

CANADA / JUDGMENT

R. v. Schirmer

2020 BCSC 100

COURT

Supreme Court of British Columbia

DECIDED

23 January 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 100 R. v. Schirmer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Schirmer,

2020 BCSC 100

Date: 20200123

Docket: 174439

Registry: Victoria

Regina

v.

Horst Francisco Schirmer

Before: The Honourable Madam Justice Murray

Oral Reasons for Judgment on Voir Dire #2 re: s. 10(b)

Counsel for the Crown:

O.L. Bick

Counsel for the Defence:

R.S. Horne

Place and Date of Hearing:

Victoria, B.C.

January 20-22, 2020

Place and Date of Judgment:

Victoria, B.C.

January 23, 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] In this application Mr. Schirmer seeks to have statements made by him to police excluded on the basis that his s. 10(b) Charter rights were violated by the police in failing to facilitate his access to counsel within a reasonable time.
- [3] This s. 10(b) Charter challenge was heard as part of voir dire # 2, a blended voir dire dealing with a number of Charter challenges (ss. 7, 8 and 9) and the voluntariness of the same statements Mr. Schirmer now seeks to exclude. The voir dire commenced on February 13, 2019. Evidence was heard from February 13-15, 2019 and continued March 6, 2019. Submissions on the voir dire were made by former counsel for Mr. Schirmer on March 6 and 7. The Crown commenced submissions March 7, 2019. On March 8, 2019, when the Crown was to continue, court was advised that Mr. Schirmer had discharged his former counsel. There followed a series of adjournments to allow Mr. Schirmer time to obtain new counsel. In December 2019 Mr. Schirmer brought a mistrial application based on ineffective representation of counsel (voir dire #3). That application was heard the week of January 13, 2020. On January 17, 2020 I gave my ruling dismissing Mr. Schirmer's application for a mistrial but allowing him to re-open the evidentiary portion of this voir dire to recall witnesses and granting him leave to bring this s. 10(b) Charter challenge. That ruling is indexed at 2020 BCSC 81.
- [4] In accordance with that ruling on January 20, 2020, Mr. Schirmer filed this s. 10(b) Charter Notice and the voir dire continued. Two police officers, Csts. McGregor and Pistone, both of whom testified in February 2019, were recalled and questioned with respect to the s. 10(b) issue. Mr. Schirmer gave evidence as well.
- [5] On January 21, 2020 counsel made submissions on the voluntariness of the statements made to police. On January 22, 2020 I ruled that the statements were voluntary. That ruling pertains to the statements Mr. Schirmer seeks to have excluded in this application.
- [6] This s. 10(b) application will determine whether statements made by Mr. Schirmer are admissible as evidence to be used by the Crown on Mr. Schirmer's s. 7 application in which he contends that the police used excessive force in arresting him. As such, although this issue is being dealt with in the blended voir dire, it technically is a voir dire within the s. 7 application. The Crown is not seeking to tender the statements on the trial proper as they are not relevant to anything other than the s. 7 issue.

- [7] I will now outline the facts relevant to this application. In doing so I will borrow from my rulings on the mistrial and voluntariness applications.

The Facts

- [8] On August 2, 2017, after running from police, Mr. Schirmer was found hiding in a back storage room of a bicycle shop in Langford. At approximately 3:25 p.m. he was arrested in that cramped 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.
- [9] 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 Mr. Schirmer seeks to have excluded.
- [10] Constable McGregor then searched Mr. Schirmer and placed him in the back seat of the police vehicle.
- [11] Between approximately 3:30 p.m. to 3:35 p.m. Cst. McGregor again advised Mr. Schirmer that he was under arrest on outstanding warrants and for the first time gave him the police warning and advised him of his right to counsel. Mr. Schirmer told Cst. McGregor that he understood the warnings but according to Cst. McGregor, did not ask to contact counsel. Constable McGregor testified that if Mr. Schirmer had asked to call counsel, he would have made note of that. He had no such note.
- [12] Mr. Schirmer testified that he told Cst. McGregor that he wanted to call lawyer Don McKay. I will return to this.
- [13] Sometime shortly before 3:40 p.m. Cst. Pistone from the Victoria Police Department (VPD) 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, as he was in plainclothes, identified himself as a police officer. He 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 said "yeah" when asked if he understood. Mr. Schirmer testified that he has no recollection of Cst. Pistone advising him of his rights.
- [14] 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 out front of the store.
- [15] That is the second statement Mr. Schirmer seeks to have excluded.

