Date: 20200213
Docket: AR19-30-09228

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Mr. Justice Marc M. Monnin
Madam Justice Karen I. Simonsen

B E T W E E N:

HER MAJESTY THE QUEEN	)	***Z. M. Jones***
	)	*for the Appellant*
	)	
Respondent	)	***J. W. Avey***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard:*
MARION E. CERNA	)	***September 30, 2019***
	)	
	)	*Judgment delivered:*
(Accused) Appellant	)	***February 13, 2020***

BEARD JA

I. ISSUES

[1] This appeal addresses, yet again, an allegation that the accused was the victim of a miscarriage of justice on the basis that he was unaware of a collateral consequence of his guilty plea and sentence, resulting in an unfair trial process. That miscarriage of justice is said to have arisen from the failure of his trial counsel (who is not the accused's appeal counsel) to advise him of the effect of the criminal convictions and sentences on his immigration status (see the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the *IRPA*))

and/or the failure to raise those issues in court at the time of his guilty plea and sentencing.

[2] Following his sentencing, the accused, who was a permanent resident of Canada, was served with a deportation order under the *IRPA* from which he has no right of appeal. (Those proceedings are on hold, pending the outcome of these proceedings.) Thus, on the basis of the appeal of his convictions, under sections 686(1)(a)(i) and 686(1)(a)(iii) of the *Criminal Code*, the accused has applied to withdraw his guilty pleas in the Provincial Court of Manitoba (the Provincial Court) and to have all matters returned to that Court.

[3] The underlying guilty pleas were entered by the accused on February 15, 2017, when he pled guilty to theft under $5,000 (section 334(b)), assault with a weapon (section 267(a)), utter threats (section 264.1(1)(a)), breach of a non-communication order under section 516(2) (section 127), and attempt to obstruct justice (section 139(2)) (all under the *Criminal Code*). He was sentenced on April 11, 2017. Because he had been denied bail and had spent 179 days in pre-sentence custody, he was sentenced to what was, in effect, a period of incarceration of time served in pre-sentence custody plus one day for his court appearance for sentencing, followed by a two-year order of supervised probation.

[4] Further, in support of his application to withdraw his pleas, the accused has brought a motion to adduce fresh evidence to establish the grounds.

[5] The Crown has opposed both the motion for fresh evidence and the withdrawal of the pleas.

II. BACKGROUND

The Facts

[6] The accused was facing criminal charges arising out of four different fact situations. The theft under $5,000 occurred on July 7, 2016, when the accused drove two friends to a shopping mall. He and his son were waiting for the friends in his car, when the friends came running out carrying merchandise for which they had not paid, followed by a loss-prevention officer. One man was arrested at the scene. The other threw the items into the car and ran away, while the accused drove off with the items. The accused returned the items to the store later that day, at which time he was arrested and charged. He was later released.

[7] On October 15, 2016, the accused got into an argument with his wife, his sister and his brother-in-law about his drug use. The police were called, and it was reported that the accused had swung a piece of wood at the three family members and uttered threats. No one was injured, and the accused was convinced to put the wood down. He was leaving the scene when he was arrested and charged.

[8] The next day, while in custody, the accused called both his wife and his mother and threatened to kill his wife and brother-in-law, which led to the utter threats charge.

[9] The accused was unable to arrange a bail plan so he was remanded in custody on October 17, 2016, at which time an order was made under section 516(2) of the *Criminal Code* that he not communicate with his wife while he was in custody. In contravention of that order, the accused called his wife from jail 67 times between October 25 and November 10, 2016, reaching

her on seven occasions. The content of the calls, which were recorded, varied from swearing and becoming angry, to asking his wife to drop the charges, to asking her to provide him with a fake address that he could use to support his release. He also called his mother and asked her to find him a fake address to use for a bail hearing. When the calls came to the attention of the authorities, the accused was charged with breaching the non-communication order and attempting to obstruct justice.

[10] The accused elected to plead guilty to all of the offences, which pleas were entered on February 15, 2017. The Crown proceeded by indictment on the charges of attempt to obstruct justice and breach of a non-communication order and summarily on all other charges. There was a comprehensive plea review, at which time the accused acknowledged the facts underlying the offences as presented by the Crown. The accused's immigration status was not mentioned, and no one made any inquiries in that regard. The matter was put over for sentencing and a pre-sentence report was ordered.

