
CANADA / JUDGMENT

R. v. Van De Graaf

2014 BCSC 626

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Supreme Court of British Columbia

DECIDED

11 April 2014

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2014 BCSC 626 R. v. Van De Graaf

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Van De Graaf,

2014 BCSC 626

Date: 20140411

Docket: 29707

Registry: Cranbrook

Between:

Regina

Appellant

And

Justin Theodore Van De Graaf

Respondent

Before: The Honourable Mr. Justice Melnick

On appeal from: An order of the Provincial Court dated February 28, 2013

(R. v. Van De Graaf, 29707-1).

Reasons for Judgment

Counsel for the Appellant:

K. Fotty

Counsel for the Respondent:

R. Batting, Q.C.

Place and Date of Hearing:

Cranbrook, B.C.

March 14, 2014

Place and Date of Judgment:

Cranbrook, B.C.

April 11, 2014

[1] This is an appeal by the Crown from the decision of a provincial court judge to stay certain charges against the respondent, Mr. Van de Graaf, pursuant to s. 24(1) of the Charter, as a result of police misconduct in the course of his arrest. For the reasons that follow I would not interfere with the decision of the trial judge.

I. FACTS

[2] There is no real dispute as to the facts, other than that the Crown does take issue with the trial judge's finding that there was "significant" bleeding, stating that such a finding is inconsistent with the evidence.

[3] As the respondent agrees with the statement of facts submitted by the Crown, but adds a small amount of transcript testimony from the trial, I will simply combine both statements of fact here. I have added a short excerpt from the testimony of one of the officers.

[4] The Crown stated the facts as follows:

1. On February 28, 2013 Webb P.C.J. ordered a stay of proceedings in Invermere Provincial Court with respect to s. 253 (1)(a), s. 253 (1)(b), and s. 249 (1)(a) of the Criminal Code of Canada.
2. The trial commenced in a voir dire at which time the Crown called two witnesses, Kenneth Smith and Glenn Fenimore. The defence did not call any evidence on the voir dire.
3. On February 24, 2012 two off-duty police officers from Alberta, Kenneth Smith of the Edmonton Police Service and Glenn Fenimore of the Calgary Police Service, along with a civilian friend, Randy McAllister, were travelling westbound from Calgary, Alberta en route to Kamloops, British Columbia.
4. Officers Kenneth Smith and Glenn Fenimore were off duty, in plain clothes driving an unmarked Suburban which they had rented.

5. While travelling westbound on highway 1, approximately 30 kilometers from the Radium turn off, Kenneth Smith testified that he noticed a jeep travelling very close behind a semi trailer. The vehicle was at times travelling less than the posted speed of 90 kilometers per hour and at times the vehicle was speeding. Kenneth Smith stated that he "had to exceed the speed limit just to keep up with the vehicle."
6. Constable Fenimore testified that he contacted the R.C.M.P. in Lake Louise, Alberta to report a possible impaired driver. However given the rural location Constable Fenimore stated there was about a 50/50 chance the R.C.M.P. would catch up.
7. Although it was the intent of the officers to travel highway 1 through Golden to Kamloops, British Columbia, as a result of the respondent's driving pattern they chose to follow the respondent to Radium as opposed to continue with their original plan of driving through Golden to Kamloops.
8. Constable Fenimore testified that the respondent turned onto highway 93 towards Radium Hot Springs. Constable Fenimore made one more call to the R.C.M.P in Lake Louise informing them of the change in direction. At that point, Constable Fenimore testified that cell phone reception was lost. They decided to continue to follow the accused until they got cell phone reception and could notify the R.C.M.P. which did not occur until they reached Radium Hot Springs.
9. It was about 3:30 p.m. when the Jeep was first noticed by the off duty police officers. At just after 4 p.m. Kenneth Smith began video recording the respondent's driving pattern on his cell phone and continued doing so intermittently until just after 5 p.m. when the jeep arrived in Radium.
10. As stated by the learned trial judge in his Ruling on Voir Dire

Mr. Van de Graaf's driving was recorded on a cell phone video camera. A copy of the video was marked Exhibit A in these proceedings. The driving was horrible. Mr. Van de Graff drove into the oncoming lane of traffic, repeatedly, without reason. It appears to be driving that is consistent with an impaired driver. The police suspected he was an impaired driver. They were probably correct, based on the evidence that I have heard thus far.

