

CANADA / JUDGMENT

## R. v. Schirmer

2024 BCCA 412

### COURT

British Columbia Court of Appeal

### DECIDED

3 December 2024

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

2024 BCCA 412 R. v. Schirmer

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Schirmer,

2024 BCCA 412

Date: 20241203

Docket: CA46511

Between:

Rex

Respondent

And

Horst Francisco Schirmer

Appellant

Before:

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Grauer

The Honourable Madam Justice Horsman

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

February 1, 2019 (conviction) (R. v. Schirmer, 2019 BCSC 297,

Victoria Docket 170268).

## Oral Reasons for Judgment

### Counsel for the Appellant:

B.R. Anderson

N.D. Chizik

### Counsel for the Respondent:

J.N. Walker

A. Wang

### Place and Date of Hearing:

Vancouver, British Columbia

December 3, 2024

### Place and Date of Judgment:

Vancouver, British Columbia

December 3, 2024

### Summary:

The appellant appeals his convictions on five counts of possession of controlled substances for the purpose of trafficking, arguing there was a miscarriage of justice based on the post-trial misconduct of a key police witness and ineffective assistance from his trial counsel. The appellant seeks the admission of fresh evidence, the setting aside of his convictions, and a new trial to be ordered. The Crown concedes that the appeal should be allowed, and a new trial ordered, on the ground of ineffective assistance of counsel.

Held: Appeal allowed.

Ineffective assistance by trial counsel is demonstrated and establishes sufficient prejudice to give rise to a miscarriage of justice. It is therefore unnecessary to address the misconduct grounds. The fresh evidence related to ineffective assistance is admitted, the appellant's convictions are set aside, and a new trial is ordered.

GRAUER J.A.:

## INTRODUCTION

- [1] Mr. Schirmer appeals his convictions on five counts of possession of controlled substances for the purpose of trafficking. The substances in question comprised cocaine, heroin, heroin and fentanyl, MDMA, and methamphetamine. He submits that his convictions should be set aside and a new trial ordered because there was a miscarriage of justice. The unpublished oral trial reasons are indexed at 2019 BCSC 297.

- [2] Mr. Schirmer says that a miscarriage of justice is established on two bases, both of which primarily relate to a witness, then-Constable Ferris, an investigating police officer whose uncorroborated evidence was accepted by the trial judge and was essential to Mr. Schirmer's convictions.
- [3] The first basis is grounded on Mr. Ferris's post-trial misconduct that led to 19 separate findings against him made under the Police Act, RSBC 1996, c 357 (the "misconduct ground"), and to his resignation from the police force. Mr. Schirmer maintains that evidence of this misconduct is admissible as fresh evidence and establishes a miscarriage of justice because Mr. Ferris's credibility was a critical issue at trial that was at least potentially decisive. Consequently, he argues, the misconduct evidence may have reasonably affected the result at trial if considered by the trier of fact alongside all other evidence.
- [4] To support his application to admit fresh evidence, Mr. Schirmer pursued the production of records relating to the criminal and disciplinary investigations of Mr. Ferris. This occupied this Court's attention for a considerable period of time in 2022 and 2023. The process and background are described in reasons indexed at 2022 BCCA 214 [Schirmer #1], and supplementary reasons indexed at 2022 BCCA 378 [Schirmer #2], 2023 BCCA 99 [Schirmer #3], and 2023 BCCA 464 [Schirmer #4].
- [5] In response to the misconduct ground, the Crown acknowledges that Mr. Ferris's misconduct was very serious, and that he gave vital evidence relating to Mr. Schirmer's conviction. The Crown says, however, that there is no real nexus between that misconduct, all of which involved post-trial incidents, and the investigation conducted that led to the criminal charges (see Schirmer #4 at para 86: "there is neither a factual nor temporal connection between the misconduct described there and the drug investigation that led to the charges of which Mr. Schirmer was convicted."). Consequently, the Crown submits, Mr. Schirmer has failed to demonstrate that, on the misconduct ground, allowing his convictions to stand would result in a miscarriage of justice. It follows, in the Crown's submission, that the fresh evidence could not reasonably have affected the outcome and ought not to be admitted.
- [6] The second basis is grounded on an allegation of ineffective representation by Mr. Schirmer's counsel (the "ineffective assistance ground"). Mr. Schirmer maintains that his lawyer was experiencing mental health challenges at the relevant time that, his lawyer has acknowledged, rendered him unable to discharge his duty as defence counsel properly. The most serious problems, Mr. Schirmer submits, arose from his counsel's approach to Mr. Ferris's evidence, including failing to bring appropriate Charter applications concerning key evidence allegedly discovered by Mr. Ferris in breach of Mr. Schirmer's section 8 Charter right, and not challenging Mr. Ferris's complete failure to fulfil his mandatory reporting requirements under the Criminal Code in relation to the search of Mr. Schirmer's residence and the seizure of the key evidence.