[11] The sentencing proceeded on April 11, 2017. By that time, the accused, who had not been released on bail, had been in custody for 179 days including over five months in a treatment facility within the prison, where he was described as a model inmate. Further, he had been accepted into a residential treatment program upon completion of the in-custody program. While the Crown asked for a further period of incarceration, the sentencing judge agreed with the defence that no further incarceration was warranted.

[12] While the pre-sentence report, which the sentencing judge had received, disclosed that the accused was born in the Philippines and that he and his wife had relocated to Canada in 2011, there was no mention of his

immigration status, which was also not mentioned by the Crown in its submissions. The defence referred to certain details from the accused's earlier life in the Philippines, but there was, again, no mention of his immigration status as a factor in sentencing.

[13] The accused was sentenced as follows: theft under $5,000—absolute discharge; assault with a weapon—suspended sentence; utter threats—20 days of pre-sentence custody, credited at 1.5:1 for the equivalent of 30 days; attempt to obstruct justice—one day, being the date of his court appearance, and 159 days of pre-sentence custody, credited at 1.5:1 for the equivalent of 249 days (8.3 to 8.4 months) [Note: Equivalent time should have been 238 days]; and breach of the in-custody non-communication order—one day, being his court appearance, and 80 days of pre-sentence custody, credited at 1.5:1 for the equivalent of 120 days, to be served concurrently to the sentence for attempt to obstruct justice. There was a two-year order of supervised probation with conditions on all offences except the theft under $5,000.

[14] It is not contested that a deportation order was subsequently issued, whereby the accused was ordered to be removed from Canada as a result of certain of these convictions, and that the sentence for the attempt to obstruct justice exceeded more than six months, resulting in him losing his right to appeal the deportation order. As noted earlier, that order is on hold pending the outcome of this appeal.

[15] The application to withdraw the pleas is based on the evidence that is the subject of the motion to adduce fresh evidence. The accused has agreed that, if that motion is denied, the application must fail.

The IRPA

[16] In *R v Wong*, 2018 SCC 25, the Supreme Court of Canada explained the applicable provisions of the *IRPA* and the immigration consequences of a conviction for a serious criminal offence, which are deportation and the loss of the right to appeal the deportation order (see paras 50-51):

- Section 36(1) of the *IRPA* provides that a permanent resident will be inadmissible to Canada on grounds of serious criminality if convicted in Canada of an offence punishable by a maximum term of imprisonment of at least 10 years, or of an offence for which a term of imprisonment of more than six months has been imposed. A hybrid offence is deemed to be an indictable offence, even if it is prosecuted summarily (see section 36(3)). If that happens, the permanent resident can be referred for an admissibility hearing to determine whether that person should remain in Canada or be ordered to leave (see sections 44(2), 45). If the person is ordered to leave and that decision is not stayed or overturned on appeal, that person will lose his or her permanent resident status and must leave Canada immediately (see sections 46(1)(c), 48-49(1)(a)).

- A removal order can be appealed and set aside on the basis of humanitarian and compassionate grounds (see sections 63(3), 67(1)); however, there is no right of appeal where a permanent resident becomes inadmissible following conviction for a crime that was punished in Canada by a term of imprisonment of at least six months (see sections 64(1)-64(2)).

[17] The accused became inadmissible to Canada and subject to deportation because he was convicted of two offences, each with a maximum sentence of 10 years, being assault with a weapon and attempt to obstruct justice, and also because he received a sentence that was more than six months. The imposition of the sentence of more than six months also meant that he had no right to appeal the deportation order.

III. STANDARD OF REVIEW

[18] Both the application to withdraw the guilty pleas and the motion to adduce fresh evidence are original proceedings in this Court. This means that there are no lower-court decisions on those issues to be reviewed and, therefore, no standard of review to be applied.

