

NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Reddick*, 2018 NSCA 85

Date: 20181102

Docket: CAC 462279

Registry: Halifax

Between:

Alexander John Reddick

Appellant

v.

Her Majesty the Queen

Respondent

Judge: The Honourable Justice Anne S. Derrick

Appeal Heard: September 20, 2018, in Halifax, Nova Scotia

Subject: **Ineffective Assistance of Counsel; Self-defence and Defence of Property**

Summary: The appellant appeals his convictions for aggravated assault and unlawful possession of a weapon for a purpose dangerous to the public peace or for the purpose of committing an offence. He claims he received ineffective representation by his trial counsel and says he was denied a fair trial. He alleges that his lawyer's incompetence led to the trial judge accepting the evidence of an eyewitness and CCTV footage of the incident. He also claims the trial judge erred by failing to consider self-defence and defence of property.

Issues:

- (1) Whether the appellant received ineffective assistance of counsel at trial; and
- (2) Whether the trial judge failed to consider self-defence and defence of property thereby committing an error of law.

Result:

Appeal dismissed. The appellant was capably represented by his lawyer at trial who, faced with a very difficult case to defend, discharged his obligations in a thoroughly competent and conscientious manner. The trial judge considered the appellant's defences of self-defence and defence of property and made no errors in deciding the Crown had established beyond a reasonable doubt that they did not apply.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 10 pages.

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Judges: Beveridge, Van den Eynden and Derrick, JJ.A.

Appeal Heard: September 20, 2018, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Derrick, J.A.;
Beveridge and Van den Eynden JJ.A. concurring.

Counsel: Appellant in person
James A. Gumpert, Q.C., for the respondent
William L. Mahody, Q.C. for Brian Church, Q.C.

Reasons for judgment:

Introduction

[1] Alexander Reddick appeals convictions for aggravated assault, contrary to s. 268(2) of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46, and unlawful possession of a weapon, a cane, for a purpose dangerous to the public peace or for the purpose of committing an offence, contrary to s. 88(1) of the *Criminal Code*. He alleges ineffective assistance by his trial counsel, Brian Church, Q.C. and says he was denied a fair trial.

[2] Mr. Reddick's convictions were for beating Peter Boudreau with a cane and injuring him severely. His claims of self-defence and defence of property were rejected. He was sentenced to four years in prison. He has not appealed his sentence.

[3] Mr. Boudreau did not cooperate with police and died of an overdose before trial. The Crown's primary evidence came from an eyewitness and CCTV footage of the incident.

[4] In Mr. Reddick's submission, his trial lawyer's incompetence led to the trial judge accepting the eyewitness evidence and the CCTV footage. He also claims the trial judge erred by failing to consider self-defence and defence of property.

[5] As the reasons that follow explain, I have concluded Mr. Reddick's trial lawyer represented him capably in the face of overwhelming Crown evidence. I am also satisfied that the trial judge considered self-defence and defence of property and made no errors in deciding the Crown had established beyond a reasonable doubt that they did not apply.

Overview of the Facts

[6] On June 21, 2016, Mr. Reddick and his friend, Manny Tolliver, were outside the Salvation Army building on Gottingen Street when Peter Boudreau approached them. Testifying in his own defense, Mr. Reddick alleged that shortly afterwards, Peter Boudreau stole his prescription medication.

[7] In his trial testimony, Mr. Reddick admitted to using force against Mr. Boudreau by striking him repeatedly with a cane that broke. He claimed he was trying to get his pills back and was defending Mr. Tolliver. He disputed causing

Mr. Boudreau's injuries which consisted of lacerations to his face and head requiring stapling and suturing, a fractured nose, and an injury to his eye.

[8] In direct examination at trial, Mr. Reddick said: "And I hit him a few time, but I just lost it, I just lost it, because this boy, this boy was acting stupid, okay? He was acting out of control." When asked what he was doing using a cane, Mr. Reddick replied: "I was defending myself and my friend [Manny Tolliver]". He later testified that he assaulted Mr. Boudreau because: "...he tried to slam me in the face with a, with a bottle, the glass, and then he, he, he disrespected me, sir. He disrespected me. He made me feel like a punk. Okay?"

