NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. White*, 2016 NSCA 20

Date: 20160323
Docket: CAC 437500
Registry: Halifax

Between:

Nicholas White

Applicant/Appellant

v.

Her Majesty the Queen

Respondent

Judge:	Bryson, J.A.
Motion Heard:	March 10, 2016, in Halifax, Nova Scotia in Chambers
Held:	Motion to extend time to file Notice of Appeal dismissed.
Counsel:	Applicant/Appellant in person Timothy O'Leary, for the respondent

Decision:

Introduction:

[1] Joseph Walker died horrifically. He was brutally attacked in his apartment on the evening of November 25, 2010. He succumbed to innumerable blows. No single injury was fatal. But they were so serious and so many that he bled to death in minutes. Blood was everywhere in his apartment, but primarily pooled around his body in the kitchen where he was attacked.

[2] The applicant, Nicholas White, was seen leaving Mr. Walker's apartment, covered in blood and wearing some of Mr. Walker's clothing. Neighbours called the police. Mr. White was found shortly thereafter in a nearby cemetery. He was arrested and charged with second degree murder.

[3] With his parents' assistance, Mr. White hired Kevin Burke, Q.C. to represent him. Following a ten day preliminary inquiry in which 18 witnesses testified and various forensic exhibits were entered, Mr. White was committed to stand trial.

[4] A lengthy jury trial was scheduled for September 3, 2013. But the parties had reached an agreement that there would be no trial. The judge was so informed a week before it was to begin.

[5] On September 3, 2013, Mr. White pleaded guilty to manslaughter. He signed an Agreed Statement of Facts which was tendered that day. Sentencing was adjourned to September 11. The trial judge received written and oral submissions from counsel and a forensic report from a psychiatrist, Dr. Scott Theriault of the East Coast Forensic Psychiatric Hospital. The judge was also given a dated pre-sentence report from 2004.

[6] The Crown and Defence made a Joint Recommendation of 12 years imprisonment, less 1:1 credit for Mr. White's three years of pre-sentence custody. The trial judge accepted the jointly recommended sentence.

Mr. White now wants to appeal:

[7] On March 10, 2015, Mr. White notified the Court that he wished to appeal. Of course, he was 17 months too late. So he has applied to extend time to appeal.

[8] Section 678(2) of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46 authorizes the Court of Appeal or a judge of the Court to extend time to appeal. The Rules of Court allow 25 days to appeal. They also permit extensions (Rules 91.02 and 91.04 respectively).

[9] The Court has a discretion to extend time. Various tests inform that discretion. Ultimately an extension must accord with the "interests of justice". Typically the Court will consider whether there was a *bona fide* intention to appeal within the appeal period; any explanation for the delay, and whether there are "exceptional circumstances" favouring an extension, including the merits of the proposed appeal, (*R. v. M.(R.E.)*, 2011 NSCA 8 at ¶39).

[10] Mr. White is self-represented on this motion. Legal Aid refused him assistance. He has filed extensive materials with the Court in support of his motion. He begins with an affidavit with proposed grounds of appeal dated March 15, 2015 and filed with the Court filed March 20, 2015. Then follows a second affidavit filed with the Court on November 19, 2015, a third on January 22, 2016, a factum of the same date and another factum of March 4, 2016. In addition, Mr. White has filed a "sworn" letter from his father, Wayne Bradley White. Finally, Mr. White called his father as a witness. His evidence was very brief and is referred to later in this decision.

[11] In response, the Crown filed a transcript of the September 3, 2013 hearing when Mr. White pleaded guilty, the Agreed Statement of Facts signed by Mr. White, the written and oral submissions of counsel on sentencing, the sentencing decision as well as a copy of the preliminary inquiry transcript and exhibits tendered in that inquiry.

[12] The Crown objects to some of Mr. White's "evidence". His father's letter contains a summary of things allegedly told to Mr. White, Sr. by lawyer Warren Zimmer whom he had initially retained. This is all hearsay and inadmissible.

