Citation: R v Robinson, 2020 MBCA 12 Date: 20200131
Docket: AR17-30-08986

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Michel A. Monnin
Madam Justice Janice L. leMaistre
Madam Justice Lori T. Spivak

B E T W E E N :

	)	***Z. M. Jones***
HER MAJESTY THE QUEEN	)	*for the Appellant*
	)	
Respondent	)	***N. M. Cutler***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard:*
KEVIN BRADLEY ROBINSON	)	***September 10, 2019***
	)	
(Accused) Appellant	)	*Judgment delivered:*
	)	***January 31, 2020***

LEMAISTRE JA

[1] The accused pled guilty to fraud over $5,000. Prior to his sentencing hearing, he discharged his lawyer and brought applications to have a lawyer appointed pursuant to *R v Rowbotham* (1988), 41 CCC (3d) 1 (Ont CA) (the *Rowbotham* application), and to withdraw his guilty plea. The sentencing judge dismissed the accused's applications, imposed a three-month conditional sentence followed by one year of probation and ordered restitution in the amount of $12,700.

[2] The accused appeals his conviction and seeks to admit further evidence on the appeal.

[3] The accused argues that his guilty plea was entered in circumstances which resulted in a miscarriage of justice. He asserts that the sentencing judge erred when he dismissed the *Rowbotham* application and the accused's application to withdraw his guilty plea. He contends that the sentencing judge provided insufficient assistance to a self-represented accused, erred in applying the law, and failed to consider relevant information and evidence.

[4] For the reasons that follow, I would dismiss the accused's motion to admit further evidence. I would also dismiss the appeal.

Background

The Guilty Plea

[5] While working as a marketing manager, the accused received vouchers from his employer redeemable for food items that he was to give away for free. He sold these vouchers to Football Manitoba for $12,700.

[6] While he was represented by experienced defence counsel (counsel), the accused pled guilty to fraud over $5,000. During a comprehensive plea inquiry, he acknowledged the facts of the offence and confirmed that he was pleading guilty voluntarily.

[7] After the sentencing judge accepted the guilty plea, the Crown stayed four additional charges.

The Rowbotham Application

[8] Almost one year later, the accused appeared before the sentencing judge without a lawyer for a hearing to determine whether the accused's right to a fair trial required an order appointing a lawyer to assist him with the

application to withdraw his guilty plea (the first hearing).

[9] When it became apparent that the accused had not filed the necessary financial information and after the accused spoke with a representative from Legal Aid Manitoba, the first hearing was adjourned for the accused to apply for legal aid.

[10] When the matter proceeded (the second hearing), despite appearing without a lawyer, the accused confirmed that he was ready to proceed and that he had provided the Court with the evidence he intended to rely on for the *Rowbotham* application. After being cross-examined by the Crown on his affidavit, the accused requested a further adjournment of the hearing to obtain his corporate tax return. The sentencing judge denied this request based on the accused's representation at the first hearing that he had the financial information he needed to provide and because "the business assets [were] not the only issue".

[11] The sentencing judge dismissed the *Rowbotham* application. In doing so, he stated that he was not satisfied that the accused had "demonstrated a financial need, or exhausted [his] application for Legal Aid".

The Application to Withdraw the Guilty Plea

[12] A subsequent hearing was held on the accused's application to withdraw his guilty plea. The sentencing judge summarised the accused's argument as follows:

> The thrust of [the accused's] argument is essentially three-fold. First, [counsel] pressured him into pleading guilty and at the very least, gave him little if any time to consider the change in plea. . . .

> Secondly, [the accused] suffers from anxiety . . .. He argued his stress and anxiety prevented him from asserting himself and he answered the plea inquiry essentially as he was told to by [counsel].
>
> Finally, [the accused] argued he was not properly informed at the time of his guilty plea, specifically, he felt that at the time of the guilty plea, he did not possess sufficient disclosure from the Crown's office, nor had his counsel reviewed all of the evidence with him in advance of the guilty plea. . . .
>
> All of these factors, [the accused] argued, made him do something he regrets. . . .

[13] The sentencing judge reviewed the transcript and listened to a recording of the plea inquiry in order to assess "the tone and tenor of the questions and answers." He concluded as follows:

> . . . The questions were asked in a straight forward manner, it was at a reasonable pace with no sense of urgency. While I cannot say how [the accused] was feeling from listening to a recording, I did not note any apprehension in his voice, although his answers were succinct.

[14] After considering the accused's testimony, the exhibits filed and the submissions of the parties, the sentencing judge dismissed the accused's application to withdraw his guilty plea. In doing so, he concluded:

> . . . By his own argument, [the accused] made a decision to plead guilty that he regrets. I am satisfied that his plea was voluntary and informed. He had sufficient information and basis for the plea. He accepted the facts. He knew the consequences of making the plea, and he did so voluntarily. . . .