11. With respect to the driving pattern of the respondent, Kenneth Smith testified as follows:

Your honour, I know you hear all kinds of detailed examples and descriptions of driving patterns, and it doesn't take much to alarm me; that in 12 years, I have never seen anything remotely close to this. Between the cars that were on the road, this vehicle was left of centre so far, so many times, coming around corners, it was almost touching the other shoulder, and it was only by the grace of god that there was no head-on.

12. Once the officers entered Radium Hot Springs, following the Accused, they got cell phone reception. At that point, Constable Fenimore testified that he immediately called the R.C.M.P.

13. The learned trial judge found as fact that:

The police followed Mr. Van de Graaf from Lake Louise, Alberta to a gas station in Radium Hot springs, British Columbia where they stopped behind him, at the gas pumps. The evidence largely uncontested, is that both police officers exited their vehicle at approximately the same time and at the same time as the accused exited his vehicle. The police told Mr. Van de Graff he was under arrest for impaired driving. They identified themselves as police officers.

14. Further,

Constable Smith, the larger of the two police officers, at six foot five and 240 pounds, gained control of Mr. Van de Graaf's left arm. Constable Fenimore had some difficulty controlling his right arm. He said the accused held his arm in front of him in a rigid manner, in front of the accused's body - while the accused was facing his vehicle, as directed to do by the police.

15. The learned trial judge stated in his ruling on the voir dire that:

Constable Fenimore says he instructed the accused, twice, to put his right arm behind his back, and that he did not. He then said that as he was preparing to tell him a third time, the accused, while grossly impaired, non-combative, having difficulty with his balance, dazed, with his eyes half open, then started to turn to the police officer.

Constable Fenimore then intentionally struck him in the face, causing both an injury to his nose and significant bleeding from his nose. Constable Fenimore struck the accused in the face while Constable Smith held his other arm and when the accused had said or done nothing to suggest he was a threat to the police officers.

16. It is respectfully submitted that the finding by the learned trial judge, that there was significant bleeding, was inconsistent with the evidence given by Constable Fenimore at trial. During the course of cross-examination the following questions and answers occurred:

Q Would you agree that--that his nose was bleeding profusely?

A No, I wouldn't agree with that statement, sir.

Q Would you agree that--that the blood came onto his--onto his jacket and onto his pants?

A That may have happened, yes.

Q Would you agree that the blood also came down on the side of the vehicle?

A Yes. I would agree with that, yes.

[5] The respondent accepted these facts but included the following additional facts:

1. Constable Smith described the respondent's demeanour in terms that were anything but aggressive. In chief he states:

Q And what was his demeanour as he was getting out of the Jeep?

A He wasn't combative. He seemed just, again, very - almost semiconscious, just very relaxed, disoriented. Didn't know what was going on.

2. This officer stated the respondent's demeanour never changed, even after the strike in the face.

Q Okay. And then after you told him he was under arrest and that the - the strike occurs to his face and he had his hands behind his back, what was his demeanour at that point?

A It was the same.

3. In cross examination of Cst. Smith he reiterated the non-aggressive demeanour of the respondent immediately prior to the blow to the face.

Q did you know exactly what the issue was until you learned a moment later that he wasn't putting his arm back?

A No. And how I learned of this was just hearing Constable Fenimore say.

Q Okay.

A So I did not know what the issue was.

Q All right. Now up to -- up to this point, my client has not been verbally abusive to either of you gentlemen?

A No.

Q He had not tried to run away from either of you?

A No.

Q He had not tried to kick you or strike you -

A Not whatsoever.

Q --or be aggressive in any manner to you?

A No.

Q And if I am understanding your evidence, in terms of the blow that was struck to my client, you didn't actually see whether it was a closed fist or an open hand?

A I can't say for sure.

4. In examination - in chief Constable Fenimore testified that he struck the respondent after twice telling him to put his arm behind his back. The officer testified he had safety concerns.

Q And was his fist closed, as you are showing us?

A Yeah. As far as I recall, yes, I - his fist was closed, like - like tensing up, right. He was tensing up, bringing his arm up into a flex position, towards sort of the centre of his chest and his jacket. So, at that point, my concern was - you know, is he ready to fight? Is he ready to resist? Is he ready to access a weapon? Is he ready to get away? Is he ready to get back in that vehicle and start driving, again?

5. When it was pointed out that his notes disclosed that he could not even see the respondent's hand, the officer resiled from his earlier testimony that he had seen a closed fist.