[9] As Justice Richard Coughlan noted in his reasons, the assault of Mr. Boudreau had been captured by a CCTV camera on the outside of the Salvation Army building, and witnessed by an independent eyewitness, Harold Mailman. Justice Coughlan described the video surveillance and summarized Mr. Reddick's evidence. He applied the *W(D)* analysis (*R. v. W.(D.)*, [1991] 1 S.C.R. 742) and found inconsistencies between Mr. Reddick's version of events and the video footage. He gave "a great deal of weight" to the evidence of Mr. Mailman. He was satisfied that Mr. Boudreau had been "wounded" by Mr. Reddick. He considered and rejected Mr. Reddick's claims of self-defence and defence of property. He concluded the Crown had proven beyond a reasonable doubt all the elements of the offences of aggravated assault and possession of a weapon for a purpose dangerous to the public peace or for the purpose of committing an offence.

Mr. Reddick's Amended Grounds of Appeal

[10] In January 2018, Mr. Reddick prepared and faxed to the Court a hand-written Amended Notice of Appeal. The grounds of appeal were not legible. In a tele-Chambers call with Chief Justice Michael MacDonald on February 14, 2018, Mr. Reddick clarified his grounds of appeal which, at the direction of the Chief Justice, were then summarized in point form by Tim Morse, the Registrar of the Court, and forwarded to the parties. I have used these grounds as headings to address the issues raised by Mr. Reddick.

The Appellant's Motion to Introduce Fresh Evidence

[11] Mr. Reddick filed an Affidavit in support of his motion for the admission of fresh evidence on appeal. He did not present any evidence beyond the allegations in his Affidavit which are repeated in his grounds of appeal.

[12] Brian Church filed an Affidavit in response strongly refuting Mr. Reddick's allegations of ineffective assistance. He was cross-examined by Mr. Reddick and the Crown.

[13] The Crown also cross-examined Mr. Reddick who chose not to file a factum and relied on making oral submissions at the appeal hearing.

The Issues

[14] There are effectively two issues in this appeal:

1. Did Mr. Reddick's trial lawyer render ineffective assistance?
2. Did the trial judge fail to consider self-defence and defence of property thereby committing an error of law?

Standard of Review

[15] To establish his ineffectiveness of counsel claim Mr. Reddick has to show that his trial lawyer's acts or omissions constituted incompetence and that as a result, there was a miscarriage of justice. A reasonableness standard is used to assess incompetence and there is a "strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance." (*R. v. G.D.B.*, 2000 SCC 22, para. 27)

[16] Mr. Reddick's claim that the trial judge failed to consider self-defence and defence of property is an allegation that he committed an error of law. The standard of review is therefore correctness.

[17] Most of Mr. Reddick's grounds of appeal deal with the ineffective assistance of counsel issue and I will deal with these first.

Trial lawyer's failure to cross-examine a witness on previous testimony (i.e., testimony provided at the preliminary inquiry)

[18] In his Affidavit, Mr. Reddick complained that Mr. Church had failed at trial to cross-examine the eyewitness, Harold Mailman, with respect to inconsistencies with his preliminary inquiry testimony. Mr. Reddick says the cross-examination would have made a difference in the verdict. The Crown appended the transcript from Mr. Reddick's preliminary inquiry to its factum so that this ground of appeal could be assessed.

[19] Mr. Reddick appears to be focused on Mr. Mailman having said at the preliminary inquiry that it was Mr. Boudreau who first approached Mr. Reddick. In his Affidavit Mr. Reddick stated: “He [Peter Boudreau] came up to the appellant, and not the appellant walking up to Boudreau.” Mr. Reddick relies on this as the basis for his claim that Mr. Boudreau should have been viewed as the aggressor.

[20] Mr. Mailman did indeed testify at the preliminary inquiry that before the assault, he observed Mr. Reddick, whom he knew, sitting on a bench when “a white gentleman...came up and they were sitting talking.” The “white gentleman” was Mr. Boudreau.

[21] Mr. Mailman described seeing Mr. Reddick and Mr. Boudreau cross the street and then come back. As Mr. Boudreau started to leave, Mr. Mailman observed Manny Tolliver try to hold him back. He then saw Mr. Reddick come up and start hitting Mr. Boudreau with his cane “until he broke it.”

[22] At trial, Mr. Mailman’s evidence was the same. He identified himself on the CCTV surveillance footage from the Salvation Army building. He testified that he had observed Mr. Reddick hitting Mr. Boudreau with his cane “until it broke.”