Motion for Further Evidence

[15] The accused filed a motion to admit his own affidavit as further

evidence on the appeal. The affidavit reviews the history of the proceedings and his communication with counsel. It also includes the accused's position on the charges, as well as his personal circumstances prior to entering the plea. The exhibits attached to the affidavit include correspondence and a document waiving solicitor/client privilege.

[16] The accused concedes that "the gist" of the information in the affidavit was before the sentencing judge but argues that "[s]ome of the information in the affidavit has not previously been [provided] and most of it was not clearly or fully explained". He says that the information is relevant to the appeal because it provides information about his intentions, state of mind and circumstances at the time the guilty plea was entered, and demonstrates that the process was unfair.

[17] The Crown opposes the admission of further evidence. It asserts that the accused's affidavit contains nothing new and that the accused admitted this when he was cross-examined on his affidavit. It submits that the essence of the further evidence was before the sentencing judge.

[18] Section 683 of the *Criminal Code* (the *Code*) permits an appellate court to admit further evidence "where it considers it in the interests of justice" (at section 683(1)). Where unfairness in the process is alleged to have resulted in a miscarriage of justice, the criteria in *Palmer v The Queen*, [1980] 1 SCR 759, do not apply. As stated by Cameron JA in *R v Richard (DR) et al*, 2013 MBCA 105 (at para 204):

> When considering evidence directed at the fairness of the trial process, the *Palmer* criteria do not apply. Rather, in determining whether the "interests of justice" are engaged, the court must conduct "an examination of the grounds of appeal raised, the

> material tendered and the remedy sought" which may include "material extraneous to the trial record" so long as it is relevant to the issue, *R. v. Widdifield* (1995), 25 O.R. (3d) 161 (at pp. 169-70) (C.A.).

[19] As I will explain, in my view, the sentencing process did not result in a miscarriage of justice. Despite the accused's assertion that the further evidence amplifies the information that was before the sentencing judge, I am not persuaded that it adds anything material to the record. Accordingly, in my view, it is not in the interests of justice to admit the further evidence and I would dismiss the accused's motion.

Analysis

Ground 1—Did the Sentencing Judge Provide Insufficient Assistance?

[20] The accused argues that the sentencing judge provided him with insufficient assistance on the *Rowbotham* application. Specifically, he says that the sentencing judge did not explain: 1) what kind of documents the Court would be relying on to assess his financial circumstances; 2) that he needed to exhaust the legal aid process; or 3) the risks and benefits of failing to waive solicitor/client privilege.

[21] When an accused is unrepresented, the judge has a duty to provide reasonable assistance and guidance to ensure the proceedings are fair without crossing the line into acting as advocate for the accused. The amount of assistance that a judge should provide a self-represented litigant is discretionary. On appellate review, it is the cumulative effect of any errors made by the judge that will determine whether there was a miscarriage of justice rendering the proceedings unfair (see *R v Tran* (2001), 156 CCC (3d)

1 at para 31 (Ont CA); *R v Olenick*, 2010 MBCA 107 at paras 6-8; and *R v Owens*, 2018 MBCA 94 at para 23).

[22] As explained by Huband JA in *R v Drury and Hazard*, 2000 MBCA 100 at paras 23-36, the factors to be considered on a *Rowbotham* application include factors relating to the nature of the case, such as the complexity of the proceedings and the accused's ability to understand and conduct his or her own defence, as well as factors relating to the financial means of the accused. (See also *R v Dew (EJ)*, 2009 MBCA 101 at paras 25-31.)

[23] The key issue the sentencing judge had to determine on the *Rowbotham* application was whether the accused had the money to retain a lawyer.

[24] In my view, the assistance provided by the sentencing judge regarding the financial information required to support the *Rowbotham* application was more than adequate in the circumstances.

[25] A review of the record demonstrates that the sentencing judge provided the following assistance to the accused. At the first hearing, the sentencing judge explained that the accused "needed to provide a clear picture of [his] financial situation" and that the material he had filed did not include the financial information required for the *Rowbotham* application. The accused assured the sentencing judge that he had documentation with him that demonstrated his "financial capability." In response to an inquiry by the sentencing judge, the accused explained that he had tax returns and documents that were "much more in depth" than bank statements. The sentencing judge also took a recess in order to allow the accused to speak to a representative from Legal Aid Manitoba and then adjourned the hearing to allow him to

apply for legal aid.

[26] In addition to the assistance provided by the sentencing judge, the Crown provided case law in advance, including *R v Austria*, 2012 MBQB 298, that explains the nature of the information required in order to satisfy the financial eligibility criterion on a *Rowbotham* application. The accused confirmed that he had read the cases provided.

