NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Janes*, 2011 NSCA 66

Date: 20110708
Docket: CAC 350487
Registry: Halifax

Between:

Derek Scott Janes

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Chief Justice Michael MacDonald, in Chambers
Motion Heard:	July 6, 2011, in Halifax, Nova Scotia, proceeded by way of written submissions and telephone conference.
Held:	Motion to extend time to file notice of appeal denied.
Counsel:	Derek Scott Janes, appellant self-represented Mark Scott, for the respondent

Decision:

BACKGROUND

[1] Derek Scott Janes has missed the deadline for filing his notice of appeal relative to two charges to which he has pled guilty. He now seeks an order extending that time so his proposed appeal, including the withdrawal of his guilty pleas, may proceed. The charges involve fabricating evidence and witness intimidation, both related to an ongoing domestic dispute. By joint recommendation, a 320 day concurrent sentence was imposed together with three years probation. The exceptional circumstances of this case, including the fact that Mr. Janes is self-represented and incarcerated, prompted me to allow the unusual step of proceeding by way of written submissions and teleconference.

[2] I would dismiss Mr. Janes' motion for the following reasons.

ANALYSIS

[3] Beveridge, J.A. of this court in **R. v. R.E.M.**, 2011 NSCA 8, recently explained our jurisdiction to grant the relief requested. It is rooted in both the *Criminal Code* and our *Civil Procedure Rules*. It involves a review of the reasons for delay and, to a limited extent, the merits of the appeal:

> ¶36 The authority to extend the time to file documents initiating an appeal is found in s. 678(2) of the *Criminal Code*. This section provides:
>
> > 678. (1) An appellant who proposes to appeal to the court of appeal or to obtain the leave of that court to appeal shall give notice of appeal or notice of his application for leave to appeal in such manner and within such period as may be directed by rules of court.
> >
> > (2) The court of appeal or a judge thereof may at any time extend the time within which notice of appeal or notice of an application for leave to appeal may be given.
>
> ¶37 ... Pursuant to this Court's rule-making powers (s. 482 of the *Code*) the *Civil Procedure Rules* provide that the time period to start an appeal is no more than twenty-five days (91.02) as calculated by Rule 94.02 but can be extended under s. 678 or Rule 91.04. Rule 91.04 simply provides:

> 91.04 (1) Any time prescribed by this Rule may be extended or abridged by a judge of the Court of Appeal or the Court of Appeal before or after the time has expired.
>
> (2) A person who seeks an extension or abridgment of a time period in the Code or this Rule may make a motion to a judge of the Court of Appeal or the Court of Appeal under a provision in the Code, such as subsection 678(2), under Rule 2 -- General, or under subsection (1) of this Rule.

> ¶38 Under our previous *Rules, (Nova Scotia Civil Procedure Rules 1972*), Rule 65.05(3) specified that the judge considering the question of extension of time must examine the court file, including the explanation for the delay and the apparent merits of the proposed appeal as indicated in the grounds of appeal, and the report of the trial judge. Despite the change in language, I see no reason not to follow this general approach to the exercise of this discretion.

[4] Mr. Janes' reasons for missing the deadline include the fact that he was waiting for materials from his former counsel and that his efforts are further complicated by the fact that he is both incarcerated and self-represented.

[5] Assuming that I accept Mr. Janes' explanation as satisfactory, the reality is that I see absolutely no merit to his proposed appeal. In saying this, I realize that at this early stage we must be hesitant to deny an extension based solely on a review of the potential merits. Beveridge, J.A. issued a similar caution in **R.E.M.**, *supra*:

> ¶71 An examination of the merits of a proposed appeal should be a limited one due to the frequent lack of a complete record and detailed submissions. It is decidedly not the role of the Chambers judge to engage in measuring the chances of success, allowing the extension if convinced the applicant has a reasonable or strong or some other adjective to measure the merits, but dismiss the application if not so satisfied.
>
> ¶72 However, the applicant must be able to identify and set out a ground that is at least arguable. ...

[6] However, this is one of those exceptional cases where Mr. Janes has failed to raise a ground of appeal that is at least arguable. The closest he comes to articulating a ground of appeal involves the fact that the sentencing judge also heard his bail application and was therefore aware of his criminal record. As such, he would have been inevitably biased.

[7] Yet this judge addressed that very potential without objection by Mr. Janes' counsel:

> THE COURT: This Court has already indicated, I speak in the singular here, I'm already dealing with a trial regarding your client. Credibility is an issue there. Does your client have any problem with this Court dealing with this matter or would you prefer a different judge?
>
> MR. HOWE: None was raised yet, Your Honour. No, Your Honour, he makes no objection at this time to you hearing the evidence.
>
> THE COURT: All right. Thank you. Probably it will be sometime after the April 28th and 29th. The other matters are . . .

[8] Furthermore, the record makes it very clear that these guilty pleas were the product of a resolution conference requested by Mr. Janes so that he could deal with all his outstanding charges and start a new life in Western Canada. His experienced counsel on his behalf stated:

> Mr. Janes has, for the last number of years, been working out West for much of the year. And the recommendation here today has been made, knowing that Mr. Janes has an opportunity at the end of October to go out West. If he misses that opportunity, then he is likely going to be in Nova Scotia for at least the winter and perhaps beyond. And I think it's in Mr. Janes' best interest and Ms. Grant's best interest and a number of people's best interest that that not happen, that he be given the chance to take advantage of that work opportunity out West. He has tended not to have been in trouble when he works out West. There's, I think, one impaired driving charge but that's it. All of the domestic related type activities all originate here in Nova Scotia.

[9] In fact, the judge was careful to address Mr. Janes directly and here is how he responded:

> THE COURT: Mr. Janes, I have heard from your lawyer, sir. Is there anything you wish to say before I pass sentence? You don't have to say anything, but now is your opportunity.
>
> MR. JANES: I believe Mr. Sarson has covered most of it, Your Honour. I'm just hoping to put this all past me and I wish no ill will towards Mrs. Grant and,

> hopefully, we can move on with our lives. And that's about all I have to say right now. Thank you, Your Honour.
>
> THE COURT: Thank you.

[10] In short, some cryptic suggestion of bias in the teeth of clear and voluntary guilty pleas amounts to no more than a frivolous appeal.

[11] I therefore deny the motion.

MacDonald, C.J.N.S.