[23] Mr. Church testified that his cross-examination of Mr. Mailman at trial was focused on trying to minimize the number of times Mr. Reddick struck Mr. Boudreau with his cane.

[24] Mr. Mailman’s evidence was confirmed by the CCTV footage. As I noted, his evidence was given great weight by the trial judge.

[25] There is no significance in the fact that Mr. Boudreau had approached Mr. Reddick before the assault. A comparison of Mr. Mailman’s evidence from the preliminary inquiry and the trial reveals nothing to support Mr. Reddick’s vague allegation that Mr. Church’s cross-examination was inadequate. Mr. Mailman was an independent eyewitness whose observations were entirely consistent with the scene captured by the CCTV footage. This evidence shows that Mr. Reddick embarked upon an unprovoked attack on Mr. Boudreau after an initial peaceful interaction.

Trial lawyer’s failure to have full disclosure of the surveillance videotape of the crime scene/Trial lawyer allowed fabricated or altered footage of crime scene as evidence/Full surveillance tape will show Boudreau used glass as a weapon to carry out robbery

[26] These three grounds of appeal were referred to extensively by Mr. Reddick in his Affidavit and oral submissions. I will deal with them together.

[27] Mr. Reddick has alleged that the CCTV surveillance video provided to Mr. Church and shown at trial was doctored. He insists it was missing initial footage of Mr. Boudreau robbing him of his medication, and that it was altered to remove images of Mr. Boudreau subsequently assaulting him. Mr. Reddick's Affidavit identifies this latter complaint in these terms:

Trial lawyer allowed the prosecution to not show the full surveillance videotape crime scene. That would show Boudreau using a coffee mug as a weapon and that as being the aggressor in this matter.

[28] Mr. Reddick has accused Mr. Church of not informing the trial judge "that the crime scene videotape was altered" and claimed in his Affidavit that Mr. Church was "well aware" the video surveillance provided in Crown disclosure was "fabricated." He has said Mr. Church will "admit" he found out after the guilty verdict that the Crown used altered CCTV footage at trial to convict him. According to Mr. Reddick, Mr. Church "received the whole full surveillance videotape of the crime scene..." following his contact with Donnie Bennette, an intake worker with the Salvation Army.

[29] The altered video footage was a theme Mr. Reddick emphasized at his trial. He claimed lawyers representing him before Mr. Church had showed him video surveillance that was different from the video that was shown to him while he was testifying.

[30] The trial judge noted Mr. Reddick's testimony about the CCTV footage and found there was no evidence of any other video.

[31] Mr. Church explained in his Affidavit and on cross-examination that Mr. Reddick believed the theft of his prescription medication by Mr. Boudreau would have been captured on other footage he thought existed. Prior to trial, appreciating the importance of this to Mr. Reddick's case, Mr. Church conducted an in-person interview at the Salvation Army to inquire about the possibility of additional video recordings. He was told there were no Salvation Army cameras that looked directly across Gottingen Street where Mr. Reddick claimed the theft of his medication had occurred. The Salvation Army had no video of any interaction between Mr. Reddick and Mr. Boudreau before the beating.

[32] Mr. Church advised Mr. Reddick accordingly, that there was no other surveillance footage.

[33] In his Affidavit and his testimony at the appeal, Mr. Church described Mr. Reddick's allegation that he was aware of video additional to the footage shown at trial as "completely without merit", and "just not true." He was "only ever aware of the existence of one video" and observed that there is "no evidence to support the allegation that the video had been altered."

[34] Mr. Reddick's claim that the CCTV footage was "altered" to eliminate evidence of Mr. Boudreau initiating the violence and make it appear that Mr. Reddick was the aggressor has no basis in reality. There is no evidence that the CCTV footage used in evidence against Mr. Reddick at trial was "fabricated" to create a misleading record of what had occurred.

[35] At Mr. Reddick's request, the copy of the CCTV footage from Crown disclosure provided to him by Mr. Church was played during the appeal. We also watched the CCTV footage used at trial. There was absolutely no difference in the footage: the trial evidence video marked as an appeal exhibit by the Crown was identical to the video footage that had been supplied to Mr. Reddick as disclosure. And while Mr. Boudreau can be seen in the video footage swinging at Mr. Tolliver with a mug, this was after he had been hit by Mr. Reddick.

