NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Gogan***, 2011 NSCA 105

Date: 20111125
Docket: CAC 346923
Registry: Halifax

Between:

Dillan (Dylan) Gogan

Appellant

v.

Her Majesty the Queen

Respondent

and

Stephanie D. Hillson

Intervenor

Judges:	Saunders, Farrar and Bryson, JJ.A.
Appeal Heard:	October 14, 2011, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Saunders, J.A.; Farrar and Bryson, JJ.A. concurring.
Counsel:	Appellant in person Mark Scott, for the respondent Stacey Gerrard for the Intervenor

Reasons for judgment:

[1] The appellant is incarcerated. Initially Mr. Gogan appealed both his conviction and his sentence. He subsequently abandoned his appeal against conviction.

[2] The case proceeded as an appeal against sentence on the sole ground that his lawyer failed to follow his instructions and that as a result he was sentenced to a federal institution, rather than to a provincial jail which he preferred.

[3] To remedy what he characterizes as a miscarriage of justice, brought on he says by his lawyer's failure to competently represent his interests, he asks that we reduce his sentence so that it may be served in a provincial facility. I decline to do so. In my opinion, the appellant's complaint that his trial lawyer's representation was ineffective, is without merit. On the contrary, her advocacy on behalf of her client was exemplary, throughout. For the reasons that follow I would dismiss the appeal.

Background

[4] In the weeks leading up to the appeal, Mr. Gogan's file was case managed by the panel assigned to hear it. He received explicit advice in how to present his appeal and his motion to introduce fresh evidence at the hearing. He sent three letters to the Registrar, and at the appeal hearing formally swore to the truthfulness and accuracy of their contents. I will quote from his letter dated September 27, 2011 which reiterates his earlier correspondence to the Court and concisely expresses the central issue on appeal:

> My argument for my appeal is my lawyer failed to properly represent me by acting without my instructions. I am filing this appeal on these grounds. My lawyer accepted a sentence that I did not wish her take (sic).

[5] In earlier communications with the Court the appellant waived solicitor-client privilege. His trial lawyer, Ms. Stephanie D. Hillson, then applied for and was granted Intervenor status. She attended the appeal with her counsel. Ms. Hillson swore her affidavit on October 13, 2011. The appellant's and Ms. Hillson's respective affidavits were filed as exhibits. Both the appellant and Ms. Hillson were questioned on their respective affidavits at the hearing. The Court advised the appellant that the fresh evidence would be provisionally admitted

subject to the panel's ultimate disposition when the merits of the appeal were addressed during its deliberations.

[6] At the hearing Mr. Gogan disclosed that further infractions within the institution have added more time to the length of his sentence.

[7] To understand the context in which counsel's advocacy has been impugned it will be necessary to review the background in some detail. My presentation of the facts is gleaned from the record and Ms. Hillson's affidavit. These facts are not disputed by Mr. Gogan.

[8] The appellant retained Ms. Hillson on December 20, 2010, when he applied for Legal Aid representation after being detained by the police and charged with obstruction of a police officer, and two breaches of recognizance. During their initial discussions on December 20, when Mr. Gogan raised concerns respecting his mental health at the time the charges arose, Ms. Hillson asked that he be sent for a psychiatric assessment on all outstanding charges to determine whether a defence of not criminally responsible (NCR) might be available. Mr. Gogan consented to his remand for the duration of the assessment.

[9] On January 5, 2011, Dr. Aileen Brunet of East Coast Forensic Hospital submitted a report to the court confirming that the appellant was criminally responsible at the time the alleged offences were said to have occurred.

[10] The appellant then returned to Provincial Court for plea on January 10, 2011. He and Ms. Hillson met prior to court to discuss how he wished to proceed. Mr. Gogan confirmed his instructions that he intended to waive his right to a show cause hearing. He also advised Ms. Hillson that he wished to plead guilty to the obstruction charge, in addition to one count of breach of recognizance.

[11] As a result of Mr. Gogan's instructions Ms. Hillson spoke with the Crown. She then advised Mr. Gogan that the Crown would be seeking five months' custody for those two charges. In response, Mr. Gogan told Ms. Hillson that he would prefer to receive a penitentiary sentence. The appellant also indicated he expected to receive a time-served credit of 1.5 days for every day spent on remand.