[13] Mr. White, Sr.'s letter also discusses his dealings with Mr. Burke and repeats many of his son's complaints about which he has no direct knowledge. For example, Mr. White, Sr. has no direct knowledge of any of the points he raises as reasons for an appeal, such as his son's state of mind when he was interrogated, what Mr. Zimmer said to police, that his son was "unconscious" almost 24 hours after his arrest, that Mr. Burke only visited "sparingly" and what passed between them. His letter concludes with an opinion about the effect of medication on his son, Nicholas, saying he was incapable of making an informed decision at the

hearing when he pleaded guilty and was sentenced – events for which Mr. Wayne White was not even present.

[14] Likewise, much of Mr. White's material contains hearsay – by way of example, paragraph 20 of his Affidavit, filed July 22, 2016, is full of hearsay. The Court cannot consider hearsay evidence because it is not evidence of the witness, but of someone else.

Bona Fide **intention to appeal**

[15] Mr. White claims that he formed an intention to appeal "right away" on the day he pleaded guilty. So, one wonders why he would plead guilty in the first place. Or why he would not mention his intention to appeal on the day he pleaded guilty or on the day he was sentenced about a week later. If Mr. White intended to appeal, he kept it to himself.

[16] Mr. White explains his failure to appeal promptly because he did not know how to go about it. But if he formed an intention to do so immediately, he had access to legal counsel for that purpose – he could have asked Mr. Burke how to appeal. He also says he couldn't file his Notice of Appeal within the deadlines provided by the *Civil Procedure Rules* because he didn't have access to a computer/printer to type up his written submissions or revise them. Mr. White adds that he wasn't aware he could extend the time limit for appealing.

[17] If Mr. White truly formed an intention to appeal his guilty plea on the day that he pled guilty, then there is no reason why he could not have said so on September 3 or September 11 when he was sentenced. Almost certainly the judge would not have accepted his guilty plea and the trial which had been scheduled could have proceeded without the loss of time, expense and potentially evidence which Mr. White's present request now risks. Alternatively, the trial could have been adjourned so that Mr. White could hire another lawyer, or prepare to defend himself.

[18] As for the delay in applying to extend time to appeal – Mr. White has been in communication with his lawyer since he was sentenced. He could have asked Mr. Burke how to appeal, even if Mr. Burke may not have prepared the Notice of Appeal himself.

[19] If Mr. White really wanted to appeal in September of 2013, he did nothing about it and his excuse for delay is unsatisfactory.

Arguable Grounds: Principles

[20] A party seeking to extend the time to appeal must establish that there are "arguable grounds" for the appeal. In *M.(R.E.)*, Justice Beveridge adopted the "arguable issue" test expressed by Justice Cromwell in *S.E.L. v. Nova Scotia (Community Services)*, 2002 NSCA 62:

> [15] One relevant consideration is the merits of the proposed appeal. Of course, ***it is not appropriate at this very preliminary stage of a proposed appeal to attempt a searching examination of the merits but, where, as here, the material before the Court permits it, consideration of whether arguable grounds of appeal exist*** is appropriate. An arguable ground of appeal has been defined as a realistic ground, which, if established, appears of sufficient substance to be capable of convincing a panel of the Court to allow the appeal: *Coughlan v. Westminer Canada Ltd.* (1993), 125 N.S.R. (2d) 171 (C.A. Chambers) at 174 - 175.

[Emphasis added]

[21] Justice Beveridge elaborated on what an applicant must demonstrate:

> [72] However, ***the applicant must be able to identify and set out a ground that is at least arguable. I had the advantage of having the whole of the trial record, written and oral argument before the SCAC and the decision of the SCAC judge. Mr. M. has had every opportunity to file evidence and submissions and make oral argument to address the requirement that his proposed appeal have at least one arguable issue***. I would not hesitate to grant an extension of time for Mr. M. if he articulated, or I could discern, any arguable issue upon which leave to appeal might be granted by this Court. I could find none, and accordingly his Motion to extend time to file an Application for Leave to Appeal and Notice of Appeal is dismissed.

