

CANADA / JUDGMENT

R. v. Schirmer

2020 BCSC 81

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Schirmer,

2020 BCSC 81

Date: 20200117

Docket: 174439

Registry: Victoria

Regina

v.

Horst Francisco Schirmer

Before: The Honourable Madam Justice Murray

Oral Reasons for Judgment on

Voir Dire 3: The Mistrial Application based on

Ineffective Representation of Counsel

Counsel for the Crown:

O.L. Bick

Counsel for the Defence:

R.S. Horne

Place and Date of Hearing:

Victoria, B.C.

January 13-16, 2020

Place and Date of Judgment:

Victoria, B.C.

January 17, 2020

Introduction

- [1] Mr. Schirmer is facing a seven count Indictment relating to possession of illicit substances and possession for the purpose of trafficking in same.
- [2] His former counsel raised a number of pre-trial Charter challenges which, by agreement of counsel, were heard in what is commonly referred to as a blended voir dire. This is common practice in criminal trials. Counsel also agreed that the evidence on the voir dire would form evidence on the trial proper. This is also common practice as it eliminates having witnesses re-attend court to repeat the same evidence on the trial.
- [3] The voir dire commenced February 13, 2019 to deal with the following issues:
 - a. A s. 7 Charter challenge alleging that police used excessive force on arrest;
 - b. A s. 8 Charter challenge alleging that police unlawfully searched a satchel found in a yard;
 - c. A s. 9 Charter challenge alleging that police did not have sufficient grounds to arrest Mr. Schirmer; and
 - d. The voluntariness of statements made by Mr. Schirmer to police regarding an injury he suffered.
- [4] From February 13 to 15, 2019 the Crown called 14 witnesses. On continuation, March 6, 2019 Mr. Schirmer testified.
- [5] After Mr. Schirmer's evidence, his former defence counsel made submissions on the voir dire which continued into the next day March 7, 2019. Crown followed. We adjourned to the next day for Crown to complete submissions. As court opened on March 8, 2019, former counsel advised the court that Mr. Schirmer had dismissed him. Mr. Schirmer expressed his that former counsel's health difficulties were interfering with his ability to effectively represent him. He requested and was granted an adjournment to retain new counsel.
- [6] There followed a series of adjournments to allow that to happen, the specifics of which are not germane to this ruling. What is relevant and significant is that we are still in the voir dire. Submissions have not concluded. No rulings or decisions have been made.

- [7] In this application Mr. Schirmer seeks a mistrial based on incompetence of his former counsel. He contends that his right to a fair trial has been irreparably or fatally wounded by the lack of effectual representation of former counsel. Alternatively he seeks an order allowing him to reopen parts of the previous voir dire to recall some witnesses and to bring a s. 10 Charter notice.
- [8] Mr. Schirmer's primary complaints regarding his former counsel are as follows:
- a. Former counsel failed to object to questions asked of Mr. Schirmer in cross-examination outside the scope of the voir dire;
 - b. Former counsel failed to file s. 10 Charter notice in order to pursue the exclusion of Mr. Schirmer's statements to police on the s. 7 voir dire; and
 - c. Former counsel failed to pursue exclusion of Mr. Schirmer's wallet and contents from the trial.
- [9] In addition he expresses dissatisfaction with the way former counsel prepared him to testify and confusion about the processes surrounding the blended voir dire.
- [10] While the Crown concedes that some of Mr. Schirmer's complaints are not without merit, it opposes the application for a mistrial arguing that there are remedies short of declaring a mistrial that can remedy any potential prejudice to his fair trial rights.

Issues

- [11] The issues are as follows:
- a. Whether Mr. Schirmer received ineffective representation, and
 - b. If so, whether a mistrial should be granted.

The Law

- [12] An accused who is represented by counsel at trial is entitled to receive effective legal assistance. The failure of counsel to provide effective representation may compromise the fairness of the trial and in some cases will result in a miscarriage of justice: *R. v. Joannis* (1995), 102 C.C.C. (3d) 35 (Ont. C.A.) at 57-58, leave to appeal ref'd [1996] S.C.C.A. No. 347.
- [13] In *R. v. G.D.B.*, [2001] 1 S.C.R. 520, the Supreme Court of Canada held that in order for an application regarding ineffective representation to succeed, the appellant must establish two things (at para. 26):
1. First, that counsel's acts or omissions constituted incompetence; and
 2. Second, that a miscarriage of justice resulted.
- [14] The Court provided guidance regarding the application of this test as follows:

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).
- [15] If a court is satisfied that ineffective representation has occurred, it must then consider the remedy.
- [16] A mistrial is a remedy of last resort and should only be granted when there has been a fatal wounding of the trial process which cannot be remedied by lesser measures: *R. v. McKinnon*, 2014 BCSC 2051 at paras. 73-76.
- [17] The test for a mistrial based on incompetence of counsel is different when it is made in the course of a trial than on appeal. This was made clear by the Ontario Court of Appeal in *R. v. C.G.*, 2018 ONCA 392:
- [4] We disagree that the same test to assess ineffective assistance claims on appeal should apply at trial. An incompetence of counsel claim, brought during the course of a trial, should be approached within the principled framework for mistrial applications. Bearing in mind the unique dynamics of each trial, judges need to be left with a broad discretion to manage the trial process. A mistrial is a remedy of last resort, and it falls squarely within the discretion of the trial judge who is in the best position to assess whether such a remedy is needed in order to avoid miscarriages of justice. No new test is required. [Emphasis added.]
- [18] In *R. v. Levin*, 2012 ABQB 769, Shelley J. dealt with a midtrial application for mistrial based on incompetence of counsel. She framed the test as follows (at para. 52):

While I do not rule out the possibility of declaring a mistrial in such circumstances, there must be clear grounds to do so and evidence that the consequences arising from the incompetent or unethical conduct of counsel, if established, cannot be cured in any manner short of a mistrial. [Emphasis added.]

- [19] I take the following from the above:

- a. Trial fairness is the paramount consideration;
 - b. The court is not restricted in what trial management orders it can make in order to ensure same and to remedy any potential trial unfairness; and
 - c. A mistrial will be granted only if the consequences cannot be remedied by other measures.
- [20] Curative measures may include re-opening a closed voir dire, recalling witnesses and striking portions of the record: *R. v. McKinnon*, 2014 BCSC 721 at para. 32.

Analysis

[21] I will analyze each alleged failure of counsel separately.

Failure to Object

- [22] Mr. Schirmer elected to give evidence with respect to the s. 7 issue, that is, an allegation that police used excessive force in arresting him thereby causing injury to his leg.
- [23] On this application Mr. Schirmer contends that in cross-examination the Crown asked him questions that were outside that ambit and former counsel failed to object. Mr. Schirmer states that it was his understanding that he was to testify only about the excessive use of force complaint and that he was not going to be asked questions about anything else. He argues that in failing to object to the Crown going down an impermissible path in cross-examination, former counsel set him up for potential cross-examination on inconsistent testimony at trial and undermined his standing on the s. 8 issue.
- [24] Before Mr. Schirmer began his testimony, former defence counsel made clear the parameters of his evidence:
- . He's going to testify with regards to the s. 7 issue and the 24(2) issue
- [25] Crown counsel further clarified what was to happen:
- I'll just clarify then for the record, our mutual understanding is that he's not touching upon issues relating to the trial proper and he's not going to be examined or cross-examined on those issues.
- [26] Mr. Schirmer's direct evidence as led by former counsel focussed entirely on the issues stated by him at the outset.
- [27] The cross-examination that Mr. Schirmer takes issue with concerns the path he took to get to the bicycle store. A key issue in Mr. Schirmer's s. 7 argument is how he suffered the injury - whether during the arrest or by tripping over a bicycle rack as he is alleged to have told police following his arrest. It was established through Crown witnesses that there was a bike rack in front of the store. Photographs of same were entered as an exhibit. In the course of his direct examination, Mr. Schirmer testified that he never saw a bike rack. In my view that opened the door to Crown's cross-examination regarding the route he took and the direction from which he approached the store. Former counsel's failure to object was therefore not

ineffective, it was correct. The questions were relevant and within the scope of the voir dire. There was nothing to object to.