[12] Ms. Hillson told her client that in her opinion it would not be realistic for him to expect remand credit, when one considered his extensive prior criminal record. She said the judge would not likely agree to a penitentiary sentence for only the obstruction and breach of recognizance charges. At that point Mr. Gogan advised Ms. Hillson that he did not wish to enter pleas to any of the matters.

[13] The appellant was also charged with a series of offences said to have occurred at the Cumberland Correctional Facility on November 27, 2010. These charges included intimidation, uttering threats, damage to property and resisting a peace officer. Ms. Hillson suggested that because the appellant was on remand, he might consider entering not guilty pleas to those matters so that he could be given a trial date. If he were later intending to enter guilty pleas to other remaining charges, he could do so at the conclusion of his trial. The appellant accepted counsel's suggestion and the court provided him with a trial date of February 3, 2011. Plea on his other charges was adjourned to that same date.

[14] Ms. Hillson travelled to the Burnside Correctional Facility on January 25, 2011, to meet with the appellant and prepare for his upcoming trial. Having reviewed the DVD and other document disclosure with the appellant, Ms. Hillson advised him that in her opinion there was a strong likelihood of conviction for most, if not all, of the charges stemming from the incident at the Cumberland Correctional Facility on November 27.

[15] During that same meeting Ms. Hillson also advised Mr. Gogan that the Crown had told her it would be seeking 34 months' custody for those charges. She told the appellant that in her view the judge would likely reject the Crown's recommendation and instead conclude that a sentence in the range of 18 to 24 months' custody would be appropriate. Were that prediction to prove accurate, Mr. Gogan instructed Ms. Hillson that he would not agree to a provincial sentence and preferred to receive a federal sentence.

[16] Mr. Gogan's trial began on February 3, and continued on February 16. At the conclusion of evidence and arguments on February 16, the Honourable John MacDougall, P.C.J., found him guilty of all five counts, namely:

1. s. 423.1(3) Intimidation of Adam Gabriel, a justice system participant

2. s. 264.1(1)(a) Uttering threats to Adam Gabriel

3. s. 430(4) Damage to property (t-shirt) belonging to CCC

4. s. 129(a) Resisting Peace Officer

5. s. 129(a) Resisting a Peace Officer

[17] As the appellant had yet to enter pleas on the remaining charges from October 27, 2010, November 26 and December 20, court adjourned for a brief interval for Mr. Gogan to consult with Ms. Hillson and decide how he wished to proceed with the additional charges. During their meeting, the appellant confirmed that he wished to enter guilty pleas to one count of possession of stolen property on October 27, three counts of possession of stolen property from November 26, one count of obstruction of a peace officer on December 20, and one count of breach of recognizance on that same date. Ms. Hillson discussed with her client the requirements under s. 606 of the **Criminal Code** on all matters for sentencing.

[18] After confirming his intention to enter guilty pleas to those charges, Mr. Gogan then told Ms. Hillson that he expected to receive a 1.5 days' credit for every day of the 80 days he had spent in pre-trial custody. He also told his lawyer that based on this credit he should only receive a sentence of time-served plus a period of probation.

[19] At their meeting, as she had on previous occasions, Ms. Hillson told the appellant that his expectations were completely unrealistic. She said it was unlikely, given the changes to the **Criminal Code** in relation to time spent on remand, that he would receive 1.5 days' credit for every day on remand. She also reminded him that the Crown would be calling for a sentence of 34 months' in custody.

[20] Further, Ms. Hillson cautioned the appellant that Judge MacDougall would treat a defence recommendation of nothing more than time-served as patently unreasonable under the circumstances. She recommended asking the judge to impose a custodial sentence in a provincial facility of something in the range of 18 months, instead.

[21] Mr. Gogan told Ms. Hillson that he did not care if the trial judge accepted the sentence urged by the Crown. He repeated his instructions that he would prefer

a federal sentence rather than a lengthy provincial sentence. He insisted that Ms. Hillson ask the judge for time-served followed by a period of probation. All parties then reassembled in open court for the sentence hearing.

[22] Just as Ms. Hillson had advised, the Crown asked that Mr. Gogan be sentenced to 34 months' custody. Ms. Hillson alerted Judge MacDougall to her client's sentencing request, and then wisely followed that suggestion with the submission that if he were not disposed to impose a sentence of time served plus probation, he sentence Mr. Gogan to less time in custody than that proposed by the Crown.