[Emphasis added]

[22] In *S.E.L.*, Justice Cromwell noted the absence of any "evidentiary basis" for a proposed ground of appeal that "no consideration was given to placement with neighbours or other members of the child's community".

Exceptional Circumstances - Arguable Grounds of Appeal?

[23] Mr. White makes numerous complaints against the police, the witnesses at his preliminary inquiry, the psychiatrist who assessed him for plea purposes, the Crown, the sentencing judge and his lawyer. These complaints will be discussed in

greater detail below. From a legal point of view, Mr. White is effectively arguing that there has been a miscarriage of justice because:

- His guilty plea was invalid.
- He received ineffective assistance from his counsel.
- He is really innocent.

Was Mr. White's guilty plea invalid?

[24] As a matter of law, it is difficult to withdraw a guilty plea, particularly when the applicant was represented by legal counsel. In *R. v. Murphy* (1995), 138 N.S.R. (2d) 231, the Court explained it this way:

> [10] This Court will permit the withdrawal of a guilty plea only in exceptional circumstances. Such circumstances include, but are not limited to, a basic misunderstanding by the accused of the nature of the charge or the effect of his plea, that he never intended to admit guilt or that there was a serious question as to his mental state at the time of entering the plea. ***Such grounds are difficult to substantiate if at the time of entering the guilty plea, the accused was represented by counsel and the plea made in open court in the presence of the accused***. See *R. v. Melanson* (1983), 59 N.S.R. (2d) 54; *R. v. Boutlier* (1986), 75 N.S.R. (2d) 157; *R. v. Alchorn* (1988), 86 N.S.R. (2d) 371, all decisions of this Court.

[Emphasis added]

[25] A valid guilty plea must be unequivocal, voluntary and informed. An informed plea occurs when the accused is aware of the allegations made against him and the effect and consequences of his plea, (*R. v. T.(R.)*, [1992] O.J. No. 1914 (C.A.), ¶14-16).

Was Mr. White's Plea Voluntary?

[26] Mr. White's submissions and evidence regarding his guilty plea can be summarized in this way:

- He has "limited comprehension".
- He suffers from Post-Traumatic Stress Disorder.
- He wasn't on the right medication at the time of his guilty plea.

- His lawyer pressured him into pleading guilty when "I had no intention to do so".
- He was "manipulated" into signing the Agreed Statement of Facts which are "not substantially correct".
- He was in "a daze at the plea and sentencing".
- He couldn't make sense of the document [Agreed Statement of Facts] he signed.

[27] Mr. White says that he suffers from Post-Traumatic Stress Disorder and that he has "limited comprehension" from a serious head injury when he was 11½ years old and another serious head injury when he was 14½ years old. He says that he has been compromised by medication and has been exhausted by everything he has been through.

[28] On this motion, Mr. White has been able to file several documents containing approximately 50 pages of clearly expressed, handwritten submissions. He reports that by November of 2010 he had completed preparatory courses for university in which he received "the top mark in my class" and had been accepted by St. Mary's University. In court, Mr. White spoke clearly and at length. Whatever health challenges he has faced, Mr. White has the ability to comprehend the charges against him and decide whether to plead guilty to them and what the consequences of doing so would have been. His admission to university in the Fall of 2010 speaks to his intellectual gifts at that time.

[29] But Mr. White says that in September 2013 he was pressured to plead guilty, was uninformed, unable to understand what he was pleading guilty to or what he had signed by way of agreed facts. He was also taking the "wrong medication".

[30] The only evidence providing any support for any of these allegations came from Mr. White's father, Wayne Bradley White, who took the stand briefly and said that when he visited his son in the Correctional Centre, prior to his plea, he was hungry, anxious, had lost weight and had "lucid" and "non-lucid" periods. But Mr. White, Sr. did not attend his son's court appearances. He cannot speak to his state of mind at his son's plea and sentencing.

