NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. MacPherson*, 2018 NSCA 82

Date: 20181018
Docket: CAC 463009
Registry: Halifax

Between:

Drew William MacPherson

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Bryson, Scanlan and Bourgeois, JJ.A.
Appeal Heard:	October 4, 2018, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Bryson, J.A.; Scanlan and Bourgeois, JJ.A. concurring
Counsel:	Drew MacPherson, appellant in person Mark Scott, Q.C. for the respondent Glenn Anderson, Q.C. for the Attorney General of Nova Scotia

Reasons for judgment:

[1] On March 23, 2016, the appellant Drew William MacPherson pleaded guilty to two charges of uttering threats contrary to s. 264.1(1)(a) of the *Criminal Code*. Mr. MacPherson refused duty counsel. He did not want a lawyer.

[2] The Crown did not proceed with charges of intimidating a justice system participant (s. 423.1(1)(b) of the *Criminal Code*).

[3] Mr. MacPherson did want a lawyer for sentencing. Proceedings were adjourned a number of times to allow him to obtain legal aid representation and to make a second application for state funded counsel pursuant to s. 684 of the *Criminal Code*, among other things. Ultimately, the s. 684 application was dismissed. Mr. MacPherson did not have a lawyer for sentencing.

[4] On September 22, 2016, the Court ordered an assessment in accordance with s. 672.11 of the *Criminal Code* to determine whether Mr. MacPherson suffered from a mental disorder that would exempt him from criminal responsibility. He protested that he was "fit" at the time.

[5] Dr. Christopher Murphy, staff psychiatrist at the East Coast Forensic Hospital, provided a report to the Court dated November 4, 2016 and opined that Mr. MacPherson had a disability, but he was not suffering from a psychotic illness and demonstrated a clear understanding of the nature and quality of his actions and their wrongfulness. Dr. Murphy added that this would be the case even if Mr. MacPherson were suffering from a primary psychotic disorder. He concluded that Mr. MacPherson did not meet the criteria for consideration of a defence of not criminally responsible by reason of mental disorder.

[6] More adjournments followed to ensure that Mr. MacPherson had an opportunity to prepare for his sentencing.

[7] On April 5, 2017, Drew MacPherson was sentenced to a total of six months incarceration for both offences, consecutive to time already being served on other matters.

[8] On April 6, 2017, Mr. MacPherson prepared a Notice of Appeal which was filed on April 28, 2017. Effectively, Mr. MacPherson's appeal is a motion to withdraw his guilty plea because:

1. He did not plead guilty knowingly and was not informed of the details of the charges until after sentencing;

2. He wasn't uttering threats;

3. He was denied a lawyer "despite mental unfitness".

[9] This last complaint appears to relate to not having counsel at the time of his plea, because Mr. MacPherson links it to overturning his conviction.

[10] The Court may permit withdrawal of a guilty plea to prevent a miscarriage of justice (s. 686(1)(a)(iii) of the *Criminal Code*). *R. v. Henneberry*, 2017 NSCA 71, summarizes that authority in the context of withdrawal of a guilty plea (¶ 15-18).

Lawyer for the appeal

[11] Mr. MacPherson said he wanted to have a lawyer for his appeal. He was advised to file an application pursuant to s. 684 of the *Criminal Code*. On September 25, 2018, the Court received a Notice of Motion with an unsworn affidavit attaching an "Exhibit A". The exhibit does not address any of the criteria that the Court must consider on a s. 684 motion.

[12] Exhibit A begins with the assertion that Mr. MacPherson is "not neurologically capable of self representation any more than a cactus would be". But he concedes, "I am a pretty smart cactus".

[13] The Exhibit is essentially an argument that Mr. MacPherson cannot represent himself, coloured by a vilification of some judges. It does not purport to present relevant evidence.

[14] Despite the fact that the Court did not have a proper motion before it, Mr. MacPherson was invited to address the merits of the s. 684 motion. The criteria set out in *Kelsie v. Nova Scotia (Attorney General)*, 2016 NSCA 72 at ¶ 13 were repeatedly described to him. After hearing from him for some time, the Court dismissed the s. 684 motion. For reasons set forth below, Mr. MacPherson failed to establish that his appeal had merit or that it was too complex for someone of his obvious intellectual gifts to conduct.

Fresh evidence of unfitness?