- [28] Mr. Schirmer complains that the evidence elicited from him on cross-examination could unfairly fetter his ability to testify at trial.
- [29] He does not question the decision that he testify on the voir dire with respect to the excessive force issue. Clearly it was incumbent on him to do so if he was to have a chance of success. In order to testify he had to acknowledge certain facts such as his identity as the person arrested in the bike shop. In doing so Mr. Schirmer was clearly aware that if he chose to testify on the trial he could not give contrary evidence without being cross-examined on the inconsistencies. In any event he has not shown on this application how that constrains him, if at all.
- [30] Mr. Schirmer further complains that the evidence elicited on cross-examination fetters his standing to challenge the search of the valise. By way of brief background, the Crown's theory is that Mr. Schirmer jumped out of a van, ran through various backyards, jumped fences and along the way dumped a valise style bag in a backyard. In answering the questions regarding the route he took to get to the bike shop, Mr. Schirmer took himself away from the route along which the valise was found. It is exculpatory evidence in that it dissociates him and the bag but it may affect his standing to bring a s. 8 argument pursuant to the decision of the Supreme Court of Canada in *R. v. Jones*, 2017 SCC 60. As both issues are being heard in the same voir dire, the evidence Mr. Schirmer gave on the s. 7 issue will be taken into account on the s. 8 argument.
- [31] I say that it may affect his standing as Crown counsel has brought to my attention the recent decision of *R. v. Labelle*, 2019 ONCA 557, in which the Ontario Court of Appeal held that the accused is entitled to rely on the Crown theory to establish standing even in the face of contradictory evidence. That decision is not binding on me but it may be persuasive.
- [32] As we are in the middle of a voir dire and it is clearly in the interests of Mr. Schirmer's fair trial rights to move along, I choose not to, at this stage, engage in a debate as to whether I accept *Labelle*. Rather I will proceed as if this evidence does have the possibility of hampering Mr. Schirmer's standing to bring a s. 8 challenge. In that case the potential issue is not with the failure to object, which I have already dealt with, but former counsel's decision to have the two issues heard together in one blended voir dire. Hindsight is always 20/20. It would have been difficult to foresee that risk. As such I do not find that former counsel fell short. I am however satisfied that Mr. Schirmer may be prejudiced by having the two issues dealt with together. There is a simple remedy.
- [33] I order that the evidence given by Mr. Schirmer on the voir dire be confined to the s. 7 issue and not be taken into account on the s. 8 application regarding the search of the valise.

Failure to file a s. 10(b) Charter Notice

- [34] Former counsel testified that he intended to file a notice seeking to have Mr. Schirmer's statements to police regarding injuring himself jumping over the bike rack excluded pursuant to s. 10(b) of the Charter, but neglected to do so. I accept this as he pursued this line of questioning with police officers until I stopped him to point out that there was no Charter notice. He then abandoned that challenge.
- [35] The statements made by Mr. Schirmer to police are important evidence on the s. 7 voir dire. I am satisfied that competent counsel would have attempted to exclude them if there was a chance of success in doing so. In my view there is a prospect of success as Mr. Schirmer was not afforded the right to call counsel until four hours after his arrest. It then falls on the Crown to justify such a delay. Whether ultimately Mr. Schirmer would be successful in having the statements excluded under s. 24(2) is less than clear, however I cannot reject it as a possibility.
- [36] Accordingly I am satisfied that the failure to file a s. 10 notice falls short of what is reasonably effective legal representation and that Mr. Schirmer's fair trial rights have been prejudiced.
- [37] As such a remedy is required. The appropriate remedy in my view is to allow Mr. Schirmer to file a Charter notice and pursue a remedy under s. 10.
- [38] In considering remedy it is incumbent on the Court to consider potential prejudice to both parties -- the Crown and Mr. Schirmer. As stated by Madam Justice Fisher, as she then was, in *R. v. McKinnon*, 2014 BCSC 721:
- [31] As I said at the outset, trial fairness is the essential consideration in this application. I found this passage from *R. v. Harrer*, [1995] 3 SCR 562 at para. 45, a case provided to me earlier by counsel in another context, to be a useful reminder about what this means:

At base, a fair trial is a trial that appears fair, both from the perspective of the accused and the perspective of the community. A fair trial must not be confused with the most advantageous trial possible from the accused's point of view: *R. v. Lyons* ... Nor must it be conflated with the perfect trial; in the real world, perfection is seldom attained. A fair trial is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness to the accused.

- [39] Permitting Mr. Schirmer to pursue a remedy under s. 10(b) will necessitate the re-opening of the evidence on the voir dire and the recalling of some witnesses for further questioning. Any potential prejudice to the Crown can be rectified by allowing it to share in this process by recalling witnesses for re-examination or calling new witnesses and making further submissions.

[40] I pause to note that Mr. Schirmer submits that such an order would prejudice him as he would be compelled to testify further on the voir dire. I find no merit in that submission. He can not have it both ways - on the one hand saying that he is prejudiced by not being permitted to testify about his access to counsel and on the other, saying he is prejudiced by having a chance to testify about same. In any event there is no order compelling Mr. Schirmer to testify. The choice to testify is his to make.

[41] I make the following order:

- a. Mr. Schirmer may file a s. 10(b) notice;
- b. The voir dire will be re-opened;
- c. Both Crown and Mr. Schirmer may recall witnesses and re-examine them or call new witnesses to testify;
- d. Counsel may make further submissions on the voir dire.