[31] Before he pleaded guilty, Mr. Burke arranged for Mr. White to be examined by Dr. Scott Theriault whom the sentencing judge described as a "well-known and respected local psychiatrist". Dr. Theriault met with Mr. White for almost 2½

hours on June 23, 2013. Dr. Theriault explained the purpose for his examination and the report he would prepare. His report records:

> He [Mr. White] was advised that any information that he gave to me would be kept in confidence unless you and he decided to use that information in the court process. Mr. White was advised that my purpose was to produce a report that was objective and fair. Mr. White appeared to understand the purpose and intent of the interview and agreed to continue with this understanding.

[32] With respect to Mr. White's intellectual capacity, Dr. Theriault said:

> Mr. White does not show any difficulties in cognition. His speech is a bit slow but he does appear to be of average intellect. He was able to answer questions appropriately and was able to demonstrate a reasonable knowledge of the court process and the issues in which he is currently involved. …Turning to medical-legal matters, Mr. White would, in my opinion be fit to stand trial. He is aware of the charge he is facing and is aware of the potential outcome of that charge. He is aware of potential legal strategies available to him and he reports that he currently has a good relationship with his lawyer. Any psychotic process that he may be experiencing does not seem to impact on his understanding of the court process he is in or his relationship with the various actors within the court process. He is able to communicate clearly so in my opinion he would be fit to stand trial.

[33] On September 3, 2013, Mr. White pleaded guilty to manslaughter and the Crown advised the Court that it would not proceed with the second degree murder charge. Before pleading guilty, the judge questioned Mr. White:

> **THE COURT**: Okay. And before we get to that; Mr. White, I just have some questions for you, very briefly. In relation to your intended plea to that manslaughter charge, I must tell you ... or, sorry, I must ask you first that you're making that plea voluntarily, having had the benefit of legal advice from your counsel. Is that correct?
>
> **MR. WHITE**: Yes.
>
> **THE COURT**: Okay. And you understand that by pleading guilty to the manslaughter charge, you're waiving any right to a trial that you would have regarding the facts which are in the agreed statement of facts.
>
> **MR. WHITE**: Yes.
>
> **THE COURT**: Okay. Thank you. And you understand that the counsel here will then make submissions at a future sentencing date in respect of your guilty plea based on the facts in the agreed statement of facts and any other evidence or information they wish to present to me and upon that your sentence would be determined by me?

> **MR. WHITE**: Okay.
>
> **THE COURT**: You ...
>
> **MR. WHITE**: Yes.
>
> **THE COURT**: You understand that? Okay. And the last thing is that I understand there may be what's called a joint recommendation here. That is that the counsel may have agreed between themselves to recommend the same appropriate sentence, in their view. And you understand that, strictly speaking, I'm not bound to accept that, though I will certainly very seriously consider it.
>
> **MR. WHITE**: Yes.
>
> **THE COURT**: Do you understand that? Okay. And what is your plea then in relation to this earlier drafted second degree murder charge?
>
> **MR. BURKE**: Not guilty to the second degree murder charge, My Lord ...
>
> **THE COURT:** Yes.
>
> **MR. BURKE**: ... and guilty to the included offence of manslaughter.
>
> **THE COURT:** And that's your wish, as well, Mr. White.
>
> **MR. WHITE:** Yes.
>
> **THE COURT:** Just ...
>
> **MR. WHITE:** Yes.
>
> **THE COURT**: Okay. Thank you. You may have a seat, Mr. White. …

[34] Mr. White signed an Agreed Statement of Facts which the judge summarized as follows:

> Mr. White was arrested in the early morning hours of November 26, 2010. He was arrested in a graveyard. The graveyard was not a long distance from 70 Cobequid Road, Lower Sackville, Nova Scotia, where Mr. White lived at apartment number 27. He was discovered by Police Services Dog, Ronan, who tracked his scent there. Cst. Bates, his handler, observed Mr. White to be very quiet while lying on the ground after being brought down in a chase by the Police Service Dog, Ronan. Mr. White was not responding to the dog's continued bite hold on his arm or bicep area. Mr. White's hands, pants and sweater appeared to be covered in blood.
>
> A further search by Police Service Dog, Ronan, discovered an eight-inch bladed knife with a curved wooden handle which, together with a sharpening steel rod, had been laid in a cross-like fashion on a gravestone. Both the knife and gravestone had blood on them as well. Mr. White appeared to be substantially intoxicated and remained in that condition for some hours after his arrest.

