

NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Rouse*, 2021 NSCA 32

Date: 20210401

Docket: CAC 500138

CAC 500152

Registry: Halifax

Between:

Darrin Phillip Rouse

Applicant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: s. 486.4 of the Criminal Code

Judge: Beveridge, J.A.

Motions Heard: March 25, 2021, in Halifax, Nova Scotia in Chambers

Held: Motions dismissed

Counsel: Raymond Kuszelewski, for the appellant
Mark Scott, Q.C., for the respondent

Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day;
or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Decision:

[1] While self-represented, Mr. Rouse filed motions to extend the time to file Notices of Appeal. The motions were filed August 31 and September 1, 2020. Affidavits accompanied the motions with the proposed Notices of Appeal attached.

[2] The motions are without any merit. Mr. Rouse does not even come close to meeting any of the criteria that should be addressed in order for me to be satisfied that it would in the interests of justice to extend the time to allow him to file his proposed Notices of Appeal. I will explain.

BACKGROUND

[3] The motions travelled together. By January 20, 2021, Nova Scotia Legal Aid had issued certificates for Raymond Kuszelewski to represent Mr. Rouse on the motions. In tele-chambers on that date, Mr. Kuszelewski advised he may wish to file further materials. Dates were set. Mr. Kuszelewski would file any further materials on or before February 12, 2021 with the Crown's response by February 26, 2021.

[4] Mr. Kuszelewski filed no supplementary affidavits, nor a Brief. The Crown filed its Brief, along with relevant affidavits on February 26, 2021. The Brief addressed the criteria to be met by an applicant, including the apparent lack of merit in the proposed grounds of appeal.

[5] I heard the motions on March 25, 2021. Mr. Kuszelewski acknowledged that Mr. Rouse's timing was well off, but it was not his fault as he had been self-represented. Mr. Kuszelewski made no submissions about the criteria to be addressed, except at one point to make the bald assertion an extension could be granted in exceptional circumstances.

THE PRINCIPLES

[6] While there can be present a myriad of circumstances that necessitate an applicant to have to seek an extension of time, the principles are uncontroversial. A judge has the discretion to extend the time if the interests of justice require an extension. That is informed by: whether the applicant had a bona fide intention to appeal within the appeal period; the presence or absence of a reasonable excuse for

the delay; the presence or absence of prejudice; and, the apparent merits or strength of the proposed appeal (see: *R. v. M.(R.E.)*, 2011 NSCA 8 at paras. 36-51).

[7] One of Mr. Rouse's motions is in relation to an appeal that he had voluntarily abandoned. No one has suggested that I do not have jurisdiction to extend the time to file a subsequent Notice of Appeal in relation to an appeal that has been abandoned. I will assume I do. Different considerations may apply if an appeal is dismissed by Court order (see: *Hoffman v. Lamb*, 2003 NSCA 101).

[8] In *R. v. Alam*, 2020 ABCA 10, Rowbotham J.A., in chambers, dealt with a situation where a self-represented appellant did not perfect his appeal in a timely way. His appeal was struck. Pursuant to the *Alberta Rules of Court*, the appeal was deemed abandoned. Mr. Alam applied to restore his conviction appeal.

[9] Rowbotham J.A. described similar principles to those that would apply for an ordinary request to extend an out-of-time appeal, but suggested a heightened threshold when an appeal has been deemed abandoned:

6 The decision to restore an appeal is discretionary and requires that Mr. Alam establish that:

- (a) there is arguable merit to the appeal;
- (b) he has a reasonable explanation for the defect or delay which caused the appeal to be taken off the list;
- (c) he has moved promptly to cure the defect and have the appeal restored to the list;
- (d) he had a timely intention to proceed with the appeal; and
- (e) there is no prejudice to the respondent (including length of delay).

7 These factors are weighed to determine if it is in the interests of justice to permit the appeal to proceed: *Al-Ghamdi v Alberta*, 2016 ABCA 324 at para 9.

8 The threshold for restoring an appeal is heightened when the appeal is deemed abandoned: see *Clark v Institute of Chartered Accountants of Alberta (Complaints Inquiry Committee)*, 2015 ABCA 271 at para 6; *Allen v Alberta (Seniors and Community Supports)*, 2015 ABCA 238 at para 5; and *Scarlett v Wang*, 2019 ABCA 72 at paras 25-30. It has been said that the discretion to restore an appeal ought to be exercised sparingly: *Allen* at para 5. The same test applies in a criminal appeal: *R v Reeves*, 2004 ABCA 376; *R v Foulston*, 1994 ABCA 362; *R v McMahon*, 2018 ABCA 344; *R v Mian*, 2012 ABCA 15.

[Emphasis added]

[10] I will briefly consider each motion based on the relevant principles.

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[11] This is, with all due respect, a most unusual request, to say the least.

[12] I say this because, as noted earlier, Mr. Rouse had already appealed from conviction and sentence, but voluntarily abandoned his appeal.

[13] Mr. Rouse was convicted by Warner J. on September 27, 2017 of trafficking hydromorphone contrary to s. 5(1) of the *Controlled Drugs and Substances Act* and obtaining sexual services for consideration, contrary to s. 286.1(1) of the *Criminal Code* (2017 NSSC 292).

[14] Sentence was not imposed until September 27, 2018. Mr. Rouse refused to cooperate with the Sexual Behaviour assessor. He wanted an adjournment. The trial judge refused. Eight months after conviction, Mr. Rouse fired his trial lawyer. Three months later, he filed a mistrial application alleging a miscarriage of justice had been caused by his trial lawyer's incompetence in not calling a certain witness at trial.

