

CANADA / JUDGMENT

R. v. Schirmer

2020 BCSC 94

COURT

Supreme Court of British Columbia

DECIDED

22 January 2020

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2020 BCSC 94 R. v. Schirmer IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Schirmer, 2020 BCSC 94 Date: 20200122 Docket: 174439 Registry: Victoria Regina v. Horst Francisco Schirmer Before: The Honourable Madam Justice Murray Oral Reasons for Judgment on Voir Dire #2 Re: Voluntariness of Accused's Statements to Police Counsel for the Crown: O.L. Bick Counsel for the Defence: R.S. Horne Place and Date of Hearing: Victoria, B.C. February 13-15, March 6-7, 2019, and January 20-21, 2020 Place and Date of Judgment: Victoria, B.C. January 22, 2020

Introduction

- [1] The Crown seeks to have three statements made by Mr. Schirmer to police declared voluntary.
- [2] Voluntariness was dealt with along with a number of Charter issues in a blended voir dire. Submissions regarding voluntariness were made separately in part because counsel seek this ruling on voluntariness before they make arguments on Charter issues and in part because the burdens are different on a Charter argument than on a voluntariness inquiry. The Law
- [3] In order to be admissible the Crown must prove beyond a reasonable doubt that the statement made by the accused was voluntary.
- [4] The twin goal of the confessions rule were described by the Supreme Court of Canada in R. v. Oickle, [2000] 2 S.C.R. 3, as "protecting the rights of the accused without unduly limiting society's need to investigate and solve crimes" (para. 33). The concept of voluntariness overlaps with reliability: Oickle at para. 47.
- [5] In assessing voluntariness, the court must consider the following factors:
 - i. The making of threats or promises; ii. Oppression; iii. The operating mind doctrine; and iv. The use of police trickery. (R. v. Groves, 2011 BCSC 1934 at para. 6.)

- [6] In this case there is no suggestion that the police used threats or promises, oppression or trickery. The primary issue is whether Mr. Schirmer had an operating mind when he spoke to the police.
- [7] The operating mind test was considered by the Supreme Court of Canada in *R. v. Clarkson*, [1986] 1 S.C.R. 383, when the court dealt with a confession made by an intoxicated accused. Justice McIntyre framed the test with respect to the admissibility of a confession by a person in a state of intoxication as follows (para. 27):
1. Was the accused aware of what she was saying? and
 2. Was she aware of the consequences of making the statement on the particular occasion in question? To be aware of the consequences in this context simply means to be capable of understanding that her statement could be used in evidence in proceedings to be taken against her. There is no novelty in this approach. It is consistent with the familiar and customary warning derived from the English judges' rules which was to the effect that "you may remain silent but anything you say will be taken down in writing and may be given in evidence". This warning was designed to insure knowledge of the consequences of the statement, that is, its possible use in proceedings against the accused. It must be observed that common sense would dictate that a very high degree of intoxication would be required to render such a statement inadmissible. [Emphasis added.]
- [8] In *R. v. Whittle*, [1994] 2 S.C.R. 914, Mr. Justice Sopinka affirmed that the operating mind test does not require that the accused possess a high level of functioning. All that is required is that the accused possess the limited degree of cognitive ability to understand what he is saying and to comprehend that the evidence may be used in proceedings against him.
- [9] The operating mind test is not a discreet inquiry but rather part of the voluntariness inquiry: *Oickle* at para. 63.
- [10] With that law in mind, I will now outline the facts relevant to this inquiry.

Facts

- [11] On August 2, 2017, after running from police, Mr. Schirmer was found hiding in a back storage room of a bicycle shop in Langford. He was arrested in that storage room by Cst. McGregor of the West Shore RCMP and was handcuffed. Constable McGregor testified that at some point during the arrest Mr. Schirmer indicated that he had a hurt right ankle.
- [12] As Cst. McGregor and Cpl. Krauss were escorting Mr. Schirmer out of the bicycle shop, Cpl. Krauss noticed that Mr. Schirmer was limping and asked him what happened to him. Mr. Schirmer nodded his head and half pointed with his lips toward a bike rack that was in front of the store and said, "I jumped over that and fell and hurt my leg." That is the first of three statements in issue.

- [13] Constable McGregor then searched Mr. Schirmer and placed him in the back seat of the police vehicle.
- [14] Constable McGregor again advised Mr. Schirmer that he was under arrest on outstanding warrants and gave him his police warning and advised him of his right to counsel. Mr. Schirmer told Cst. McGregor that he understood the warnings.
- [15] Constable Pistone from the Victoria Police Department then arrived to take custody of Mr. Schirmer. He walked over to where Mr. Schirmer was seated in the rear of the police vehicle, rolled down the window and identified himself as a police officer. Constable Pistone advised Mr. Schirmer that he was under arrest for outstanding warrants, possession of drugs for the purpose of trafficking and flight from police. He then read him his s. 10(b) rights. Mr. Schirmer said that he understood and that he wanted to talk to his lawyer, Don McKay. Following that, Cst. Pistone read Mr. Schirmer the police warning. Mr. Schirmer answered "yeah" when asked if he understood.
- [16] At that point Cst. Pistone noticed that Mr. Schirmer appeared to be in discomfort so he asked him if he had any injuries. Mr. Schirmer told him that he had a sore ankle and that he had injured it while jumping over a bike rack in front of the store.
- [17] Constable McGregor corroborated this evidence. He testified that after Cst. Pistone arrested Mr. Schirmer, he heard Mr. Schirmer tell Cst. Pistone that he thought he had broken his ankle and "mentioned or laughed or joked" that he thought he broke it jumping over a bike rack in front of the business.
- [18] That is the second statement in issue.
- [19] The third statement in issue was made to Cst. Brendan Robinson while he was waiting with Mr. Schirmer at the hospital.
- [20] Constable Robinson testified that the conversation at the hospital with Mr. Schirmer was general, low key and relaxed. Constable Robinson testified that Mr. Schirmer told him that he hurt his ankle running when he tripped on a bike rack in front of the bike store before he went into the store. According to Cst. Robinson, at this time he said that Mr. Schirmer was "relaxed and almost jovial" and appeared sober and coherent. This evidence was unchallenged.
- [21] Mr. Schirmer denies making the first two statements in front of the bike shop. His evidence is that while he was seated in the rear of the police vehicle outside the bicycle shop he heard Cst. McGregor tell Cst. Pistone that Mr. Schirmer had hurt himself jumping over a bike rack. He remembers wondering where that came from. Mr. Schirmer insists that there is no bike rack in front of the store and is adamant that he never saw one.
- [22] Mr. Schirmer admits making the third statement to Cst. Robinson at the hospital but explained that he was being sarcastic about what the police had said.