[27] At the second hearing, the accused told the Court that he was ready to proceed and that he did not intend to provide any additional evidence. It was only during cross-examination by the Crown that it became clear that he had not fully disclosed his financial circumstances. In my view, despite the assistance provided by the sentencing judge, the accused was less than forthcoming about his financial circumstances.

[28] Regarding the accused's argument that the sentencing judge did not explain that the accused had to exhaust the legal aid process, I am not persuaded that this rendered the proceedings unfair.

[29] The accused filed a letter from Legal Aid Manitoba which informed him that his application had been rejected and that he could appeal the decision rejecting his legal aid application. This was not the accused's first experience with Legal Aid Manitoba. He had previously been represented by counsel from Legal Aid Manitoba and spoke with a representative from Legal Aid Manitoba about obtaining legal aid for the *Rowbotham* application. In any event, this was not the only reason the sentencing judge dismissed the *Rowbotham* application.

[30] The accused also argues that the sentencing judge did not explain

the risks and benefits of waiving solicitor/client privilege for the purposes of the application to withdraw his guilty plea.

[31] In my view, the sentencing judge was careful to ensure that the accused's right to solicitor/client privilege was respected. The accused admitted that he knew counsel could not be called as a witness for the Crown unless he waived solicitor/client privilege and he told the sentencing judge that he did not believe counsel's testimony would be favourable to his case. In these circumstances, it should not have come as a surprise to the accused that the sentencing judge inferred that counsel's evidence would likely have been unfavourable.

[32] In my view, the assistance provided by the sentencing judge was more than adequate to ensure that the proceedings were fair and I am not persuaded that there was any injustice to the accused. I would dismiss this ground of appeal.

Ground 2—Did the Sentencing Judge Err in His Application of the Law?

[33] The accused alleges that the sentencing judge erred when he dismissed the application to withdraw his guilty plea. He argues that the guilty plea is invalid and ought to be set aside because it was not voluntary and was made in circumstances that led to a miscarriage of justice.

[34] The accused also argues that the sentencing judge erred in law by "stating repeatedly that potential defences were not relevant or that it was improper to consider them" and later concluding that the accused did not proffer a valid defence. He asserts that the presence of a viable defence is a valid reason for withdrawal of a guilty plea and relevant to whether the plea

was informed and voluntary.

[35] A valid guilty plea is voluntary, unequivocal and informed (see *R v Desrochers*, 2018 MBCA 55 at para 27; see also *R v T (R)*, 1992 CarswellOnt 117 at para 14 (CA); *R v Wong*, 2018 SCC 25 at para 3; and section 606(1.1) of the *Code*). A voluntary plea is the "conscious volitional decision of the accused to plead guilty for reasons which he or she regards as appropriate" (*T (R)* at para 16).

[36] A judge has the discretion to permit an accused to withdraw his or her guilty plea and this exercise of discretion will not be lightly interfered with on appeal provided it has been exercised judicially (see *Adgey v The Queen*, [1975] 2 SCR 426 at 430; see also *R v Thomas*, 2017 MBCA 23 at para 17, quoting *R v Sunshine*, 2016 SKCA 104 at paras 12-14).

[37] At the hearing of the accused's application to withdraw his guilty plea, the accused asserted that he had a defence to the charge. He proffered evidence that he provided advertising services on billboards and signs on vehicles. He said that the $12,700 was given to him by Football Manitoba for advertising services he provided. He denied that the money was given to him for the vouchers from his employer. He asserted that his original invoices for the advertising services (which he was unable to produce) had been tampered with and that there were credibility issues with the Crown's witnesses.

[38] The accused also argued that he did not have all of the disclosure supporting his defence, including the original invoices, and, therefore, his plea was uninformed.

[39] In dismissing the accused's application to withdraw his guilty plea,

the sentencing judge concluded that the "plea inquiry was comprehensive", that counsel's questions on the plea inquiry "were not assertive or aggressive," and that the accused's "answers were clear and unequivocal." He also concluded that, at the time he entered his plea, the accused "had a full appreciation for what had transpired, for the facts and what the evidence against him was likely to be" and that he did not have a valid defence to the charge.

[40] The sentencing judge found that the requirement to be "informed does not mean every stone has been unturned or that [the accused] ought to be in possession of every scintilla of information." He concluded that "a potential defence is not determinative, as it may be counsel's assessment if it is likely to be successful or not."

[41] In my view, there is no merit to the accused's assertion that the sentencing judge erred in his application of the law.