Also living at 70 Cobequid Road, in apartment number seven, was Joseph or "Joe" Walker. It had been his 76th birthday on November 25th and a number of persons had come by to celebrate with him. Mr. White did not know Joe Walker other than, it appears, in passing perhaps in their apartment building. Yet Mr. White was also present, having mistakenly knocked at Joe Walker's door and being welcomed to come in, and Mr. White remained after others had left at approximately 10:30 p.m. on November 25th.

To that point the mood in Joe Walker's apartment was easy-going and celebratory. Witnesses who saw Mr. White characterized him as being "really drunk. He had a hard time standing up and talking. His eyes were barely open." And that his eyes were "quite glazed". And, of course, we do have the characterization of one witness that he was, on a scale of one to ten, actually 11 on the intoxication level scale when she last saw him as she left the apartment of Mr. Walker.

At about 11 p.m. one of the tenants heard a sustained period of smashing, crashing and banging noises coming from the area of Joe Walker's apartment. Mr. White was observed leaving Mr. Walker's apartment. Several residents, and the apartment building supervisor, saw Mr. White who appeared to be covered in blood.

The supervisor described Mr. White's demeanour to be calm when, in response to her question, "Nick, what are you doing," as he was leaving Joe Walker's apartment covered in blood, that he responded he was, "Just leaving my buddy's house."

Later, when police entered Joe Walker's apartment, they found many items strewn about and blood everywhere. They located Joe Walker, who had a noticeably large gash to the left side of his naked body facing face down.

Expert analysis by blood splatter analysts, DNA analysts, and toxicologists concluded that Mr. White had been moving about the apartment number seven while slightly bleeding himself, but that the primary source of blood was from Joe Walker. It was Joe Walker's blood that was all over Mr. White and his clothes as well.

Expert toxicology indicated that Mr. Walker himself had elevated levels of alcohol in his blood at the time it was examined.

Dr. Matthew Bowes, Chief Medical Examiner, determined the cause of death was from multiple sharp force injuries consistent with a knife attack to the head, face, neck, chest, abdomen, back, both hands and arms and both legs. He concluded that there were multiple injuries; in fact, in his estimation "too many to count". None of the injuries were immediately fatal. Joe Walker bled to death because of them.

[35] On September 11, the submissions of counsel and Victim Impact Statements occupied about an hour of the court's time. The sentencing itself followed shortly

thereafter. The transcript does not say how much time it took. But it is 39 pages long. Before imposing sentence Justice Rosinski asked Mr. White if he had anything to say. Mr. White replied:

> I am just going to confer with my lawyer. I can't really talk very good, so … I have a lot of mental issues and just … yeah. I was trying to stay out of trouble. I was out of jail and not getting any charges for four years. I liked college, I graduated. I was going to university. And this is just a tragedy for me and my family as well. And sorry it happened, but … okay.

[36] Although he says that the Agreed Statement of Facts was not explained to him and he only saw it and signed it on September 3, the decision to plead guilty and to proceed by way of Joint Recommendation must have been known to Mr. White for some time before that. First, the Theriault Report would not have been released to the Crown or the court without Mr. White's prior consent. Second, Mr. Burke would not have advised the court a week before trial was to begin that a resolution had been reached without Mr. White's agreement. And third, Mr. White admits in his submissions to this Court that he was aware that the Joint Recommendation would be for 12 years. All of that had to happen before September 3.

[37] Mr. White challenges Dr. Theriault's diagnosis that he "likely" suffered from paranoid schizophrenia. He does not dispute Dr. Theriault's opinion that he had a "psychotic disorder". Indeed, he says that both Dr. Kronfli at the Correctional Centre, and his medical advisers at Renous, made the same diagnosis of "psychotic disorder", although of unspecified type. Dr. Theriault's report records that Mr. White was receiving an anti-psychotic medication at the time of his interview in June 2013. Dr. Theriault thought Mr. White was fit to stand trial, give instructions and understand legal advice.