- [7] The ineffective assistance ground, too, is supported by an application to admit fresh evidence.
- [8] In response, the Crown concedes that Mr. Schirmer has established that he did not receive effective representation at trial, so that the appeal should be allowed and a new trial ordered on that basis.
- [9] For the reasons that follow, I would admit the fresh evidence specific to the ineffective assistance ground, set aside Mr. Schirmer's convictions, and order a new trial. (I observe that Mr. Schirmer's sentence has been fully served.)
- [10] It is accordingly unnecessary to consider the admissibility of the fresh evidence relevant to the misconduct ground, and what, if anything, would flow from a possible determination in Mr. Schirmer's favour.

## DISCUSSION

- [11] In *R v Mehl*, 2021 BCCA 264, this Court described the importance of the right to effective assistance of counsel at trial, and the three things that must be established by an appellant who asserts a breach of it:
- [132] The right to effective assistance of counsel at trial is a principle of fundamental justice. It is derived from the common law, s. 650(3) of the Code (confirming the entitlement to an accused to make full answer and defence after the close of the case for the prosecution) and ss. 7 and 11(d) of the Canadian Charter of Rights and Freedoms.
- [133] As Justice Doherty noted in *R. v. Joannis*, [1995] O.J. No. 2883 (C.A.), leave to appeal ref'd (1997), [1996] S.C.C.A. No. 347, the importance of effective assistance of counsel at trial is obvious. The advocate who is both prepared and skilled can contest the case advanced by the prosecution, advance the case on behalf of the defence and marshal the evidence that supports it. In addition, as Doherty J.A. wrote at para. 64:

Effective assistance by counsel also enhances the adjudicative fairness of the process in that it provides to an accused a champion who has the same skills as the prosecutor and who can use those skills to ensure that the accused receives the full benefit of the panoply of procedural protections available to an accused.

- [134] An appellant who asserts ineffective assistance of counsel must establish three things: (1) the factual foundation for the claim -- that the acts or omissions of counsel that are alleged to be incompatible with the exercise of reasonable professional judgment in fact occurred: *R. v. G.D.B.*, 2000 SCC 22 at para. 27; (2) counsel's acts or omissions amounted to incompetence; and (3) counsel's ineffective representation caused a miscarriage of justice: *R. v. Archer*, [2005] O.J. No. 4348 at paras. 119-120 (C.A.).

- [12] In *R v Ball*, 2019 BCCA 32, this Court summarized the legal principles that guide evaluation of an ineffective assistance claim as set out by the Supreme Court of Canada in *R v GDB*, 2000 SCC 22:
- [107] A claim of ineffective assistance of counsel has two distinct components, performance and prejudice. To succeed, the appellant must establish both that counsel's acts or omissions were incompetent (performance) and that, as a result, a miscarriage of justice occurred (prejudice). Professional incompetence is assessed on a standard of reasonableness and it must be proven on a balance of probabilities. A miscarriage of justice resulting from professional incompetence must also be proven on a balance of probabilities and it may take many forms: *R. v. G.D.B.*, 2000 SCC 22 at paras. 26-28; *R. v. Dunbar*, 2003 BCCA 667 at para. 34.
- [108] The bar for establishing professional incompetence is high and surpassing it is challenging. It is strongly presumed that counsel's conduct fell within the wide range of reasonable professional assistance, deference will be accorded to counsel's strategic and tactical decisions and the "wisdom of hindsight" has no place in the analysis. Nevertheless, unreasonable acts or omissions by counsel might include a failure properly to challenge the Crown's case, bring a necessary application or make duly diligent efforts to adduce relevant defence evidence, any of which could amount to assistance so deficient that it was ineffective. Alternatively, unreasonable acts or omissions might include representing the accused while in a compromised state or failing to comply with instructions, both of which could deny real assistance altogether and thus taint the adjudicative process by which the verdict was reached: *Aulakh* at paras. 46-48; *G.D.B.* at paras. 27, 29.
- [109] On appeal, a court should analyze the prejudice component of an ineffective representation claim before the performance component. If prejudice is not proven to the requisite standard, the court should typically end the analysis. This is because grading counsel's performance is not the object of the exercise. As Justice Major pointed out in *G.D.B.*, that is a matter for the self-governing body of the legal profession, not the court: *G.D.B.* at paras. 27, 29; *Dunbar* at paras. 24-25.
- [110] The prejudice component of an ineffective assistance claim is established where the appellant proves that professional incompetence is linked to a miscarriage of justice. A miscarriage of justice can result where there is a reasonable probability that the outcome of the proceedings below would have been different but for the errors made by counsel. In *Joanisse*, Justice Doherty explained that a reasonable probability is a probability which is sufficient to undermine confidence in the reliability of the outcome and it "lies somewhere between a mere possibility and a likelihood": *Joanisse* at para. 82. Alternatively, a miscarriage of justice may result where the outcome was reached through an unfair process, regardless of the reliability of the outcome. In other words, professional incompetence may result in a miscarriage of justice by reason of procedural unfairness alone: *G.D.B.* at para. 28; *Dunbar* at para. 26.