IV. TEST FOR AN APPLICATION TO SET ASIDE A GUILTY PLEA

[19] The principles applicable in this appeal were recently addressed by the Supreme Court of Canada in *Wong*. They were summarised by Watt JA, for the Court, in *R v Girn*, 2019 ONCA 202 (at paras 50-52, 65-70):

> To be valid, a plea of guilty must be voluntary, unequivocal and informed: *Wong*, at para. 3; *R. v. Quick*, 2016 ONCA 95, 129 O.R. (3d) 334, at para. 4.
>
> **The Informed Guilty Plea**
>
> For a plea of guilty to be *informed*, the accused who enters it must be aware of the nature of the allegations made by the Crown and the effect and consequences of the plea: *Wong*, at para. 3; *Quick*, at para. 4; *R. v. T. (R.)* (1992), 10 O.R. (3d) 514 (C.A.), at p. 519.
>
> An informed guilty plea means that an accused must be aware of the criminal consequences of the plea and the legally relevant collateral consequences. A legally relevant collateral consequence

is a consequence that bears upon sufficiently serious legal interests of the accused. Immigration consequences bear on sufficiently serious legal interests, falling within the legally relevant collateral consequences of a guilty plea: *Wong*, at para. 4.

Setting Aside Pleas of Guilty

An accused who seeks to set aside a presumptively valid guilty plea on the basis that the plea was uninformed because he or she was unaware of a legally relevant collateral consequence at the time of entering the plea, must establish:

i. that she or he was in fact unaware of a legally relevant consequence of entering the plea at the time of pleading guilty; and

ii. subjective prejudice.

See *Wong*, at paras. 6, 9, 19.

To establish subjective prejudice, an accused must file an affidavit establishing a reasonable possibility that he or she would have either:

i. elected to plead not guilty and go to trial; or

ii. plead guilty, but with different conditions.

See *Wong*, at paras. 6, 19.

Of necessity, a reviewing court must assess the veracity of an accused's claim. This inquiry is subjective to the particular accused who seeks to set aside their plea, but allows for an objective assessment of contemporaneous evidence to determine the credibility of the accused's subjective claim: *Wong*, at para. 6.

In connection with the first form of prejudice – where an accused would have pleaded not guilty and opted for trial – there will always be cases in which the accused may have little to no chance of success. However, that is not to say that a remote chance of success at trial means the accused is not sincere in his or her claim that the plea would have been different. Sometimes, certain but previously unknown consequences of a conviction make even a remote chance of success at trial a chance worth taking. Provided a court accepts the veracity of the accused's statement, when tested against the objective

contemporaneous evidence, then the accused has demonstrated prejudice and should be entitled to withdraw their guilty plea: *Wong*, at para. 20.

The second form of prejudice – where an accused would have pleaded guilty, but only on different conditions – will be established where a reviewing court finds that the accused would have insisted on those conditions to enter the guilty plea and those conditions would have alleviated, in whole or in part, the adverse effects of the legally relevant collateral consequence: *Wong*, at para. 21.

On the other hand, the mere possibility of different conditions, without more, is not automatically sufficient. It is only where an accused credibly asserts that she or he, during the plea negotiation phase, would have insisted on additional conditions, but for which she or he would not have pleaded guilty. Said in another way, an accused must articulate a meaningfully different course of action to justify vacating a plea, and satisfy the reviewing court that there is a reasonable possibility that she or he would have taken that course: *Wong*, at paras. 22-23.

A final point concerns the consequences of focusing the prejudice analysis on the subjective choice of the accused. It does not follow from this focus that a court must automatically accept an accused's claim. The credibility of the claim is at large, not a given. The court must measure the accused's claim about what his subjective and fully informed choice would have been against the objective circumstances as revealed by the evidence. Relevant factors in this assessment include, but are not limited to:

i. the strength of the Crown's case;

ii. any concessions or statements from the Crown about its case (for example, a willingness or refusal to participate in a joint submission or reduce the charge to a lesser included offence);

iii. any available defence; and

iv. the strength of connection between the plea of guilty and the collateral consequence (where the collateral consequence depends on the length of the sentence, a court may have reason to doubt the veracity of the claim).

See *Wong*, at paras. 26, 28.

See also *R v Singh*, 2019 MBCA 105.

[20] Given that an accused must establish that he or she was unaware of the consequences of entering a guilty plea and, also, subjective prejudice, it is clear that he or she must file affidavit evidence to do so. While, in most cases, it appears that the admissibility of the evidence is not opposed, in this case, it is.