[23] After hearing counsels' submissions, Judge MacDougall delivered a comprehensive and thoughtful oral decision wherein he explained how he arrived at a sentence of 17 months for all charges, save for the two counts that arose December 20. He said he intended to impose sentences on those two remaining counts which would have the effect of Mr. Gogan being required to serve either a lengthy provincial sentence, or a minimum federal sentence. Judge MacDougall asked counsel for the appellant whether her client had a preference.

[24] This takes us to the contentious issue on appeal.

[25] The evident concern and good advice Judge MacDougall had for Mr. Gogan are reflected in his decision and bear repeating. His reasons are not lengthy and I will quote them verbatim. Towards the end, three words will be underlined for emphasis. As I will explain in a moment, these three words may be what first prompted the appellant to complain about the sentence he received:

> **By the Court:**
>
> [1] First off we'll deal with the collateral issues, and that is the DNA order under 423. That will be granted. And also the 109 orders with respect to 423 and 264, both granted for lifetime. And with respect to the victim surcharge, that will be suspended or waived.
>
> [2] With respect to the request for time served and the imposition of a period of probation, that I'm afraid is not a realistic response to the issues that have obviously been accumulating, and indicate a lack of control by Mr. Gogan with respect to the commission of criminal offences.

[3] I'm familiar with fetal alcohol spectrum disorder, and the diagnosis with respect to people who are affected by that, and as Ms. Hillson has said, the symptoms that she put forward are all symptomatic of that type of a problem that is brought upon people who are born following the influence of alcohol on their system prior to birth. It is unfortunate, but it is a fact, that there are numerous people in our jails that have suffered as a consequence of those particular problems. The difficulty is, what do you do? The motivation has to be there for that person to take control of his life, and without the motivation, there is virtually little opportunity or prospect of change in criminal behaviour. So there has to be, number one, a motivation to change, but also society has to be protected. If you have a number of people running around without, for one reason or another, without the ability to control what they do and acting impulsively in committing criminal acts, then it is an invitation to mayhem. There's not going to be anyone that is safe from having their property invaded, and their safety or security invaded, by individuals who are not going to be held accountable for what they do. You have to be accountable for your conduct. The degree of accountability has, in some way, to be measured with the culpability.

[4] I'm not sure what it is that is required to keep Mr. Gogan in such a state where he can control his impulses. He has obviously been seen by various medical practitioners, and he has listed the medications that have been prescribed for that purpose. If he has the medications, if he has the diagnosis and people have told him what is the underlying cause of his criminal behaviour, then it is his responsibility to surround himself with people who are going to assist him in not committing that type of behaviour. If it's medication that assists, with respect to the ADHD and the impulsive behaviour and the Ativan, et cetera, then it's up to him to make sure that he takes that medication, such that he is in a position to give himself the best opportunity of not becoming involved in continued criminal behaviour. But over a very short period of time, he has accumulated a number of offences, all of which are repetitious of the record that he has accumulated, and indicate that at least up to December 20th, he is not in control of his life. What has happened since December 20th is that he has been incarcerated, and therefore has not committed further offences.

[5] He indicated on the stand that he was prepared to go ahead and change. The actions of November 27th, the trial that I have just completed, suggest that change is not in the offing, that he, once he gets into a situation where he doesn't get his own way, he acts out, and for some strange reason thinks that by acting out, he is going to end up getting his own way.

[6] My understanding of the appropriate way to deal with persons such as himself that have problems with impulse control, until something better comes along is, number one, to look at my responsibility under section 718 of the *Criminal Code* and protect society, and number two, hold those persons who have

issues with respect to criminal conduct and impulsivity accountable for what they do, but at the same time taking into account the challenges that they have. There is a balance there that has to be met, that hopefully will recognize, in a measured way, what they have done as being wrong, hit them with the deterrence and denunciation, but hold out some hope that there might very well be the opportunity for rehabilitation.

[7] It may very well be that Mr .Gogan doesn't turn the corner for a few years yet. I don't know. But to suggest that this series of offences is sufficiently dealt with by recognizing time served and putting him yet again out on probation, in my opinion doesn't recognize or take into account the history and the number of offences and the repetition that has yet to be demonstrated as under control.