..of course that's contradictory, but I can tell you his -- his hand and his arm were - were tense and flexed and up towards the top of his jacket on his chest .

6. The trial judge expressed a lack of understanding as to why the facial strike was warranted.

THE COURT: I'm just going to - because I don't understand this. He has been compliant, other than he hasn't moved his arm. He is not aggressive. You have your companion with you, who is six foot five and 240 pounds, and he is hanging onto his other arm. You have hold of his arm, and it just strikes me that punching somebody in the nose is going to make a bad situation worse rather than better.

[6] I note that in addition to the above, Cst. Fenimore testified on cross-examination as follows:

Q If you look above the wheel well of that driver's side, it appears as though that was generally the location of where my client was facing at the time that you struck him?

A Yes, sir. It was at the back wheel.

Q And it appears as though that part of the vehicle has been wiped down.

A Yes, sir. I took a -- a cloth and wiped his -- wiped his vehicle down, yes.

Q You wanted the vehicle to be wiped down before it was photographed?

A No.

Q Why did you decide to clean up the area?

A Because there was blood all over the vehicle and people were in the area, and they were approaching us and asking us what was going on, and that's what I did it, and I testify to that.

II. ISSUE

[7] The sole issue on appeal is whether the trial judge erred in concluding that a stay of proceedings was the appropriate remedy. There is no issue with regards to the trial judge's finding that the respondent's Charter rights had been violated.

III. ANALYSIS

[8] With regards to standard of review, the Supreme Court of Canada in R. v. Babos, 2014 SCC 16 [Babos], stated:

48 The standard of review for a remedy ordered under s. 24(1) of the Charter is well established. Appellate intervention is warranted only where a trial judge misdirects him or herself in law, commits a reviewable error of fact, or renders a decision that is "so clearly wrong as to amount to an injustice" (Bellusci, at para. 19; Regan, at para. 117; Tobias, at para. 87; R. v. Bjelland, 2009 SCC 38, [2009] 2 S.C.R. 651, at paras. 15 and 51).

- [9] Findings of fact are to receive a high level of deference by appeal courts and are only reversible if it is found that the trial judge made a "palpable and overriding error": Housen v. Nikolaisen, 2002 SCC 33 at para. 10.
- [10] A stay of proceedings is the "most drastic remedy" of a court when faced with a Charter breach as it halts the prosecution, frustrates the truth-seeking function of the court, and deprives the public and victims of the opportunity to see a trial on the merits (Babos at para. 30; R v. Regan, 2002 SCC 12 [Regan] at para. 53).
- [11] However, in rare circumstances, courts are faced with the "clearest of cases" of misconduct where a stay is warranted. These cases fall into two categories: 1) where the conduct compromises the fairness of the trial; and, 2) where trial fairness is not at issue but the misconduct undermines the integrity of the judicial process. This latter category is referred to as the "residual" category (Babos at para. 31).
- [12] The case at bar clearly falls within the residual category, as it does not involve the fairness of the trial going forward, but state misconduct on the part of the police during the arrest. With regards to when a stay is appropriate for circumstances involving the residual category, the Supreme Court of Canada stated in Canada (Minister of Citizenship and Immigration) v. Tobias, [1997] 3 S.C.R. 391 at para. 91:

For a stay of proceedings to be appropriate in a case falling into the residual category, it must appear that the state misconduct is likely to continue in the future or that the carrying forward of the prosecution will offend society's sense of justice. Ordinarily, the latter condition will not be met unless the former is as well -- society will not take umbrage at the carrying forward of a prosecution unless it is likely that some form of misconduct will continue. There may be exceptional cases in which the past misconduct is so egregious that the mere fact of going forward in the light of it will be offensive. But such cases should be relatively very rare.

- [13] The test is the same for both categories, and, as stated in Babos at para. 32, consists of the following three requirements:
 - 1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" (Regan, at para. 54);
 - 2) There must be no alternative remedy capable of redressing the prejudice; and

- 3) Where there is still uncertainty over whether a stay is warranted after steps 1) and 2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (ibid., at para. 57).

See also *R v. McCrea*, 2004 BCCA 229 [McCrea] at para. 17.