- [23] In addition, Mr. Schirmer argues that the statements were not the product of an operating mind as a result of the overwhelming pain he was experiencing and the pain medication he was given at the hospital. He testified that he was given two doses of pain medication. The first was administered by ambulance attendants. It was the second dose given at the hospital that is relevant. Mr. Schirmer testified that it made him high like being on morphine. The Issues
- [24] There are two issues to be determined:
- i. Whether Mr. Schirmer made the three statements; and ii. If so, whether they were voluntary and the product of an operating mind.

Analysis

- [25] I have no doubt that Mr. Schirmer made all of the statements in issue for the following reasons:
- i. The evidence makes sense. Mr. Schirmer was badly hurt and was limping. It would have been unusual for the police not to ask him what happened. ii. The explanation accords with the evidence. The evidence is overwhelming that there was a bike rack in front of the store where Cpl. Krauss said that Mr. Schirmer indicated toward it. That evidence was given not only by the police officers but also by the store owners. Photographs corroborate the positioning of the rack. It is along the route a witness testified seeing Mr. Schirmer running. iii. Mr. Schirmer's evidence that there was no bike rack and that he did not see one does not make sense. He entered the bike shop through the front door. The bike rack was in front. iv. Four different police officers testified about the three statements. In order to exclude their evidence I would have to be satisfied or at least have a doubt that all four of them- two from the Victoria Police department and two from the West Shore RCMP- together concocted this evidence. I am unable to do so. I found the police officers to be honest, straightforward witnesses. I accept their evidence.
- [26] In addition to the above, I find Mr. Schirmer's evidence troubling. He remembers some details clearly, for example, the colour of the chairs in the waiting room (blue), and that the police officers were sitting to his left in the waiting room but claims to not remember other things like being advised of the police warning or efforts made by police to call his counsel. In fact Mr. Schirmer claims a complete lack of recall of almost everything police said to him asserting that he just remembers "what they say they said" through their testimony on this voir dire. In my view Mr. Schirmer's memory is convenient. He remembers things that he feels are helpful to him and feigns memory loss and confusion when in his estimation they are not. He was also very evasive in cross-examination, constantly feigning confusion. For these reasons, where Mr. Schirmer's evidence conflicts with the evidence of the police officers, I accept the evidence of the officers.

- [27] Having found that the three statements were made by Mr. Schirmer, the issue then becomes whether the statements were voluntary.
- [28] As stated earlier, there is no suggestion that the police used threats or promises, oppression or trickery. The police officers were not challenged on their evidence regarding same.
- [29] The primary issue raised by Mr. Schirmer is whether he had an operating mind when he spoke to the police.
- [30] As per Clarkson, two questions must be considered in determining operating mind: first, was Mr. Schirmer aware of what he was saying; and second, was he aware of the consequences of making the statement?
- [31] I am satisfied that the answer to both of these questions is yes.
- [32] As set out above, Mr. Schirmer was advised of the police warning twice, once by Cst. McGregor and again by Cst. Pistone. They both testified that Mr. Schirmer indicated that he understood the warning. That evidence went unchallenged.
- [33] If Mr. Schirmer was in fact given pain medication, there is no evidence that he was affected by it or pain to the point that he was rendered incapable of understanding what he was saying or that what he said to police could be used against him. Although Mr. Schirmer testified that he was "high" after the second injection of pain medication at the hospital, he did not testify as to what that meant or how that impacted his abilities. The only statement made by Mr. Schirmer at the hospital was to Cst. Robinson. His testimony that Mr. Schirmer was "sober" and "coherent" went unchallenged. Similarly, the other officer at the hospital, Cst. Pistone, testified that Mr. Schirmer was having a nice, relaxed conversation with them. I pause to note that it is unclear whether the second injection, the one that purportedly caused Mr. Schirmer to feel "high", was given before or after that statement.
- [34] Finally, there is absolutely no evidence that Mr. Schirmer did not know what he was saying. His evidence is not that he does not know what he was saying. His evidence is clear: he did not make the first two statements attributed to him and he did make the third. His evidence is equally clear that he made the third statement for a reason.
- [35] Having considered all of the evidence, I find beyond a reasonable doubt that Mr. Schirmer made the statements attributed to him by the police and that he did so voluntarily with an operating mind.

Conclusion

- [36] Accordingly, I am satisfied that the Crown has proven beyond a reasonable doubt that the three statements made by Mr. Schirmer that he hurt his ankle by tripping over the bike rack are voluntary. "The Honourable Madam Justice Murray"

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