[38] Mr. White is incarcerated but his parents, who have been supportive of him, could certainly have spoken to a psychiatrist in the past three years and, presumably, have obtained whatever evidence that might vindicate Mr. White's current assertions. Nothing supports Mr. White's statements about his state of mind at the time of his plea and sentencing. The record does not suggest any misunderstanding. Dr. Theriault's report – which his own lawyer obtained – contradicts him. No doubt Mr. White felt under pressure at the time of his plea. He was facing a jury trial for second degree murder. But that is not duress: *R. v. Krzehlik*, 2015 ONCA 168, ¶35-36; *R. v. Singh*, 2014 BCCA 373 at 36-37.

[39] Whatever passed between Mr. White and his lawyer, Mr. White was not being pressured in the courtroom when he was asked by the judge whether he was making his plea voluntarily and replied “yes”. Mr. White had prior experience with the justice system and had spent time in prison. He says he pleaded guilty when he intended to appeal. He did not withdraw his plea on September 3 or September 11. He did not fire Mr. Burke. He did not ask for an adjournment. He listened placidly to the case against him. He apologized prior to sentencing although now he says that he was not assuming responsibility but simply expressing regret.

[40] On this record, there is no arguable issue about whether Mr. White’s guilty plea was voluntary.

Was Mr. White’s Plea Informed?

[41] An objective test is applied when determining whether to allow a guilty plea to be withdrawn because the appellant claimed he was uninformed. There must be an objective basis to convince a court that there is a reasonable possibility that a reasonable person in the same circumstances as the appellant would have refused to plead guilty, (*R. v. Riley*, 2011 NSCA 52).

[42] Mr. White submits his plea was not informed – not because he did not know the nature of the allegations against him or the consequences of his guilty plea – but because he did not have full disclosure from his lawyer. In particular, he says the DNA evidence was not disclosed to him.

[43] Mr. White attended the ten day preliminary inquiry. A number of police witnesses testified about what they saw and found on the night of the crime. They described what tests they performed. There was very strong circumstantial evidence that Mr. White had killed Mr. Walker. That evidence included police DNA reports.

[44] The evidence against Mr. White which came out at the preliminary inquiry was summarized in the Agreed Statement of Facts he signed and in the judge’s summary at sentencing (¶34 above).

[45] Mr. White also says that he was unaware that some of the DNA evidence against him was “contaminated”. This is not new. It all came out during Mr. Burke’s cross-examination of police at the preliminary inquiry. The police

confirmed that some blood-stained exhibits were not analyzed because they were not properly isolated and there was a risk of cross-contamination with other items.

[46] Although Mr. White complains about "non-disclosure" of the DNA reports, they formed the foundation of his counsel's cross-examination of police witnesses for which he was present. They were in the courtroom when these witnesses were testifying. They were clearly available to Mr. White's lawyer and to Mr. White, if he cared to ask.

[47] Mr. White protests further that there was some DNA evidence that did not come from him or Mr. Walker. In this Mr. White is correct.

[48] Virtually all of the exhibits containing blood, on which DNA testing was performed, showed the blood of Mr. Walker or Mr. White (Mr. White had cut hands when he was arrested). But four forensic reports noted trace amounts of a third person's DNA.

[49] The outside bottom of Mr. White's right shoe had fragments of "mixed origin". The major DNA component was Mr. Walker's. The minor components were of "mixed profile" suggesting two other individuals. Owing to the "mixed profile" no meaningful comparison could be made. The right elbow of the sweater that Mr. White was wearing was of "mixed origin" with the DNA of at least three individuals. The major component was Mr. White's blood; the minor component was Mr. Walker's. There was a "trace component" of a third individual's DNA. But owing to limited genetic information no meaningful comparison could be made. Finally, the inside pockets of Mr. White's pants at the scene disclosed DNA of three individuals, the major component being Mr. White's blood. Owing to the mixed nature of the minor component, no meaningful comparison could be made.