[42] I leave it to counsel to work out the logistics of this order. If they are unable to do so, they may seek guidance from the Court.

Failure to seek exclusion of Mr. Schirmer's wallet and contents

[43] This issue is similar to the s. 10(b) issue above.

[44] In the course of arresting Mr. Schirmer police seized his wallet. In it was a quantity of money bundled in a particular way that Crown counsel advises is, according to a proposed drug expert, consistent with drug trafficking, and papers which Crown counsel advises that the same witness will say are score sheets. Clearly this is key evidence should we get to trial.

[45] Former counsel candidly testified that he should have sought to exclude that evidence and that Mr. Schirmer instructed him to do so.

[46] As above with the s. 10 analysis, the question becomes whether there was some realistic prospect that the wallet could be excluded from evidence. If the answer is yes, then counsel's failure to attempt to do so would fall below the standard expected from competent counsel.

[47] This is a difficult question to answer as there was no evidence elicited as to why officers searched the wallet.

[48] However having regard to all of the circumstances, as I have already ordered that the voir dire be reopened, there is no prejudice to either party in allowing Mr. Schirmer to pursue this avenue as part of his s. 8 Charter challenge. I therefore order that Mr. Schirmer may pursue the exclusion of his wallet and contents. His Charter notice may be amended if necessary or a new notice filed and as above both counsel may re-call and re-examine witnesses or call new witnesses and make further submissions on the voir dire.

Other issues

[49] In addition to the above, Mr. Schirmer makes a number of other complaints regarding former counsel's representation.

Failure to prepare him adequately for his testimony

[50] Mr. Schirmer testified that former counsel failed to adequately prepare him to give his testimony.

[51] In my view there is no evidence upon which to find that former counsel performed that function other than competently.

[52] According to former counsel, he heard Mr. Schirmer's version of events several times. That was borne out in the direct examination he conducted. Mr. Schirmer's testimony on direct examination was orderly and focussed and Mr. Schirmer's answers responsive and detailed.

[53] Mr. Schirmer has failed to show on this application how his evidence would have differed or what was missing. This argument fails.

Failure to communicate, give advice and take instructions

[54] Mr. Schirmer complains that former counsel failed to communicate, give advice and take instructions and yet testified that the conduct of the trial was a matter for counsel. Former counsel testified that his practice was to make most decisions but keep his clients in the loop.

[55] As stated by the Supreme Court of Canada in G.D.B. at para. 34, the conduct of the trial is the bailiwick of counsel:

While it is not the case that defence lawyers must always obtain express approval for each and every decision made by them in relation to the conduct of the defence, there are decisions such as whether or not to plead guilty, or whether or not to testify that defence counsel are ethically bound to discuss with the client and regarding which they must obtain instructions .

[56] As have been discussed in this ruling, there were specific instances where former counsel failed to follow Mr. Schirmer's instructions with regard to his wallet and statements to police regarding the bike rack. They are addressed above.

[57] Aside from those instances, Mr. Schirmer has failed to show ineffective representation.

Failure to mount a sub-facial attack on the tracking warrant

[58] Next, Mr. Schirmer submits that former counsel failed to bring a sub-facial challenge to the tracking warrant when he pointed out things in the ITO that were not accurate.

[59] There is nothing preventing Mr. Schirmer from bringing such a challenge now.

Incoherent and incomplete submissions on the voir dire

- [60] Finally Mr. Schirmer complains that former counsel's submissions on the voir dire were incomplete and incoherent.
- [61] It is unnecessary to make a finding as to whether that is so. The voir dire is reopened in that both counsel may recall witnesses and make further submissions. I extend that order to allow new counsel to make submissions generally on any matter on the voir dire that he considers was inadequately dealt with. Of course the Crown is permitted sur-reply on new argument raised.

Conclusion

- [62] In closing, there is no doubt that Mr. Schirmer's former counsel suffers health difficulties and that he was so suffering throughout the trial. As a result of his difficulties, court was adjourned on several occasions. On this application former counsel swore an affidavit setting out what those difficulties are and the impact they have had on him. He acknowledges that as a result of his health challenges, he had difficulty fulfilling some of his duties as counsel. The instances where he failed to adequately fulfill his duties are dealt with in this ruling.
- [63] In my view the trial has not been fatally wounded by the issues raised in this application. Any prejudice or potential prejudice caused by the ineffective representation of counsel can be remedied by measures less drastic than a mistrial, as ordered.
- [64] Accordingly Mr. Schirmer's application for a mistrial is dismissed.
- [65] Leave is granted to reopen voir dire 2 as set out in this ruling.

"The Honourable Madam Justice Murray"

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