[8] The appropriate disposition, in going through the various offences, October 27th, two months for the theft under would be a reasonable disposition. The November 26th, looking at the time and the various offences, three months on the first and second, consecutive and consecutive, three months concurrent on the third. With respect to the November 27th incidents, six months with respect to the 423, the intimidation. Six months with respect to the second, the threat charge, but concurrent. One month consecutive with respect to the destruction of the shirt. And with respect to each of the resisting charges, one month consecutive and consecutive. With respect to the charges under section 145, yet again aggravating because he's out on a recognizance, the question now becomes whether it's a very lengthy provincial time or federal time. There is, on occasion, a preference. I don't know what the preference is.

MS. HILLSON: Mr. Gogan has expressed to me a preference for federal time, Your Honour.

[9] All right. Then with respect to the last two charges, and taking into account all of the time which he has served, and taking into account also totality, there would be an additional seven months, I believe would bring us to 24 months, which would be three and four months consecutive on each of the last two. What I have is two months on the first, six months in total on the second, that's three and three and three concurrent, but six months in total for the November 26th matters. That gets us to eight. Six for the 423 charge, consecutive. That's to 14. One month on each of the others, except for the threat. That's up to 17 months.

MR. BAXTER: Oh okay, I'm sorry. I thought I heard you say concurrent. So those are consec (sic) okay.

[10] Consecutive, yes. And then it would be four months on the 129 charge, three months on the 145, once again consecutive, to bring us up to the 24 months.

(Underlining mine)

[26] The appellant represented his own interests on appeal. He did very well and was commended by the panel at the conclusion of the hearing. He asked that the audio recording of the hearing before Judge MacDougall in Provincial Court in Amherst on February 16, 2011 be replayed in open court. That was done. The appellant complained there were "differences" between the judge's signed decision found in the Appeal Book (which I have reproduced above) and what was *actually* said at his sentencing hearing. After listening to the audio transcription of the hearing, the panel was satisfied that Mr. Gogan's recollection, in this respect, was right. On those three occasions where I have underlined the word "consecutive" in the typed decision, Judge MacDougall actually said "concurrent" during the course of his oral delivery. This is what the appellant and everyone else would have heard in the courtroom. It is obviously what prompted the Crown Attorney Mr. Baxter to say:

> Oh okay, I'm sorry. I thought I heard you say concurrent. ...

[27] But, none of this matters. Judge MacDougall must have realized that he had misspoken and then corrected those slips before signing the typed decision that forms part of the appeal book. There can be no question that the judge intended to say "consecutive". During the short pauses that are evident when the audio recording is played, the judge is obviously counting up the individual sentences which led him to his interim total "That's up to 17 months." At that point he paused again to inquire of counsel for the appellant whether her client had a preference for provincial or federal "time" for the two remaining charges for which he had not yet sentenced the appellant, namely, the s. 129 charge and the s. 145 charge. Judge MacDougall wanted to know whether Mr. Gogan wished to serve his sentence in a federal institution, in which case the judge would have imposed a global sentence, in the aggregate, of two years. Had the appellant indicated a preference for provincial time it is certain that Judge MacDougall would have ordered a global sentence which was less than two years, by at least a day. After obtaining Ms. Hillson's advice that her client expressed to her "a preference for federal time", Judge MacDougall concluded his sentencing remarks:

> ...then it would be four months on the 129 charge, three months on the 145, once again consecutive, to bring us up to the 24 months.

[28] Having established the context I will now address the merits of the appeal. The appellant's only complaint may be simply stated. He says his lawyer did not consult with him before she agreed to federal incarceration on his behalf. This, he says, amounts to ineffective counsel requiring this Court to intervene to prevent a miscarriage of justice.

[29] Mr. Gogan bears the burden of demonstrating that his lawyer's acts or omissions amounted to incompetence. Incompetence is measured against a reasonableness standard. The appellant must demonstrate that counsel's ineffective representation caused a miscarriage of justice. A miscarriage of justice occurs if we are satisfied that counsel's ineffective representation undermined trial fairness, or the reliability of the verdict. **R. v. Fraser**, 2011 NSCA 70. On the facts of this case, Mr. Gogan bears the onus of demonstrating that his trial counsel acted independently of, and contrary to, his instructions in order to displace the strong presumption of competence in favour of counsel.