- [13] Mr. Schirmer seeks to admit two affidavits of his own, and two from his former counsel, to support the ineffective assistance ground. We received this evidence for the limited purpose of assessing the allegation.
- [14] The evidence includes: (1) three affidavits from trial counsel, one of which is appended as an exhibit to an affidavit of Mr. Schirmer and relates to a subsequent case shortly after the one in question in which he represented Mr. Schirmer; and (2) an exchange of emails between trial counsel and Mr. Schirmer's appellate counsel. The evidence is somewhat marred by inconsistency, but from it these points clearly emerge:
- a) trial counsel was experiencing anxiety and depression that impacted his ability to act beginning at least by the summer of 2018, and worsening thereafter (the trial took place between October 2018 and February 2019). He deposes that he was subsequently diagnosed with a major depression disorder;
  - b) trial counsel did not challenge the lawfulness of Mr. Ferris's seizure of the key evidence and failed to pursue an argument that the evidence should be excluded as unauthorized; and
  - c) trial counsel did not pursue the issue of the search warrant reports to determine if there was a late or incomplete filing of the results of the searches, and failed to pursue an argument that the lack of reporting gave rise to a section 8 Charter breach (describing this at one point as a "particularly embarrassing lapse on my part").
- [15] After reviewing this evidence, the Crown submitted the following in its factum:
- [61] Regrettably, the appellant was not adequately represented at trial. Trial counsel failed to recognize that the police did not comply with their obligatory reporting requirements relating to the seizure of evidence from the appellant's residence. The non-reporting breached the appellant's s. 8 Charter right because he had a residual privacy interest in the seized evidence. As trial counsel effectively acknowledges, this was an obvious oversight. Moreover, trial counsel chose not to challenge the lawfulness of the seizure of the key, despite the fact that the search warrant did not permit keys to be seized.
- [62] Trial counsel's failure to challenge both the non-reporting of the seized evidence and the seizure of the key fall below the standard of a reasonably competent professional. The key was the most important evidence linking the appellant to the seized drugs. Trial counsel's performance prejudiced the appellant. The trial judge's s. 24(2) analysis might have led to the exclusion of the evidence had the s. 8 Charter breach in relation to the non-compliance with the filing requirements been before him.
- [16] I agree with this analysis of the evidence and its import. In Schirmer #1, this Court observed at para 82 that the trial judge plainly had concerns about Mr. Ferris's testimony, and that Mr. Ferris was the only witness who could link the key evidence to Mr. Schirmer. A failure to challenge the lawfulness of that evidence effectively and fully when there were grounds to do so constitutes professional incompetence on the part of counsel that engendered prejudice in the circumstances of this case. There is no basis upon which we could conclude

otherwise given the evidence and the concession of the Crown. In my opinion, these errors, viewed in the context of the importance of Mr. Ferris's evidence to Mr. Schirmer's convictions, give rise to a reasonable probability (that is, a probability that "lies somewhere between a mere possibility and a likelihood") that the outcome would have been different but for the failures.

- [17] All of this is conceded by the Crown, and for good reason. The circumstances demonstrate incompetent performance by counsel who was experiencing mental health issues at the time, and establish sufficient prejudice to give rise to a miscarriage of justice.
- [18] In these circumstances, I would admit the fresh evidence in support of the ineffective assistance ground, allow the appeal, set aside Mr. Schirmer's convictions, and order a new trial.
- [19] HARRIS J.A.: I agree.
- [20] HORSMAN J.A.: I agree.
- [21] HARRIS J.A.: The fresh evidence in support of the ineffective assistance ground is admitted, the appeal is allowed, Mr. Schirmer's conviction is set aside, and a new trial is ordered.

[Discussion with counsel re: bail]

"The Honourable Mr. Justice Grauer"

---

## 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/ca/24/04/2024BCCA0412.htm>

CASE PAGE              <https://chat.esheria.ai/case-law/canada/r-v-schirmer-2024>

Prepared on 29 October 2026 · Esheria