- [14] Although the test is the same for the residual category, the focus will be slightly shifted. At the second stage, instead of looking for an alternate remedy that would ensure a fair trial, the goal is to see if there is an alternative remedy that can adequately dissociate the justice system from the state misconduct (Babos at 39). As well, it is often possible in dealing with cases within the main category to not have to perform the final step, as it may be clear that trial fairness has not been prejudiced or another remedy can be used. Moreover, for the main category, the final step "will often add little to the inquiry, as society has no interest in unfair trials." (ibid at para. 40). When it come to the residual category on the other hand, the Court in Babos held:

41 However, when the residual category is invoked, the balancing stage takes on added importance. Where prejudice to the integrity of the justice system is alleged, the court is asked to decide which of two options better protects the integrity of the system: staying the proceedings, or having a trial despite the impugned conduct. This inquiry necessarily demands balancing. The court must consider such things as the nature and seriousness of the impugned conduct, whether the conduct is isolated or reflects a systemic and ongoing problem, the circumstances of the accused, the charges he or she faces, and the interests of society in having the charges disposed of on the merits. Clearly, the more egregious the state conduct, the greater the need for the court to dissociate itself from it. When the conduct in question shocks the community's conscience and/or offends its sense of fair play and decency, it becomes less likely that society's interest in a full trial on the merits will prevail in the balancing process. But in residual category cases, balance must always be considered.

[Emphasis added]

IV. DISCUSSION

- [15] The Crown makes three submissions in order to justify overturning the trial judge's decision: first, that the judge erred in finding that there was "significant" bleeding; second, that the trial judge erred in law by failing to apply all three requirements of the stay analysis; and, third, the judge erred, specifically, in failing to consider the other available remedies put forward by the Crown.
- [16] With regards to the issue of the trial judge's finding that there was "significant" bleeding, I do not find that this is an overriding or palpable error which justifies interference. Cst. Fenimore disagreed with the characterisation that the respondent's nose was bleeding "profusely", but went on to agree that blood went onto the jacket and pants of the accused as well as down the side of the vehicle. Further, when asked about why he cleaned the blood off

the respondent's vehicle prior to it being photographed, Cst. Fenimore stated: "Because there was blood all over the vehicle " [My emphasis]. Based on this evidence, I find that the use of the phrase "significant bleeding" by the trial judge was completely reasonable, and certainly did not constitute a reversible error of fact.

- [17] I will now look at the second and third submissions of the Crown together. To begin, I point out that a judge need not state every detail of his or her thinking, and the fact that the format of a judge's reasons are not laid out like a text book does not justify overturning his or her decision. Although not exactly on point, the Supreme Court of Canada's comments on the sufficiency of reasons in *R v. R.E.M.*, 2008 SCC 51 at para. 17, are useful to bear in mind:

The object [of reasons] is not to show how the judge arrived at his or her conclusion, in a "watch me think" fashion. It is rather to show why the judge made that decision. The decision of the Ontario Court of Appeal in *Morrissey* predates the decision of this Court establishing a duty to give reasons in *Sheppard*. But the description in *Morrissey* of the object of a trial judge's reasons is apt. *Doherty J.A.* in *Morrissey*, at p. 525, puts it this way: "In giving reasons for judgment, the trial judge is attempting to tell the parties what he or she has decided and why he or she made that decision" (emphasis added). What is required is a logical connection between the "what" - the verdict - and the "why" - the basis for the verdict. The foundations of the judge's decision must be discernable, when looked at in the context of the evidence, the submissions of counsel and the history of how the trial unfolded.

- [18] The trial judge in this case references recent case law, making extensive use of *R v. Mohmedi*, 2009 ONCJ 533 [Mohmedi]. That case, in turn, refers to leading Supreme Court of Canada cases on this issue, including *R v. O'Connor*, [1995] 4 S.C.R. 411, and *Regan*, both of which are followed in *McCrea* and cited in *Babos*. The trial judge states that he finds *Mohmedi* very helpful and similar in many respects to the case at bar. It is also important to note that the trial judge states at para. 12: "The Crown, despite being provided with the defence cases, did not provide any cases of its own".

- [19] Though he does not go through the steps found in *Regan*, *McCrea* and *Babos* in order, the trial judge starts his analysis of the appropriate remedy under s. 24(1) by quoting, at paras. 21-22, the paragraphs from *Mohmedi* dealing with the second category of the "clearest of cases", those involving the integrity of the justice system rather than trial fairness. In doing so, the trial judge implicitly addresses the inquiry in the first step of the stay analysis, of whether there will be continued prejudice, showing that he recognizes that such prejudice will be in the form of harm to the integrity of the justice system, not continued prejudice to the accused or the possibility of a fair trial.