V. FRESH EVIDENCE MOTION

[21] The fresh evidence that the accused proposes to file consists of two affidavits, being his own affidavit and that of his counsel at trial. At the suggestion of both counsel, the panel reviewed the proposed fresh evidence prior to the hearing. Following argument, the parties were advised that this Court was granting the accused's motion to admit the fresh evidence, with reasons to follow. These are those reasons.

The Test for Filing Fresh Evidence

[22] The admission of fresh evidence on an appeal is governed by section 683(1) of the *Criminal Code*, which states that the court may admit evidence "where it considers it in the interests of justice" to do so. Both parties take the position, and I agree, that the applicable test for the admission of fresh evidence directed to an allegation of trial unfairness leading to a miscarriage of justice is that set out in *R v Richard (DR) et al*, 2013 MBCA 105 (see paras 199-206). More particularly, to be admissible, the fresh evidence must be otherwise admissible, credible in the sense that it is

reasonably capable of belief and relevant to the remedy being sought. It should be noted that the criteria set out in *Palmer v The Queen*, [1980] 1 SCR 759, which govern the admissibility of evidence where the issue on appeal is the reliability of factual findings at trial, do not apply in this case, where the allegation is one of an unfair trial process (see *Richard* at para 204).

Positions of the Parties

[23] The Crown's position is that the evidence should not be admitted because it is not credible. It argues that the new version of facts in the accused's affidavit, particularly related to the theft and assault with a weapon, is irreconcilable with the facts that he accepted on the record when he entered his guilty pleas, which the sentencing judge accepted. It states that, by now refuting those facts and suggesting that he is innocent, the accused is admitting to a willingness to have deceived the Court to achieve his goal of being released.

[24] This deception, it says, renders his current evidence not credible and, for this reason, it should not be admitted.

[25] The accused's position is that it is a well-known phenomenon that innocent people will plead guilty for many reasons unrelated to their guilt. In this case, the accused had served approximately six months in pre-sentence custody, and he was concerned that he and his wife would lose their home if he was not working to help pay their bills. Because he had not been able to secure his release pending trial, he took a practical approach to get out of jail as soon as possible by pleading guilty, believing that this would hasten his release. He argues that this reality should not lead to the rejection of his fresh evidence on the basis that he is now not being truthful.

Analysis

[26] Pomerance J recently addressed the problem of false guilty pleas in *R v McIlvride-Lister*, 2019 ONSC 1869, stating (at paras 57, 59-60):

> The above cases illustrate, in stark and concrete terms, that innocent people sometimes plead guilty; sometimes in the most serious of cases. It has been suggested that this phenomenon may be even more frequent when the stakes are lower, in cases involving less serious crimes.
>
> . . . Likewise, a guilty plea may promise release from custody, a tempting prospect for a detained person waiting several months for a trial. Guilty pleas may be prompted by other factors, such as a desire to protect the family unit, financial limitations, a lack of understanding of the process, or personal vulnerabilities. It has been observed that false guilty pleas may be more prevalent among those who are "marginalized by race, ethnicity, socioeconomic status, intellectual disability or some combination thereof" . . ..
>
> The point is that a person who is factually innocent may perceive a plea of guilt to be the lesser of the two evils – a choice between a proverbial rock and a harder place. The cost of maintaining innocence – be it financial, emotional, familial, custodial or other – may be seen as too high. . . .

[27] While the accused states in his affidavit that he is not guilty of either the theft or the assault with a weapon, a review of the transcript of the proceedings leading up to the accused's guilty plea shows that the underlying facts to which he admitted in court in relation to the theft and the assault with a weapon and those in the affidavits do not differ significantly. As regards the theft, the accused admits that he was driving the "get-away" vehicle and that he drove away from the mall with the stolen merchandise in the back seat. In his affidavit, however, he states that he was at the mall because he had agreed to give his friends a ride there, but that he did not know that they were

planning to steal any merchandise. At both the plea hearing and in his affidavit, it is stated that he returned the merchandise to the store within a short time. As regards the assault with a weapon, he states that he did throw a piece of wood, but he explains that he was only moving it out of the way.

