN J.A.: I agree.
- [55] BENNETT J.A.: The appeal is dismissed.

"The Honourable Madam Justice Bennett"

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