IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Barbara M. Hamilton
Mr. Justice Christopher J. Mainella
Madam Justice Jennifer A. Pfuetzner

B E T W E E N :

HER MAJESTY THE QUEEN	)	***Z. M. Jones***
	)	*for the Appellant*
	)	
Respondent	)	***R. N. Malaviya***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard and*
	)	*Decision pronounced:*
FLORA JEAN DUCHARME	)	***April 25, 2017***
	)	
	)	*Written reasons:*
(Accused) Appellant	)	***May 15, 2017***

PFUETZNER JA (for the Court):

[1] The accused pleaded guilty on May 27, 2015 to one count of break and enter to commit robbery, one count of break and enter to commit theft (both charges were laid under section 348(1)(b) of the *Criminal Code*) and other offences. She received a global sentence, based on a joint recommendation, of six years' custody less credit for pre-trial custody.

[2] The accused appealed her convictions for the two break and enter offences and sought to withdraw her guilty pleas. The accused brought a motion to admit fresh evidence in support of her appeal. At the appeal hearing we concluded that it was not in the interests of justice to admit the fresh evidence and that it would not be a miscarriage of justice to deny the request to withdraw the guilty pleas. Accordingly, we dismissed both the

motion to admit fresh evidence and the appeal, with brief reasons to follow. These are those reasons.

[3] The facts giving rise to the first offence were that the accused was part of a group of four individuals that broke into the home of an elderly couple twice in one day. One of the co-accused pushed the elderly man to the ground. The accused used the washroom in the house and carried out a box of canned food. Within two months, the accused was arrested for the second offence when police in The Pas were investigating a break-in and theft from an apartment building storage area. The accused was found carrying stolen goods in the company of another individual.

[4] The accused was represented by experienced criminal defence counsel in dealing with the charges. The record shows that counsel for the accused and the sentencing judge took appropriate steps in the circumstances to ensure that the accused's guilty pleas were voluntary, unequivocal and informed. At an appearance before the sentencing judge about one month prior to the accused entering the guilty pleas, counsel for the accused expressed concern regarding "bizarre" instructions he had received from the accused and requested a forensic assessment, which the sentencing judge ordered.

[5] The forensic assessment was done by Dr. Johnson at the Health Sciences Centre in Winnipeg. His findings included that the accused's "thoughts were organized and logical and did not display evidence of a thought disorder", nor did she present symptoms "consistent with psychosis". Dr. Johnson could not "identify a psychiatric reason why she would be unable to communicate with counsel." She was assessed as fit to

stand trial. She subsequently appeared again before the sentencing judge, entered guilty pleas and was sentenced.

[6] On this appeal, the proffered fresh evidence includes: the accused's affidavit; an affidavit of the accused's former counsel (as well as a second affidavit of that counsel submitted by the Crown); and medical records consisting of two duty doctors' initial assessments and various progress notes dating between July 6, 2016 and February 2, 2017.

[7] The accused's position is that the fresh evidence shows that her guilty pleas were not voluntary, unequivocal and informed because she was confused and unable to express herself sufficiently to make her wishes known to her counsel and the sentencing judge. It is important to note that the accused does not allege ineffective assistance of counsel.

[8] Although the accused raised other issues regarding the validity of the guilty pleas, in our view, the only issue that merits attention is whether the proposed fresh evidence is admissible. If the fresh evidence is inadmissible, the appeal cannot succeed.

[9] The applicable criteria for the admission of fresh evidence are set out in *Palmer v The Queen*, [1980] 1 SCR 759 (at p 775):

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v The Queen* [[1964] SCR 484].
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.

> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
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> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[10] Setting aside the question of whether the proposed fresh evidence meets the due diligence criterion, it fails to meet the other *Palmer* criteria for admissibility for the following reasons.

[11] The affidavit of the accused's former counsel is not such that it could have affected the result of the guilty pleas. He states that he reviewed the police reports and met with the accused several times to discuss her charges and to take instructions. He explains the reasons why he requested a forensic assessment of the accused. There is nothing in the affidavit, or in the supplementary affidavit submitted by the Crown, that points to the guilty pleas being anything other than voluntary, unequivocal and informed. Accordingly, the affidavit evidence of the accused's former counsel fails to meet the fourth *Palmer* criterion.

[12] The medical evidence fails to meet the second *Palmer* criterion of relevancy. This evidence consists of clinical notes, most of which are unsigned, without any context, diagnosis or medical opinion. In addition, the notes post-date the guilty pleas by more than a year. The medical evidence simply provides no assistance in determining the state of mind of the accused at the time of her guilty pleas.

[13] In her affidavit, the accused claims that, at the time of her guilty pleas, she did not have a good memory of the offences, was suffering from

auditory and visual hallucinations and was unable to effectively communicate with her male counsel due to a longstanding fear of men. She says that she did not realize she had pleaded guilty and been sentenced until she wrote to Legal Aid Manitoba to request a new lawyer and was advised that she had no outstanding charges.

[14] The affidavit evidence of the accused fails to meet the third *Palmer* criterion. We are not suggesting that the accused is untruthful. However, there are several factors indicating that the evidence of the accused is unreliable. First, the accused admits several times in her affidavit that she has difficulties retaining information and focusing on conversations. Second, the affidavit has internal contradictions. For example, the accused says she does not have a clear memory of her discussions with her former counsel yet later she says she remembers him discussing the option that she could plead guilty for a jointly recommended sentence. Similarly, although she claims she did not realize she had pleaded guilty and been sentenced, she is nonetheless able to identify and articulate one of the reasons that she entered guilty pleas. Third, the affidavit contradicts the evidence of her former counsel, the record of her court appearances, and the forensic assessment, none of which indicate she was confused or failed to understand the proceedings. Lastly, certain aspects of the accused's memory of the offences are directly contradicted by the evidence read into the record at the sentencing. This includes when the accused entered the house during the first break and enter, and whether the accused was intoxicated during the second break and enter.

[15] We are left with a lack of reliable evidence in support of the accused's claim that her guilty pleas were not voluntary, unequivocal

and informed.

[16] For these reasons, we were of the view that the fresh evidence is inadmissible and the appeal was dismissed.

Pfuetzner JA

Hamilton JA

Mainella JA