[28] Further, the accused explained that, at the time that he pled guilty, he had been in pre-sentence custody for approximately six months. He was concerned that he and his wife would lose their house because he was not working and she could not afford to pay their bills on her own. He also stated that, while getting out of jail as soon as possible was important, he would have stayed there until his trial if it would increase his chance of remaining in Canada. The evidence is that the accused's wife, son, mother, sister and her family all live in Winnipeg, so the certain prospect of deportation upon being convicted was, arguably, a much more significant deterrent to pleading guilty than was the incentive of getting out of jail earlier. When the two options are weighed, it cannot be said that his evidence that he would not have entered the plea had he known the consequences is not credible.

[29] The panel was of the view, after reviewing the transcript of the plea hearing and the accused's affidavit and considering his explanation, that the new evidence was credible, in that it was reasonably capable of belief, and should, therefore, be admitted for consideration on the appeal. Thus, the accused's motion to adduce the fresh evidence was granted at the hearing.

VI. WITHDRAWAL OF THE GUILTY PLEA

Positions of the Parties

[30] The Crown does not take issue with the accused's assertion that he did not know of the legally relevant collateral consequence of the pleas—that

is, that he would be deported from Canada with no right to appeal the deportation order. That assertion is supported by the transcript of the proceedings, which contains no mention of his immigration status, and confirmed in the affidavit of his trial counsel.

[31] The Crown is opposed to the withdrawal of the pleas on the basis that the accused has failed to establish subjective prejudice. Its position is that, when his assertion of subjective prejudice is considered in the context of the objective circumstances, his assertion that he would have elected to stay in custody and proceed to trial and/or pled guilty with different conditions does not hold up.

[32] The Crown argues that the evidence shows that the accused was desperate to get out of custody, as demonstrated by the many calls and threats that he made to his wife and to his mother while looking for their assistance. It says that this belies his statements that he would have remained in custody awaiting a trial.

[33] It also argues that the Crown's evidence regarding the attempt to obstruct justice charge was very strong, as it consisted of recorded telephone conversations by the accused. Further, the accused acknowledged that the Crown had a strong case, but stated that he would have looked for a different sentence. The Crown argues that the sentence for this offence of over eight months' incarceration (by way of pre-sentence custody) was lenient, and less than the Crown was asking for, so an even lower sentence of less than six months was unlikely.

[34] Finally, the Crown argues that the only pleas that should be considered are those for attempt to obstruct justice and assault with a weapon,

as they are the only two that had immigration consequences. Thus, it states, the evidence related to the other offences, and particularly the theft, is irrelevant.

[35] The accused's position is that all of the pleas should be set aside, not just the two that led to the deportation order. The accused argues that the convictions were sentenced together and that a finding of not guilty on some may well have affected the sentences on the remaining offences.

[36] The accused argues that a sentence of just less than six months on the attempt to obstruct justice conviction would not be out of the range, particularly given that he received a sentence of 249 days, or approximately 8.3 months, without considering the immigration consequences of the sentence. Even though this would have triggered the deportation proceedings, he would have retained the right to appeal a deportation order.

[37] Regarding the accused's desperation to gain his release, the accused argues that that was not at any cost. He wanted to be released to be with and help his family, so it would not make any sense to enter a plea that would ensure his deportation and permanent separation from them.

[38] In response to the Crown's argument that it had a strong case for conviction, the accused points out that *Wong* makes it clear that the accused does not have to show a viable defence to withdraw a plea (see paras 23, 95-98).

Analysis

[39] The issue on this appeal is whether the accused, who has the burden of proof, has established subjective prejudice—that is, that he would have

either pled not guilty or, in relation to some charges, negotiated a different outcome if he had known of the immigration consequences. He has stated that clearly in his affidavit, but the Crown argues that that assertion is not credible when looked at in the totality of the circumstances.

[40] The Crown argues that the accused's evidence that he would have pled not guilty and remained in custody pending a trial is not credible when considered in the context of his extreme efforts to get his family to assist him in obtaining his interim release.

[41] The accused's evidence was that the motivation for his actions to gain his release was his concern for his family and their home, because his income was necessary to meet their bills and not lose that home. That evidence was not challenged on cross-examination. Accepting that evidence, it is not unbelievable that, if faced with deportation and possible permanent separation from his family, he would have chosen a path that had the potential to avoid that outcome, even if it meant remaining in pre-trial custody for a longer time.