[50] Trace amounts of third party DNA at a crime scene where the overwhelming DNA was that of the deceased and Mr. White, does not suggest that a third party was involved in this horrendous crime.

[51] Mr. White's accusation that all of this is evidence of a police conspiracy to frame him and his connection of this to perceived police persecution in the past is pure fantasy with no evidentiary foundation.

Ineffectiveness of counsel

[52] To succeed in an "ineffectiveness of counsel" argument, an appellant must show that his counsel's acts or omission were incompetent and that a miscarriage of justice resulted, (*R. v. Messervey*, 2010 NSCA 55; *R. v. Ross*, 2012 NSCA 56).

[53] Mr. White now criticizes Mr. Burke's performance at the preliminary inquiry as incompetent, and complains he did not give him disclosure, accuses him of misleading him, misadvising him, and indeed, "working to put him away". But in June 2013, Dr. Theriault recorded that Mr. White had a "good relationship" with Mr. Burke.

[54] Mr. White complains that Mr. Burke did not advance a *Charter* argument available to him. He says his s. 7 *Charter* rights were denied because a lawyer hired by his parents on the day of his interview by police – Mr. Warren Zimmer – was denied access to him on that day. Mr. Zimmer was said to have wanted a blood test done on Mr. White.

[55] There is no evidence from Mr. Zimmer, but it is clear that Mr. White had the benefit of legal counsel for about 1½ hours before his interview began. Mr. Peter Mancini attended at the courthouse in the early hours of the 26th of November and concluded that Mr. White was not able to appreciate advice or give instructions. He returned at 11 a.m. and spent about 1½ hours with Mr. White.

[56] During the interview process in the afternoon, Mr. Zimmer made an attempt to contact the police. The purpose of a blood test would ordinarily have been to determine Mr. White's state of inebriation, laying the ground work for a manslaughter charge, rather than second degree murder. Of course, that is what the evidence showed and that is the charge to which Mr. White pleaded guilty, with the benefit of Mr. Burke's advice.

[57] Mr. White also alleges that he was drugged on the night of the crime. He says the blood test would have established this. This is addressed further below.

[58] There was no prospect of a s. 7 *Charter* argument succeeding, and Mr. Burke was right not to pursue it.

[59] In this case, there is no evidence whatsoever either that Mr. White's counsel was incompetent or that he suffered any prejudice as a result of Mr. Burke's work on his behalf.

[60] Mr. Burke's cross-examination of witnesses at the preliminary inquiry; his retention of a very skilled psychiatrist to assist Mr. White's defence; use of that evidence; securing the Crown's consent to a manslaughter plea, his oral and written submissions to the court; the advice to Mr. White implied by the guilty plea, all suggest the actions of very competent counsel.

Mr. White says he is innocent:

[61] The Court will extend time to appeal if there is real doubt that the appellant committed the offence for which he pled guilty (*R. v. Melanson* (1983), 59 N.S.R. (2d) 54 (C.A.) at ¶6).

[62] On the one hand, Mr. White says he was innocent and had nothing to do with the killing. Of course he cannot say this from his own recollection because he has no recollection of how Mr. Walker was killed.

[63] On the other hand he says Dr. Kronfli told his lawyer, Mr. Burke, "I was NCR", meaning Not Criminally Responsible. Apart from the fact that this is double hearsay – what Dr. Kronfli is alleged to have told Mr. Burke and what Mr. Burke is alleged to have told Mr. White – it defies belief that Mr. Burke would ignore such professional advice. Moreover, it is completely inconsistent with Dr. Theriault's opinion and the other evidence of Mr. White's drinking and his intoxication on that fateful night.

[64] Mr. White disputes that he was drunk at Mr. Walker's apartment. He was drinking vodka, but not enough to make him inebriated. This contradicts all the evidence of the people at Mr. Walker's, as well as the police evidence regarding his condition later that night.