[36] There is nothing to support Mr. Reddick's claim that Mr. Church was incompetent or complicit in how he dealt with the CCTV evidence. Mr. Church undertook a diligent inquiry for additional footage. There was none.

Trial Lawyer's failure to arrange testimony from Constable "Beaujean Novocosivic" to corroborate his defence of property

[37] Cst. Bojan Novakovic is referenced in the Crown Brief Report. The Crown Brief Report and Cst. Novakovic's notes were entered into evidence at the appeal. There is nothing in Cst. Novakovic's notes to suggest he would have been a material witness. The Crown Brief Report notes that Cst. Novakovic "Can Testify that": "He learned that the altercation started when the white male, now identified as Peter BOUDREAU, attempted to steal REDDICK's Hydromorphone prescription."

[38] In his Affidavit, Mr. Reddick submitted that Cst. Novakovic's evidence "was admissible" and "could have been useful to show that this incident would have been avoided if Peter Boudreau didn't try to robbed me of my medication."

[39] Cst. Novakovic's notes confirm that his principal role was the arrest of Manny Tolliver for his involvement with Mr. Reddick in the altercation with Mr. Boudreau. According to the notes, Mr. Tolliver had been struck on the left side of his jaw with a coffee mug and his left wrist was swollen. He was released with no charges that same day.

[40] Mr. Church testified at the appeal that he had concluded whatever Cst. Novakovic may have learned about the altercation constituted hearsay. He had not called him as a witness because his evidence would not have been allowed. Mr. Church was quite correct: the fact that Cst. Novakovic had not been present for the incident on Gottingen Street meant what he had been told about it was hearsay and inadmissible.

Trial counsel's failure to obtain, via production order, the recording/videotape of a July 8 interview, at the Burnside Correctional Facility, between the Appellant and Constable Hayes, which would corroborate that a robbery occurred and show possible perjury on part of Cst. Hayes

[41] Mr. Reddick had referred to this issue in his testimony at trial. He said that when he spoke with Cst. Jonathan Hayes at the Central Nova Scotia Correctional Facility (Burnside) in July 2016, Cst. Hayes told him the police knew Mr. Boudreau had stolen his medication.

[42] Mr. Reddick has been insistent, in his Affidavit and in submissions on appeal, that Mr. Church should have obtained "a production order" for what he has claimed was a video/audio recording of his meeting in Burnside with Cst. Hayes. In Mr. Reddick's submission, the video/audio recording would prove that Cst. Hayes committed "perjury" at the preliminary inquiry when he testified to having "no memories" of Mr. Reddick being robbed of his medication.

[43] At Mr. Reddick's preliminary inquiry, Cst. Hayes testified about Mr. Reddick calling Halifax police to report the theft of his medication by Mr. Boudreau. He said that Mr. Reddick "alleged the incident started as a result of Mr. Boudreau stealing his medication." It was Cst. Hayes' evidence that he did not know if Mr. Boudreau stole Mr. Reddick's medication; he only knew what Mr. Reddick had told him.

[44] At trial, Cst. Hayes testified that when Mr. Reddick called Halifax police to report the theft of his medication he did not want charges laid. He made the theft

report so he could obtain a replacement prescription from a doctor, should he be released.

[45] Cst. Hayes was not aware of any video in the interview room when he met with Mr. Reddick. He did not record the interview with video or audio.

[46] Mr. Church noted on cross-examination at the appeal that the Burnside interview rooms are video recorded only, with no audio recording. He did not obtain a production order for the video as it “would not have been helpful.” It was his opinion that anything Cst. Hayes would have had to say about his conversation with Mr. Reddick was hearsay and not admissible.

[47] It was entirely reasonable for Mr. Church to have concluded that a video without audio of a meeting between Mr. Reddick and Cst. Hayes at Burnside would have added nothing to Mr. Reddick’s defence. He also correctly understood that anything Mr. Reddick may have said to Cst. Hayes about Mr. Boudreau stealing his medication was hearsay and inadmissible.

Failure to allow Crown to allow medical doctor’s testimony concerning photographs, not taken by Pete Boudreau, but by someone else.

[48] At trial, Mr. Church agreed that Dr. Cox, the emergency department doctor who treated Mr. Boudreau, could speak to the photographs of Mr. Boudreau’s injuries without the requirement of having the photographer attend to verify them.