- [16] Constable Pistone did not facilitate Mr. Schirmer's access to counsel in the police vehicle. His plan was to transport Mr. Schirmer to VPD Headquarters in order to do so in a secure interview room.
- [17] At approximately 3:50 p.m. Csts. Pistone and McGregor departed the scene with Mr. Schirmer. They travelled directly to VPD Headquarters arriving at approximately 4:13 p.m.
- [18] Once there Cst. Pistone left Mr. Schirmer and Cst. McGregor in the police vehicle in the secure bay and went in to advise the Sergeant in charge that Mr. Schirmer had arrived and that he had an injured ankle that needed to be examined by Emergency Health Services (EHS). Mr. Schirmer was then escorted into the booking area. As part of the booking-in process, Mr. Schirmer's clothing and possessions were gathered from him. Mr. Schirmer testified that jail staff had difficulty removing his boot as his ankle was so swollen and sore. It was a lengthy and painful process. The booking process usually takes about 20 minutes.
- [19] After Mr. Schirmer was booked in, Cst. Pistone placed him in a secure interview room and got him a drink of water. According to Cst. Pistone, Mr. Schirmer was clearly in considerable pain. Constable Pistone had the phone that is used to afford prisoners access to counsel and was ready to accommodate Mr. Schirmer's call to counsel when he was advised that EHS had arrived.
- [20] Constable Pistone asked Mr. Schirmer what he wanted to do - call counsel or be seen by the medical personnel. Mr. Schirmer chose the latter. Mr. Schirmer was examined by ambulance attendants who, at approximately 4:46 p.m., advised that they were taking Mr. Schirmer to the Royal Jubilee Hospital for treatment.
- [21] Constable Pistone accompanied Mr. Schirmer in the ambulance. On the 12 minute ride to the hospital, EHS attendants were dealing with Mr. Schirmer. The ambulance arrived at the hospital at 5:02 p.m. Mr. Schirmer was taken into the emergency ward waiting room. Constable Robinson attended to assist Cst. Pistone maintain security of Mr. Schirmer at the hospital.
- [22] At 5:05 p.m., while they were in the waiting area of the emergency department, Cst. Pistone offered Mr. Schirmer access to counsel. Constable Pistone testified that although he was still concerned about the security of his work cell phone, he was more concerned that Mr. Schirmer had not yet contacted counsel and his work cell was the only option. Constable Pistone believed it could be hours before he could get Mr. Schirmer to another phone. At 5:12 p.m. Cst. Pistone called Mr. McKay. When Mr. McKay did not answer, he left a voice mail. Mr. Schirmer expressed surprise that Mr. McKay did not pick up, so Cst. Pistone called him again at 5:25 p.m. without success. Constable Pistone left another voice mail for Mr. McKay at that time.
- [23] Mr. McKay never did call back. At 7:05 p.m., when Mr. Schirmer was in the x-ray room awaiting his second round of x-rays, Cst. Pistone called Mr. McKay for a third time and reached him. Mr. Schirmer was able to talk to Mr. McKay in private.