[65] Then Mr. White attacks the credibility of all the witnesses at Mr. Walker's apartment. He alleges at least one of them had criminal acquaintances and claims she has been deported from the country. Since others there were allegedly her friends or family, their evidence is tainted too. But Mr. White brought a companion with him that night whom he had just met and invited for a drink. She left early, between 8:30 and 9:00, describing Mr. White at that time as an "11 out of 10" on a scale of intoxication. Since this witness is unconnected to anyone else at the apartment, she cannot be discredited by any association of blood or friendship.

[66] All of Mr. White's claims against these witnesses do not rise to hearsay – they are speculation. To take one example, if any of the witnesses had criminal records and had been deported from the country, that should have been easy enough to ascertain and on which to file admissible evidence.

[67] Mr. White protests that he was "drugged" by someone in Mr. Walker's apartment on the evening of November 25 and, presumably, a blood test would have disclosed this drug. Leaving aside the pure speculation of this submission, it is not consistent with Mr. White's evidence. He told Dr. Theriault that he remembers nothing after entering Mr. Walker's apartment. "I go to walk in and I black out". By Mr. White's own account of matters, his amnesia preceded his entry into Mr. Walker's apartment. It happened before anyone there had an opportunity to "drug him".

[68] Mr. White then claims that Dr. Theriault is inconsistent when he says, "I am unable to assess Mr. White's mental state at the moment of the attack on the victim or the time immediately preceding that", but then offers, "His actions appear to have arisen as a result of a loss of impulse control - for reasons unknown - occurring in the context of acute, severe alcohol intoxication rather than as a function of psychosis".

[69] There is no inconsistency here. Mr. White has quoted Dr. Theriault out of context. What he actually said was:

> … I am of course unable to assess Mr. White's mental state at the time of the alleged offense itself. Mr. White claims amnesia for the events preceding and following the death of Mr. Walker. Given the reported level of intoxication as noted by others and given that Mr. White was on a benzodiazepine which could interact with the alcohol and enhance its effects, including the induction of amnesia, I am given to believe that Mr. White's claim of amnesia is a reasonable one. However, as a result of his amnesia I am unable to draw any conclusions as to what his mental state was at the moment of the attack on the victim or his mental state in the time immediately preceding that.
>
> In my opinion, there is insufficient evidence to suggest that even although Mr. White has a mental disorder, that as a result of the mental disorder he was unable to appreciate the nature and quality [of] his actions or to know that they were wrong. His actions appear to have arisen as a result of a loss of impulse control - for reasons unknown - occurring in the context of acute and severe alcohol intoxication rather than as a function of a psychosis.

[70] Dr. Theriault was affirming Mr. White's claim of amnesia, while explaining that it precluded conclusions about his mental state at the moment of the attack. But this would not prevent Dr. Theriault from expressing an opinion about whether Mr. White suffered from a mental disorder that compromised his ability to know right from wrong.

The sentence appeal

[71] The sentence was the result of a Joint Recommendation including agreement that Mr. White would receive 1:1 credit for his three years of presentence custody and nine years on a "go forward" basis. The Joint Recommendation received careful consideration by the trial judge, who recited appropriate law when he implemented it, including this Court's direction regarding joint recommendations: *R. v. A.N.*, 2011 NSCA 21. There is no arguable issue for appeal of sentence.

Conclusion

[72] Mr. White is not credible when he says that he formed an intention to appeal the day that he pleaded guilty. Nor are his explanations for delaying an appeal or a motion to extend time for 15 months credible.

[73] By his guilty plea, Mr. White avoided a second degree murder trial and the risk of a life sentence.

[74] Most importantly, Mr. White has not established that his guilty plea was not voluntary and fully informed. On any objective basis, it was reasonable for Mr. Burke to advise Mr. White to plead guilty and for Mr. White to accept that advice.

[75] Mr. White has failed to raise arguable issues. The interests of justice do not favour an extension of time. The motion to extend time to appeal is dismissed.

Bryson, J.A.