[30] As I explained at the outset, Mr. Gogan took the stand to swear to the truthfulness of the correspondence he had filed with the Court and also to give evidence with respect to these issues. He waived solicitor-client privilege. Ms. Hillson was then given formal Intervenor status. Her affidavit was received. She, too, was questioned by the appellant, and the panel under oath.

[31] Given the allegations in this case, we cannot assess the strengths of the appellant's complaint on the existing record. In my opinion, the fresh evidence ought to be admitted so that we will be able to properly address the merits of this appeal. Accordingly, I will admit Mr. Gogan's and Ms. Hillson's affidavits, together with their *viva voce* testimony as fresh evidence in this case. It will be taken into account when deciding the outcome of this appeal. See generally **R. v. Fraser**, **supra**; **R. v. West**, 2010 NSCA 16; and **R. v. Hobbs**, 2009 NSCA 90.

[32] Having carefully considered the record and all of the circumstances, the appellant has failed to persuade me that Ms. Hillson's advocacy was ineffective. On the contrary, I have no doubt that the legal representation she provided was meticulous, professional and exemplary throughout.

[33] I think it important to mention some of the circumstances unique to this case and this offender. Mr. Gogan has a lengthy record for which he has received significant periods of incarceration. His familiarity with "the system" was obvious

from the way in which he handled himself and responded to the panel's questions during the hearing. In Provincial Court counsel stood beside him while he personally entered his guilty pleas. He was present in court when all submissions were made on his behalf. He was present when the facts were offered and not disputed. He was present when his lawyer said he preferred to be incarcerated federally in the event that his submissions on sentence were rejected. The record of proceedings below demonstrates that Mr. Gogan did not appear shy or reticent in addressing the court. His representation by the same counsel spanned some 2½ months, with numerous court appearances in that interval. At trial, on one occasion, the appellant motioned to speak with his lawyer, to which she responded and supplemented her direct examination of a witness.

[34] At the sentencing hearing Ms. Hillson outlined numerous factors in mitigation of her client's moral culpability. She put the "pitch" to the court for time served on her client's instructions. She explicitly stated that federal incarceration was the express wish of her client in the alternative to his primary argument. He did not object. I accept Ms. Hillson's affidavit and *viva voce* testimony as an accurate reflection of the instructions she received from her client and meticulously followed throughout. He never waivered from those instructions or signalled that he had changed his mind. In such circumstances, Mr. Gogan's complaint that Ms. Hillson acted in contravention of his instructions, is simply untenable.

[35] Judge MacDougall's anticipation that the appellant might, in fact, prefer federal time was based on a vast judicial experience. The judge undoubtedly felt that not only were programming and conditions often significantly better; provided one's behaviour is satisfactorily managed, chance for release tends to be more favourable.

[36] Judge MacDougall recognized the terrible disadvantages Mr. Gogan experienced growing up, yet noted that many people within the criminal justice system have faced and overcome similar challenges. The judge's task was to balance Mr. Gogan's prospects for rehabilitation against the need to protect society, especially in light of Mr. Gogan's most recent behaviour which showed an accumulating lack and loss of control. Judge MacDougall concluded that incarceration was necessary to account for the seriousness of the offences, safeguard the community and provide structure in Mr. Gogan's life. This would enable him to get help, should he wish to accept it. Recognizing that the global

sentence he intended to impose on all counts might well straddle a federal period of incarceration, the judge asked counsel whether Mr. Gogan had a preference. I am satisfied that the answer given by Ms. Hillson was entirely in accordance with her client's instructions.

Conclusion

[37] The appellant is at a crossroads. He is 22 years of age. Despite his relative youth, he has amassed an extensive criminal record, which includes crimes of violence and other serious offences. A hard life, difficult upbringing, poor choices and bad company have all led to the place where Mr. Gogan now finds himself. But professional treatment and guidance have and will continue to be offered. Services, courses, counselling and dedicated staff are all available within the institution, should Mr. Gogan decide to avail himself of those opportunities and take the first step in turning his life around. A helping hand has been extended. Mr. Gogan must decide whether he chooses to grasp it.

[38] The appellant's complaint that the legal representation he received from his lawyer was ineffective, is rejected. Nothing here gives rise to a miscarriage of justice. I would dismiss the appeal.

Saunders, J.A.

Concurred in:

Farrar, J.A.

Bryson, J.A.