[42] In his reasons, the sentencing judge correctly articulated the law regarding the validity of the plea, including the requirements of section 606(1.1) of the *Code*. In determining whether he had "real doubt as to the plea's validity," he reviewed the governing principles as explained by Beard J (as she then was) in *R v Manimtim*, 2002 MBQB 235 (at para 9):

> The following principles underlie an application to set aside a guilty plea before sentence:
>
> - a guilty plea entered in open court is presumed to have been voluntary and valid, especially where the accused was represented by counsel;
>
> - the accused has the burden of proof to establish that the guilty plea should be set aside and a plea of not guilty entered;

> - there is no requirement that the facts be read to the accused and that there be an express admission of the elements of the offence before the accused enters a guilty plea, especially where the accused has legal counsel;
>
> - the grounds for setting aside a guilty plea include the following:
>
> (i) the plea was not voluntary and unequivocal;
>
> (ii) the plea was not informed, in that the accused was not aware of the nature of the allegations made against him or her, the effect of the plea and the consequences of the plea; or
>
> (iii) other circumstances make it justified, in the interests of justice, to permit a withdrawal of the plea;
>
> - there is evidence of a viable defence.

[43] The accused argues that the sentencing judge refused to consider whether he had a defence to the charge. I disagree. In my view, the record demonstrates that the sentencing judge considered the defence raised but concluded that it was not viable.

[44] The sentencing judge explained that the accused did not have to prove anything and that the hearing was not about the merits of his case (whether the accused was guilty or not guilty) but, rather, whether his plea should be withdrawn.

[45] When the accused raised his defence, the sentencing judge stated, "Your point is . . . that you have some evidence to show that there was some monies that you would have had owing to you from Football Manitoba, and that you've had this all along?" The accused confirmed that this was the point he was trying to make.

[46] I am not convinced that the sentencing judge erred when he concluded the accused's defence was not valid. While the accused alleged that there were issues with the Crown's case, he produced no evidence to contradict the facts of the offence or support his assertion that he was entitled to the money, and he acknowledged that Football Manitoba did not support his assertion.

[47] Nor am I convinced that the plea was uninformed. I agree with the sentencing judge that the accused "had sufficient information" and "knew the consequences of making the plea" and that he understood the effect of his plea (see *T (R)* at para 14).

[48] Ordinarily, pleading guilty involves certain inherent and external pressures but it is coercive or oppressive conduct or any personal circumstance that deprives the accused of free choice in the decision to plead guilty that renders a plea involuntary (see *R v Moser* (2002), 163 CCC (3d) 286 at para 33 (Ont Sup Ct J)).

[49] The sentencing judge concluded that the evidence did not support the accused's assertions that the plea was involuntary due to pressure from counsel or that he was medically incapable of making a decision as a result of stress or anxiety. I am not persuaded that he erred in doing so on the evidence or that the pressure experienced by the accused in this case deprived him of free choice rendering the plea invalid.

[50] The accused was represented by experienced counsel; a comprehensive plea inquiry was conducted; the accused was able to assert himself in court during the hearings subsequent to the plea inquiry, even when under pressure; and the accused has not raised a viable defence.

[51] In my view, the accused has not established that the sentencing judge erred in his application of the law or in his conclusion that the plea was voluntary and valid. The fact that the accused now has regrets did not warrant withdrawal of the guilty plea and provides no basis to justify appellate intervention. I would dismiss this ground of appeal.

Ground 3—Did the Sentencing Judge Fail to Consider Relevant Evidence and Information?

[52] Regarding the final ground of appeal, the accused argues that the sentencing judge failed to consider emails which supported his assertion that he never intended to plead guilty and only did so due to counsel's influence. He also argues that the sentencing judge erred in law by failing to conduct a subjective analysis when assessing the validity of the guilty plea as required by *Wong* (released after the accused was sentenced).

[53] In my view, there is no merit to this ground of appeal. First, a judge is not required to refer to all of the evidence in his or her reasons. The emails were filed as exhibits and referred to by the accused during his testimony. The issue of counsel's influence on the accused when he entered his guilty plea was a key issue on the application to withdraw his guilty plea and was squarely before the sentencing judge.

[54] Second, *Wong* did not change the law regarding the nature of the inquiry on an application to withdraw a guilty plea. It is an inquiry by the Court into the factual circumstances surrounding the guilty plea (see *T (R)* at para 12; and *Thomas* at para 17). The sentencing judge very clearly considered the factual circumstances, including the accused's personal circumstances, when determining whether the plea was voluntary.

Ultimately, he was not satisfied that these circumstances rose to the level required to affect the accused's ability to freely choose whether to plead guilty.

[55] I would dismiss this ground of appeal.

Conclusion

[56] I have not been persuaded that the sentencing judge erred or that the proceedings were unfair and resulted in a miscarriage of justice. Accordingly, I would dismiss the appeal.

leMaistre JA

I agree: Monnin JA

I agree: Spivak JA