- [20] Turning to the second step, the Crown claims that they offered other remedies, including a shorter sentence or the exclusion of evidence "obtained subsequent" to the breach, which the trial judge failed to consider. Clearly the most relevant evidence is the video recording taken by the officers prior to the misconduct, which the Crown does not suggest should be excluded. Furthermore, although the Court of Appeal in *McCrea* has said that a shorter

sentence is a possible remedy in appropriate residual cases, given the seriousness of the misconduct in this case, I am of the view that the use of such a remedy here would still leave the impression with the public that police officers may misbehave in this violent way with no consequence, unless or until the accused is found guilty and sentenced.

- [21] The case at bar is also distinguishable from *McCrea*. In that case one of the officers acted in a menacing and insulting fashion in an interview with the accused, but the Court of Appeal explicitly points out that the accused had not been touched (at para. 26). The Court of Appeal described the conduct as inappropriate, but not "so egregious that continuation of the prosecution would cause the community to take umbrage" (at para. 21). However, in this case the respondent was actually struck in the face while defenseless and with no evidence of his being aggressive. In fact, Cst. Smith described the respondent's demeanor as follows:

He wasn't combative. He seemed just, again, very - almost semiconscious, just very relaxed, disoriented. Didn't know what was going on.

- [22] This makes the actions of Cst. Fenimore more shocking, as can be seen in the following comment from the trial judge:

I'm just going to - because I don't understand this. He has been compliant, other than he hasn't moved his arm. He is not aggressive. You have your compnaion with you, who is six foot five and 240 pounds, and he is hanging onto his other arm. You have hold of his arm, and it just strikes me that punching somebody in the nose is going to make a bad situation worse rather than better.

- [23] I take this statement by the trial judge to demonstrate that he was not speaking in terms of punishment, but rather concern for there being a public perception that the justice system condones such police misconduct. That is, the trial judge is trying to understand why the officers would act in this fashion, and appeared to be concerned with the danger that the public would think that there is nothing stopping such police violence even when it is unprovoked. The perspective of the trial judge was thus appropriately prospective, thinking of the future integrity of the justice system rather than attempting to make amends for past wrongs.

- [24] The trial judge's statement, at para. 24, that he is torn between two evils of letting the accused go or condoning the police's behaviour, implies that he does not see the other remedies as being appropriate in addressing the harm done by Cst. Fenimore's conduct, which requires dissociating the justice system from that conduct. This is the proper test, as stated at para. 39 of *Babos*:

39 At the second stage of the test, the question is whether any other remedy short of a stay is capable of redressing the prejudice. Different remedies may apply depending on whether the prejudice relates to the accused's right to a fair trial (the main category) or whether it relates to the integrity of the justice system (the residual category). Where the concern is trial fairness, the focus is on restoring an accused's right to a fair trial. Here, procedural remedies, such as ordering a new trial, are more likely to address the prejudice of ongoing unfairness. Where the residual

category is invoked, however, and the prejudice complained of is prejudice to the integrity of the justice system, remedies must be directed towards that harm. It must be remembered that for those cases which fall solely within the residual category, the goal is not to provide redress to an accused for a wrong that has been done to him or her in the past. Instead, the focus is on whether an alternate remedy short of a stay of proceedings will adequately dissociate the justice system from the impugned state conduct going forward.

[Emphasis added]

[25] The trial judge clearly turned his mind to the balancing required in the third step of the test. Because the first two steps involve prejudice, a "residual" case will have to go to this third step, and it is this step which takes on additional significance in these cases (Babos at para. 41). At para. 22 the judge correctly references the appropriate test to be considered at the balancing stage in cases of a police officer's use of force, quoting para. 64 of Mohmedi:

In the result, this action is an affront to society's sense of "fair play and decency and disproportionate to the societal interest in the effective prosecution of criminal cases". The integrity of the judicial system will be irreparably harmed if courts were to condone the excessive use of force by law enforcement authorities. This is one of those "clearest of cases" and the charges are stayed.

[26] In the final analysis I conclude that the trial judge turned his mind to the correct test. Cst. Fenimore struck the respondent in the face while he was being held, already "semiconscious" and showing no aggression. Unlike McCrea, this is one of those exceptional cases where the conduct of the officers was so egregious that it would cause the community to take umbrage, so as to warrant a stay of proceeding in order to dissociate the justice system from that conduct.

V. CONCLUSION

[27] I would therefore dismiss the appeal.

"Melnick J."

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Prepared on 25 October 2026 · Esheria