[42] The Crown also argues that it had a very strong case on the attempt to obstruct justice charge, so that it was unbelievable that the accused would have pled not guilty. It was made clear in *Wong* that an accused does not have to demonstrate a viable defence in order to withdraw a plea (see para 23). Further, the majority stated (at para 20):

> With respect to the first form of prejudice – where the accused would have opted for a trial and pleaded not guilty – there will of course be instances in which the accused may have little to no chance of success at trial, and the choice to proceed to trial may simply be throwing a "Hail Mary". But a remote chance of success at trial does not necessarily mean that the accused is not sincere in

> his or her claim that the plea would have been different. For certain accused, such as the accused in *Lee* [*Lee v United States*, 825 F3d 311 (6th Cir 2016)], the certain but previously unknown consequences of a conviction made even a remote chance of success at trial a chance worth taking. In such circumstances, and where the court accepts the veracity of his or her statement, the accused has demonstrated prejudice and should be entitled to withdraw his or her plea.

[43] That said, the strength of the Crown's case is one factor that is relevant to determining the credibility of the accused's claim that he would have chosen to proceed to trial (see *Girn* at para 70, at para 19 herein).

[44] On the question of whether the accused would have pled guilty only on different conditions, the majority in *Wong* stated (at para 22):

> The mere possibility of different conditions on its own is not, we stress, automatically sufficient. A plea may be withdrawn only where an accused credibly asserts that he or she would have, during the plea negotiation phase, insisted on additional conditions, but for which he or she would not have pleaded guilty. In short, the accused must articulate a meaningfully different course of action to justify vacating a plea, and satisfy a court that there is a reasonable possibility he or she would have taken that course.

[45] On the attempt to obstruct justice charge, the accused said that he would have negotiated a different sentence. While the Crown asked, at the sentencing, for a further period of incarceration, the sentencing judge sentenced the accused to time served and apportioned that time between two of the offences. Given that the accused received something over eight months for the attempt to obstruct justice conviction, a sentence of just less than six months is, arguably, not out of the range and would have preserved the accused's right to appeal his deportation.

[46] The Crown also argues that the only convictions that lead to deportation are the attempt to obstruct justice and assault with a weapon, so there is no basis on which to overturn the other pleas.

[47] I do not agree with the Crown's argument on this point. In this case, all of the convictions were sentenced together and at the same time. It is trite to state that, generally, a greater number of convictions should lead to a more significant sentence. An acquittal on the theft and assault with a weapon charges would reduce the overall seriousness of the accused's behaviour, and may have had an effect on the sentences for any other convictions. A reduction in the number of convictions may also improve the accused's negotiating position with the Crown in relation to the remaining charges.

[48] Further, the sentence that was imposed was an allocation of the accused's pre-sentence time served. Even if the accused had pled guilty to, or had been convicted of, all of the offences, he could have negotiated or made submissions regarding the allocation of that time among the convictions in a way that would have preserved his right to appeal the deportation order.

[49] In my view, the accused's evidence, when considered in the context of all of the circumstances, demonstrates a reasonable possibility that he would have either entered pleas differently and/or pled guilty only with different conditions, had he been aware of the immigration consequences of the pleas. In particular, the accused's many efforts to gain pre-sentence release (albeit misguided) in order to work and support his family demonstrate his commitment to his wife and son. Further, he clearly had a close relationship with his mother and sister, who had participated with his wife in trying to get him into addiction rehabilitation. While a not guilty plea on the attempt to obstruct justice charge, if the Crown would not recommend a

different sentence, may have been a "Hail Mary" choice, I would find that there was a real possibility that this accused would have chosen that route, rather than entering a plea that was going to result in his deportation with no right of appeal.

VII. DECISION

[50] For these reasons, I would find that the accused has established that he suffered subjective prejudice because he was not advised of the immigration consequences of his guilty pleas, such that his pleas were the result of an unfair trial process and a miscarriage of justice. I would, therefore, grant the accused's appeal, permit him to withdraw his guilty pleas and return the matter to the Provincial Court.

Beard JA

I agree: Monnin JA

I agree: Simonsen JA