- [24] Between 5:25 p.m. and 7:05 p.m. Mr. Schirmer was being examined by medical personnel, having x-rays done and waiting in waiting areas with the two police officers. At some point during this period, Cst. Pistone asked Mr. Schirmer if he wanted to call anyone else. Mr. Schirmer responded that he knew Don McKay and wanted to speak to him.
- [25] Also at some point before he was relieved at 7:00 p.m., Cst. Robinson asked Mr. Schirmer what happened to his ankle and Mr. Schirmer responded 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.
- [26] That is the final statement Mr. Schirmer seeks to have excluded.

Issues

- [27] There are two issues on this application:
1. Whether Mr. Schirmer has proven on a balance of probabilities that there was a breach of his s. 10(b) Charter rights; and
 2. If so, whether the evidence should be excluded under s. 24(2) of the Charter.

The Law

- [28] Section 10(b) of the Charter states that everyone has the right on arrest or detention "to retain and instruct counsel without delay and to be informed of that right."
- [29] The section imposes the following duties on state authorities who arrest or detain a person:
- 1) To inform the detainee of his right to retain and instruct counsel without delay and of the existence and availability of legal aid and duty counsel;
 - 2) If a detainee has indicated a desire to exercise this right, to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances); and
 - 3) To refrain from eliciting evidence from the detainee until he has had that reasonable opportunity to speak with counsel (again, except in cases of urgency or danger).
- R. v. Bartle, [1994] 3 S.C.R. 173, at paras. 191-192; R. v. Taylor, 2014 SCC 50 at paras. 23, 26.
- [30] The second and third duties are implementational and are not triggered unless a detainee invokes the right to counsel. Put another way, there is no obligation on police to provide the detainee with a phone call to counsel unless the detainee asserts the desire to speak to counsel.
- [31] It is the second duty that is in issue in this application.
- [32] Whether a detainee has invoked his right to counsel is a question of fact.

- [33] Once a detainee has requested to speak to counsel, the arresting officer is under an obligation to facilitate access to counsel at the first reasonably available opportunity: Taylor at para. 24.
- [34] The burden is on the applicant to prove a Charter breach. In a s. 10(b) application such as this, once the applicant has proved that there was a delay in providing access to counsel, the burden shifts to the Crown to prove that the delay was reasonable in all of the circumstances: Taylor at para. 24.
- [35] The determination of whether a delay in providing access to counsel is reasonable is a question of fact: Taylor at para. 24.
- [36] The Crown in this application fairly concedes that Mr. Schirmer has proved a delay as he was not given the opportunity to talk to counsel for approximately four hours after he requested to do so. The burden is then on the Crown to prove on a balance of probabilities that the delay was justifiable.

Analysis

- [37] Mr. Schirmer argues that his s. 10(b) rights were violated as the police failed to afford him access to counsel at the first reasonable opportunity. He submits that there is no reason that he was not permitted to use Cst. Pistone's cell phone while he was sitting in the back of the police vehicle outside the bike shop. There followed, according to Mr. Schirmer, several opportunities to give him access to a phone along the way. That includes in the police vehicle while en route to VPD Headquarters, at the police department, and in the ambulance.
- [38] The Crown counters that the delays were justified and that in all of the circumstances, the delay was reasonable.
- [39] It is necessary to consider the evidence step by step.
- [40] The right to counsel was triggered when Mr. Schirmer told police that he wanted to speak to Mr. McKay. When that was in issue. According to the police evidence, Mr. Schirmer said that to Cst. Pistone after he chartered and warned him. Mr. Schirmer testified that it was Cst. McGregor to whom he said he wanted to speak to Mr. McKay. He also testified that no other police officer advised him of his Charter rights. In fact Mr. Schirmer testified that he does not recall speaking to any officer other than Cst. McGregor while he was in the back of the police vehicle.
- [41] As I stated in my ruling on voluntariness, I have difficulty with Mr. Schirmer's evidence. I find his memory to be selective and convenient. He remembers only what he thinks is helpful to him. Further, as I set out in my ruling on voluntariness, I find the police witnesses to be credible. Accordingly, where Mr. Schirmer's evidence conflicts with the police evidence, it is the police evidence I prefer.