[15] Effectively, Mr. MacPherson was also bringing a motion for fresh evidence in relation to his allegations of unfitness at the time of his plea.

[16] A person may be fit to stand trial, but may also be found not criminally responsible. The two are not the same (*R. v. Whittle,* [1994] 2 SCR 914). An accused is presumed fit to stand trial (s. 672.22 of the *Criminal Code*). Unfitness means that owing to mental disorder an accused is unable to conduct a defence. Relevant considerations include whether he understands the nature and object of the proceedings, understands the possible consequences and can recount the necessary facts to counsel relating to an offence so as to enable counsel to present a defence (see for further discussion: *R. v. Eisnor*, 2015 NSCA 64). Nothing in the record before us raises fitness concerns at the time Mr. MacPherson entered his guilty pleas.

[17] Mr. MacPherson made reference to a psychiatric assessment made in 2013. He has had a number of assessments in addition to the "not NCR" assessment performed by Dr. Murphy described above. A recent history of those assessments is summarized in Dr. Murphy's opinion:

> Following the motor vehicle collision of September 30, 2011, after recovering from his injuries Mr. MacPherson was remanded to the Central Nova Scotia Correctional Facility on October 28, 2011 until his admission to the East Coast Forensic Psychiatric Hospital pursuant to an Assessment Order under s. 672.13 of the Criminal Code on June 20, 2013. ***He was assessed by Dr. Grainne Neilson, forensic psychiatrist, who opined that Mr. MacPherson was suffering from a psychotic disorder, namely schizophrenia, paranoid subtype, and that as a result of this disorder he was unfit to stand trial***. Dr. Neilson indicated to the Court that Mr. MacPherson should be treated, pursuant to s. 672.58 CC to restore his fitness. Mr. MacPherson was vehemently opposed to this formulation and the prospect of mandated antipsychotic medication, which he interpreted as an attempt to administer medication to which he had previously had significant adverse and paradoxical reactions ("a deliberate attempt at doing harm to me"). ***Mr. MacPherson was transferred to the care of Dr. Risk Kronfli, who opined that Mr. MacPherson was fit to stand trial from a psychiatric perspective. It appears that this correspondence was not viewed at the time of Mr. MacPherson being found unfit to stand trial on January 15, 2014***.
>
> [Emphasis added]

[18] Following Dr. Kronfli's finding of fitness, Mr. MacPherson was also assessed by Dr. Scott Theriault of the East Coast Forensic Hospital. Dr. Theriault

interviewed Mr. MacPherson on four occasions between January 20-24, 2014. He offered this opinion:

> 1. Mr. MacPherson is not currently suffering from a psychotic disorder.
> 2. Mr. MacPherson is likely experiencing an autism spectrum disorder (Asperger's) with concurrent features of narcissistic, paranoid and schizotypal personality traits.
> 3. Mr. MacPherson is fit to stand trial. There is no indication at this time to treat Mr. MacPherson with antipsychotic medications.

[19] Although there was no proper motion before the Court with respect to fresh evidence, what Mr. MacPherson was alluding to was effectively considered by this Court in the context of Dr. Murphy's opinion.

Informed guilty plea

[20] According to Dr. Theriault, Mr. MacPherson has an IQ of 135. He graduated from university with a Bachelor of Mathematics with distinction in computer science and electrical engineering. While clearly experiencing some disabilities, Mr. MacPherson presented as a highly intelligent, highly articulate individual with a broad vocabulary and the capacity—when he wants to—of addressing issues put to him by the Court. On the day he pleaded guilty, Mr. MacPherson's hearing was adjourned over lunch so that he could read the Crown disclosure. On returning to the courtroom, he confirmed that there was no question that he was making the plea voluntarily and that no one was forcing him to do so.

[21] After a reading of the charges, Mr. MacPherson elected Provincial Court and pleaded guilty:

> **The Court:** Okay. So the election is to Provincial Court. In terms of those two charges that I've just read into the record, what is your plea to those, sir, guilty or not guilty?
>
> **Mr. MacPherson:** Guilty.
>
> **The Court:** Guilty, okay. And now that I've confirmed the election, I've confirmed your plea, I just want to make sure that obviously we've had a lot of discussion about this plea so I don't think there's any question you're making it voluntarily. I was the last person probably in here that said go ahead and make the plea. So you're telling me you want to make the plea today, no one's forcing you?
>
> **Mr. MacPherson:** Yeah.
>
> **The Court:** Certainly not me.