[49] Mr. Church testified that the same photographs were presented in evidence at Mr. Reddick’s preliminary inquiry. He saw no value in insisting at trial that the Crown call the police photographer. He was focused on getting to the real issues in the case. As the Crown noted at the appeal, there is nothing controversial or incompetent about defence counsel agreeing in these circumstances that the police photographer need not be called to testify.

[50] Mr. Reddick’s attacks on Mr. Church’s competence and the effectiveness of his representation have absolutely no merit. Mr. Church did a thorough job as Mr. Reddick’s trial lawyer. Through Mr. Reddick’s direct examination he brought out his defence that what had happened was just a fight over the theft of drugs. He tried to minimize the evidence from Harold Mailman, and Cst. Hayes, who had studied the CCTV footage, about the number of blows inflicted by Mr. Reddick on Mr. Boudreau. He tried to locate additional video footage, hoping to corroborate what Mr. Reddick had claimed about Mr. Boudreau stealing his medication. He

testified at the appeal that he would have liked to speak with Mr. Tolliver but his process server was unable to locate him.

[51] I agree with Mr. Church's response to Mr. Reddick during cross-examination: Mr. Reddick presented a full answer and defence, it just wasn't accepted by the trial judge.

[52] As the Crown has observed, the CCTV footage was "a damning piece of evidence." It was played for the Court several times during the appeal hearing. Mr. Reddick identified himself in the video carrying a cane. He acknowledged that he can be seen hitting Mr. Boudreau and agreed that he was "beating" him. As for Mr. Reddick's claim that Mr. Boudreau had stashed the stolen pills in the bag he had with him, he agreed with the Crown that he made no attempt to recover his medication from the bag. Mr. Boudreau's bag can be seen in the street. The video shows Mr. Reddick going nowhere near the bag or making any attempt to retrieve anything from it. He is seen concentrating his attention wholly on assaulting Mr. Boudreau.

[53] Mr. Church had a very difficult case to defend. He discharged his obligations to Mr. Reddick in a thoroughly competent and conscientious manner and bears no responsibility for Mr. Reddick's convictions. Mr. Reddick was well-served by Mr. Church's capable, diligent efforts on his behalf. I would dismiss these grounds of appeal.

Trial judge erred in failing to consider defence of property and self-defence

[54] There is no merit to this ground of appeal. The trial judge considered Mr. Reddick's defences of self-defence and defence of property. He correctly stated and applied the law. He found that Mr. Reddick had no defence under section 34 of the *Criminal Code*:

Considering all the evidence, I find the section does not provide a defence to Mr. Reddick. Mr. Boudreau was attempting to leave the area. It was Mr. Reddick who started the assault when Mr. Boudreau had his arms down holding a cup in one hand and a bag in his other arm. Mr. Boudreau did not hit anyone until Mr. Tolliver moved toward him as he tried to leave after being struck by Mr. Reddick.

[55] The trial judge also concluded that section 35 of the *Criminal Code* did not provide Mr. Reddick with a defence:

... I did not find that Mr. Boudreau took any property of Mr. Reddick and, as well, the force used by Mr. Reddick in assaulting Mr. Boudreau was not reasonable in the circumstances of the incident.

[56] The CCTV footage is clear evidence that Mr. Reddick initiated and pursued a violent attack on an unarmed man. He had no basis for a belief that he was under threat from Mr. Boudreau. He broke his cane inflicting significant injuries on Mr. Boudreau in a vicious onslaught. Even if Mr. Boudreau had stolen Mr. Reddick's medication, a claim the trial judge rejected, Mr. Reddick's use of force was excessive.

[57] I recounted at the start of these reasons Mr. Reddick's trial evidence that he "lost it" with Mr. Boudreau because he had been "disrespected." He disclosed this same attitude on appeal, saying that Mr. Boudreau had "got what he deserved." Mr. Reddick continued to claim that Mr. Boudreau stole his pills which he says "provoked" him so that he "did what I had to do." What Mr. Reddick did was commit an aggravated assault against Mr. Boudreau using a weapon. He was competently represented by his lawyer and convicted without error by the trial judge. I would dismiss his appeal.

Derrick, J.A.

Concurred in:

Beveridge, J.A.

Van den Eynden, J.A.