[15] The trial judge considered the affidavit of the witness and dismissed the mistrial motion on the basis the evidence from the witness would not have changed his analysis and factual findings "one iota". The judge imposed a sentence of 22 months' incarceration.

[16] On October 18, 2018, Mr. Rouse appealed conviction and sentence, well within the allotted time to do so (CAC 481511). His Notice of Appeal again alleged ineffective assistance of counsel.

[17] Multiple appearances followed. Legal Aid would not provide counsel. Mr. Rouse applied for appointment of state funded counsel. That motion was scheduled to be heard on September 12, 2019 by videoconferencing. It could not proceed due to technical issues. The motion was adjourned to September 26, 2019 for an in-person hearing in Halifax. A Warrant to Convey issued.

[18] The motion was cancelled. Mr. Rouse advised the Registrar he wanted to withdraw his appeal. The appropriate form to do so, a Notice of Abandonment, was sent to his parole officer. Mr. Rouse filed his Notice of Abandonment with the Registrar on September 19, 2019.

[19] Mr. Rouse's motion materials to extend the time to file—to again pursue an appeal that he himself abandoned—contains no proper or believable explanation as to why he abandoned the appeal. He does not even try to say he did not know the consequences of his Notice of Abandonment.

[20] Instead, his affidavit suggests Correctional Services Canada did not send with him his appeal documents when he was transferred from Springhill to Atlantic Institution. Without his appeal books, "I did not know what to do, so I abandon [*sic*] my appeal".

[21] The Crown tendered an affidavit from a Springhill Correctional Officer who directly contradicts the applicant's assertion that his property and legal documents did not go with him. Documents are attached to substantiate.

[22] Quite apart from the fact Mr. Rouse's original appeal tied up Court and legal resources for months and was voluntarily abandoned, his proposed grounds of appeal have no apparent merit.

[23] It is a terrible thing if a lawyer's incompetence causes a miscarriage of justice. Such allegations are easy to make. All too often, they turn out to be without substance.

[24] Mr. Scott, in a thorough and well-documented brief, pointed out the potential problem of being able to pursue an appeal based on a claim of ineffective assistance of counsel when the same argument, made almost a year after conviction, was unsuccessfully made before the trial judge as the basis for his mistrial application. If trial fairness were compromised by incompetence, then the trial judge erred to dismiss the mistrial motion. No appeal has ever been proposed from the trial judge's mistrial decision.

[25] During the tele-chambers call of January 20, 2021, the Crown warned Mr. Kuszelewski that it would argue the proposed appeal had no merit. Crown counsel made the argument. Mr. Kuszelewski filed no Brief, nor made any argument to even try to demonstrate any merit to Mr. Rouse's proposed grounds alleging ineffective assistance of counsel.

[26] There is not a shred of evidence to suggest Mr. Rouse did not understand the consequences of the Notice of Abandonment. I have no explanation why Mr. Rouse waited almost a year before bringing these proceedings, and Mr. Kuszelewski has failed to satisfy me that the proposed grounds of appeal have any

apparent merit, let alone that they are sufficiently strong to overcome the frailties of the case put forward to extend the time. The Crown, as an institution, would suffer no direct prejudice, but both trial counsel and the victim would suffer prejudice to now permit the applicant to recommence his abandoned appeal.

[27] With or without a heightened threshold, the Motion fails to meet any of the criteria and is dismissed.

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[28] On October 11, 2019, Justice Pierre Muise convicted Mr. Rouse of sexual assault (s. 271 of the *Criminal Code*) and trafficking in hydromorphone (s. 5(2) of the *CDSA*). Patrick Eagan was trial counsel.

[29] Justice Muise sentenced Mr. Rouse on February 20, 2020 to a total sentence 15 months' incarceration, consecutive to any other sentence. March 27, 2020 was the last day he could have filed a Notice of Appeal, as-of-right. He did not.

[30] This Court, in light of the COVID-19 pandemic, issued a Practice Directive on March 27, 2020 that suspended the filing deadlines for all matters. The Court lifted the suspension on June 27, 2020.

[31] Mr. Rouse makes no claim that he missed the time to file his intended Notice of Appeal because of the pandemic or any confusion over the filing deadline. Instead, Mr. Rouse's affidavit asserts his trial counsel, Patrick Eagan, led him to believe that "we were going to appeal", and it was not until after the due date that he was informed that trial counsel was not going to file the appeal.

[32] Mr. Rouse's affidavit attaches his proposed Notice of Appeal. All of his grounds of appeal allege ineffective assistance by trial counsel. No particulars are provided beyond the suggestion of incompetence by failure to follow directions in court and by not presenting evidence that had been provided to counsel when first retained.

[33] There are problems. I agree with Mr. Scott when he points out that Mr. Rouse's explanation seems absurd—Mr. Rouse missed the deadline because he was misled by trial counsel's failure to file a promised appeal alleging trial counsel's incompetence had caused a miscarriage of justice. Furthermore, the Crown tendered trial counsel's affidavit, which not only flatly contradicts Mr. Rouse, it attaches a letter dated April 27, 2020 that documents his advice.

[34] What was that advice? It appears they spoke on April 8, 2020. The prospect of an appeal was discussed, as it had been before. Mr. Eagan advised Mr. Rouse that: he was not retained to conduct an appeal; he would not recommend an appeal as there was no realistic prospect of success; and, if Mr. Rouse wanted to pursue an appeal, he had to file a Notice of Appeal by June 26, 2020. Mr. Eagan spoke with Mr. Rouse a month later. Mr. Rouse confirmed he had received the letter of April 27, 2020.

[35] At the end of the day, I have no proper explanation why the deadline was missed and no basis to conclude the proposed grounds of appeal have any merit whatsoever.

[36] This Motion is also dismissed.

Beveridge, J.A.