C.A.C. No. 125528

NOVA SCOTIA COURT OF APPEAL
Cite as R. v. Pettigrew, 1996 NSCA 17

BETWEEN:

DENNIS WAYNE PETTIGREW Appellant - and - HER MAJESTY THE QUEEN Respondent	Appellant not appearing (in-mate) Kenneth W.F. Fiske, Q.C. for the Respondent Application Heard: March 28, 1996 Decision Delivered: March 29, 1996

BEFORE THE HONOURABLE MR. JUSTICE FLINN IN CHAMBERS

FLINN, J.A.:

On February 23rd, 1996, the appellant, presently incarcerated and not represented by counsel, filed a notice of appeal against conviction and sentence imposed upon him nine months earlier, in May 1995. Included with the notice of appeal is an application by the appellant for an extension of time within which to file the notice of appeal.

The notice of appeal is eight months overdue. The Crown does not vigorously oppose the application. However, counsel for the Crown expresses concern that too much time has passed, without justification.

Civil Procedure Rule 65.05 deals with extension or abridgement of time in criminal appeals. **Rule 65.05(1)** gives the Chambers judge of this Court a discretion to, among other things, extend the time for filing a notice of appeal.

Rule 65.05(3) provides as follows:

> "65.05. (3) A Judge on an application to extend or abridge time, shall examine the court file, including the explanation for the delay or the reasons in support of abridgement and the apparent merits of the proposed appeal as indicated by the grounds of appeal set forth in the notice of appeal and the report of the trial judge upon the matter and shall determine whether an extension or abridgement of time should be granted."

While, in considering how I should exercise my discretion in this matter, I am obliged to consider the matters set out in **Rule 65.05(3)**, it ultimately comes down to a question of whether justice requires that the time be extended. This is the basis on which this Court deals with applications to extend the time for filing a notice of appeal in civil appeals (**Tibbetts v. Tibbetts** (1992), 112 N.S.R. (2d) 173 and **Morash v. Hanna** (unreported September 5, 1995 - C.A. No. 119355)). I see no reason why this should not apply to criminal appeals as well.

I have reviewed the record of the court below.

On May 18th, 1995, the appellant appeared before Chief Judge MacDonald of the Provincial Court of Nova Scotia, without counsel, and pled guilty to four counts in one

Information and to three counts in a second Information. Six of the counts were under s. 212 of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46 (the **Code**) dealing with Procuring. The seventh count was under s. 264(1) of the **Code** relating to Criminal Harassment.

The charges involved three different females, one of whom was under the age of 18 during the period covered by one of the counts. This is a separate offence under s. 212(2) of the **Code**. The counts, in the two Informations, included living off the avails of prostitution (s. 212(1)(j); Procuring a person to become a prostitute (s.212(1)(d); Exercising control, direction or influence over a prostitute (s. 212(1)(h) and Criminal Harassment (s. 264(1)).

These were offences which Chief Judge MacDonald described as a system on the appellant's part:

> ".....which involved the procurement of young girls, some very young girls, the use of force and intimidation to retain their services."

Chief Judge MacDonald further described these offences as being:

> ".....at the high end of the range of these kinds of offences. There was force, there were threats, and this was over a period of time and so they call for strongly deterrent sentences."

In sentencing the appellant, Chief Judge MacDonald indicated that the appellant was at the time 42 years of age with a "fairly extensive record going back to 1969". He sentenced the appellant to a total of five years in a federal institution:

(i) three years for count 1 of the first Information, involving living off the avails of prostitution of a certain female person who at the times mentioned in the first count was under the age of 18 years;

(ii) two years (consecutive to the three years for count 1) for count 4 of the first Information, involving procuring a certain female person (other than

the person mentioned in count 1) to become a prostitute.

The sentences for the other five counts varied from six months to three years, and all were concurrent to the five years.