Mr. MacPherson: Right.

The Court: Right. So you're voluntarily making the plea?

Mr. MacPherson: Yeah.

The Court: Okay. And do you understand, and this is the reason of course, for reading the disclosure, that number one, there won't be a trial of those two charges, you understand that?

Mr. MacPherson: Yeah, yeah.

The Court: There's going to be the entry of a criminal conviction?

Mr. MacPherson: Yeah.

The Court: Right. And what the Crown Attorney, that's the importance of reading the . . . the disclosure, the Crown Attorney's going to read certain facts into the record that are in that disclosure package. You don't dispute those essential facts of that, that essentially on such and such a day or between those dates, threats were made?

Mr. MacPherson: Yeah.

The Court: I guess we heard earlier this morning by way of a letter . . .

Mr. MacPherson: Yeah.

The Court: . . . to Ms. Robere and Ms. Mickalus. You don't dispute those facts?

Mr. MacPherson: I think it was to the College of Registered Nurses.

The Court: Okay.

Mr. MacPherson: I think that's what it said.

The Court: But the nature of the essential elements of this charge, you don't dispute those?

Mr. MacPherson: Right.

The Court: Okay. And I think that that is important so I've confirmed with you that it's voluntarily made so I will accept and enter those pleas. I'm going to just mark that right now that I've accepted those pleas to those two charges. In accordance with the discussion that we had earlier, I'm going to order a Presentence Report. You mentioned that one was done earlier. If it's a lot longer than you think, I'm not aware of it, I'll either ask for a new Presentence Report to be prepared or an update to the other one, okay.

Mr. MacPherson: All right.

[22] Keeping in mind his grounds of appeal, this Court questioned Mr. MacPherson about the 2014 fitness opinion of Dr. Theriault and Dr. Murphy's opinion in 2016 that Mr. MacPherson was not "NCR". Mr. MacPherson said he

had no reason to question those expert opinions. This was a rational and appropriate acknowledgement.

[23] There is no merit to the first issue raised on appeal.

Uttering threat charges

[24] It is also clear from a review of the record and particularly the threatening letters Mr. MacPherson sent to the complainants that all the elements with respect to a charge of uttering threats were made out consistently with the law described by the Supreme Court of Canada in *R. v. McRae,* 2013 SCC 68, ¶ 10-19. There is no merit to the second issue raised on the Notice of Appeal.

No counsel when he pleaded

[25] When he pleaded, Mr. MacPherson twice rejected access to duty counsel:

> **Mr. MacPherson:** Okay. I'll just plead guilty to both of those and can we set sentencing for June when I'm back in?
>
> **Mr. Mathers:** Your Honour, I . . . I mean at least with respect to this . . .
>
> **The Court:** Do you want to talk to the duty counsel before . . .
>
> **Mr. MacPherson:** No, no, absolutely not.
>
> [. . .]
>
> **Mr. Mathers:** So I'm providing that second disclosure package with all the metal removed to Mr. Sherriff.
>
> **The Court:** Okay. So, Mr. MacPherson, Ms. Jones is here, she's heard our conversation. Do you want to meet with the duty counsel over the noon hour?
>
> **Mr. MacPherson:** No, I don't.
>
> **The Court:** Are you sure?
>
> **Mr. MacPherson:** Yes, I'm sure
>
> **The Court:** Okay. That's your prerogative, sir.

[26] Absent evidence of unfitness to stand trial, Mr. MacPherson's rejection of counsel at the time dispenses with this issue.

[27] In sum, the record establishes:

1. Mr. MacPherson was fully aware of the offences to which he pleaded guilty and he did so knowingly and voluntarily.

2. At the time of his guilty pleas, he acknowledged the effect and consequences of doing so.

3. The facts supported the charges of uttering of threats.

4. There is no evidence that Mr. MacPherson was not fit at the time he entered his guilty pleas.

[28] The appeal has no merit. Acceptance of Mr. MacPherson's guilty pleas did not constitute a miscarriage of justice.

[29] I would dismiss the appeal.

Bryson, J.A.

Concurred in:

Scanlan, J.A.

Bourgeois, J.A.