- [42] Given the above, I find that Mr. Schirmer's right to counsel was triggered when he told Cst. Pistone that he wanted to call Don McKay. I pause to note that the difference between the right being triggered with Cst. McGregor versus Cst. Pistone is only a matter of minutes so it is of little moment.
- [43] Constable Pistone testified that once Mr. Schirmer said that he wanted to call Mr. Mackay, he advised Mr. Schirmer that they would transport him to the VPD to facilitate access to counsel. At that point Cst. Pistone calculated that the delay would be 40 minutes, taking into account the time to drive to VPD and the booking-in process.
- [44] Constable Pistone had two reasons for not permitting Mr. Schirmer to call counsel in the back of the police car. First was a safety/security concern. In order to accommodate access, police would have to remove Mr. Schirmer from the back of the police vehicle and unhandcuff him. Constable Pistone was concerned that if they did that, Mr. Schirmer would pose a flight risk. Constable Pistone was further concerned that, because the scene was not secured and people were walking around the area, if Mr. Schirmer escaped, the public could be at risk.
- [45] Second, Cst. Pistone had security concerns about letting Mr. Schirmer use his work cell phone as it would be possible for Mr. Schirmer to access sensitive information such as his email and work files. In Cst. Pistone's view he would not be able to control his privacy.
- [46] In my view these are both valid concerns. The fear that Mr. Schirmer would flee was real. Immediately before he was arrested Mr. Schirmer had fled police twice- the first time in a vehicle and the second, on foot. Constable McGregor found him hiding in the back storage room of the bike shop. I note that at the point Cst. Pistone made this decision, he was not aware of the extent of the injury to Mr. Schirmer's ankle nor had he seen him walk. In my view Cst. Pistone would have been remiss in his duties to not consider Mr. Schirmer a significant flight risk.
- [47] Further, I find Cst. Pistone's concerns about giving Mr. Schirmer his cell phone while he was seated in the rear of the police vehicle reasonable.
- [48] This concern was addressed by the Supreme Court of Canada in Taylor at para. 27 where Justice Abella stated, "I agree that in light of privacy and safety issues, the police are under no legal duty to provide their own cell phone to a detained individual."
- [49] The privacy concern applies as well to the suggestion by Mr. Schirmer that he should have been given the opportunity to call counsel on the ride to VPD. I find that police were justified in not doing so. In my view the concern for privacy was even greater in a moving car with the accused in the back behind a partition. In addition, Mr. Schirmer would have had to be unhandcuffed or at the very least handcuffed in his front in order to use the phone which gives rise to concerns for officer safety when they open the back door to let him out of the vehicle.

- [50] The police station was the next possible opportunity. Constable Pistone was clear in his evidence that his intention was to get Mr. Schirmer to a phone as soon as possible. He was about to do so immediately following the booking-in process but the ambulance arrived. Mr. Schirmer chose to be checked out by the ambulance attendants. I find that it was reasonable in all of the circumstances for Cst. Pistone to allow Mr. Schirmer's concern for his ankle to take priority.
- [51] Mr. Schirmer argues that Cst. Pistone could have called counsel in the ambulance on the way to the hospital. Constable Pistone testified that ambulance attendants were dealing with Mr. Schirmer on the way to the hospital and he did not think it was appropriate to interrupt. I agree.
- [52] Once at the hospital, Cst. Pistone almost immediately began trying to contact Mr. McKay.
- [53] In all of the circumstances I am satisfied that the delay was justified.

Conclusion

- [54] In conclusion, I am satisfied that the Crown has discharged their burden.
- [55] I find no infringement of Mr. Schirmer's s. 10(b) rights. His application is dismissed.

"The Honourable Madam Justice Murray"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/01/2020BCSC0100.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-schirmer-2020>

Prepared on 28 October 2026 · Esheria