Explanation for the Delay

To explain this delay, the appellant in his application states the following:

> ".....This is the 5th time I have submitted this and in accordance to that I enclose a letter from Philop McNeal the legal aid guy here to basicaly state the truth of what I say. If the first one would have arrived this late date would not be required or this request for an extention of time to have this delt with. The court registrar is or his staff have some knowlage of the validity of what I say and were contacted by Mr Mcneal of legal aid in Amhurst." [sic]

There is no record in the Registry of this Court, of the appellant having filed an earlier notice of appeal. Further, attached to the application is a memorandum, dated February 19th, 1996, from Jim O'Neil, Barrister and Solicitor, of Amherst, Nova Scotia, directed to the clerk of the Court of Appeal, which states as follows:

> "Based upon a phone call from a Dennis Pettigrew, I agreed to forward the attached Notice of Appeal, as received by me, to the Court on a *pro bono* basis. I assume that it was drafted by Mr. Pettigrew personally.
>
> I have never met Mr. Pettigrew nor have I ever acted as his solicitor. Any contact by you should be directly with him at the Springhill Institution."

On March 13th, 1996, Mr. Fiske, counsel for the Crown, wrote to the appellant, and requested him to provide to the Registrar of the Court of Appeal, along with a copy to Mr. Fiske, a more detailed statement of the appellant's reasons for seeking an extension of time.

The appellant responded with a 2-page response dealing, for the most part, with the merits of his appeal. However, the appellant did say in this letter:

> "I attempted an appeal in the time frame allotted and on several other occasions including several extension of time applications. There have been I am assumed several calls to your and the Registrar as to what is going on with it from both myself as well as Mr. Phil MacNeal at legal aid here."

He further says:

> "I tried 5 times to get this appeal to you and had to smuggle it out with another inmate to his lawyer to get it there."

Grounds of Appeal

(a) **Conviction**

In his notice of appeal the appellant contends that he should not have been convicted of two of the counts:

(a) with respect to the count of living off the avails of prostitution with a female person under the age of 18, he says that he did not know she was under 18 years of age; and, in any event, she was only 80 days short of her 18th birthday at the relevant time. The appellant pled guilty to this offence. He has not sought relief to withdraw that plea, nor has he provided any basis for it to be withdrawn. This ground of appeal has no merit.

(b) with respect to the other count of living off the avails of prostitution, and the count of exercising control, direction or influence over a prostitute he stated:

> "..... sir the reason for the appeal as well is not so much in the reduction of time but in the stacking of charges to portray an over criminalization of an offence to placate public opinion."

In essence what the appellant is saying is that the count of living off the avails of prostitution, and the count of exercising control, direction or influence of a prostitute violate the rule in **Kienapple v. The Queen** (1974), 15 C.C.C. (2d) 524 against multiple convictions for the same delict. Clearly, living off the avails of prostitution is one thing; exercising control, direction or influence over a prostitute is quite different. This is not a case of multiple convictions for the same delict.

(ii) **Sentence**

The basis of the appellant's appeal against sentence is not clear. In his application to extend the time for filing the notice of appeal he indicates that he wants the sentence "reduced by one year" on the basis of the "stacked charges".

In his response to the inquiry from counsel for the Crown he says:

> "I asked for an extension of time to be heard and get my sentence changed to deffinate [sic] time. ..... If it is 5 years, fine; if it is less fine but I want to know how long not to have it decided by some monolistic value placed on my crime by a C.M.O.1 [Case Management Officer] but instead by the courts."

The appellant's sentence was clearly a sentence of five years, and there is nothing on the record that would lead him to believe otherwise. Further, there is no suggestion that the five year sentence is manifestly excessive. The appeal against sentence, therefore, has no merit.

Disposition

I am not prepared to exercise my discretion in favour of granting the appellant's application to extend the time for filing his notice of appeal.

I am not satisfied with his explanation for the delay. It is most unsatisfactory, and it is not corroborated in any way. I am also not satisfied that this proposed appeal has any merit.

Further, from my overall review of this matter, I am not satisfied that justice requires that I exercise my discretion in favour of extending the time for filing the notice of appeal in this case. To put it another way, by refusing to extend the time for filing the notice of appeal, I am not left with any concern that the appellant will have suffered any injustice.

The application is, therefore, dismissed. Pursuant to the provisions of **Rule 65.05(4)** the notice of appeal is quashed.

Flinn, J.A.

C.A.C. No. 125528

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DENNIS WAYNE PETTIGREW

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT BY:

FLINN, J.A.
(in Chambers)