NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Holloway*, 2024 NSCA 60

Date: 20240617
Docket: CAC 529156
Registry: Halifax

Between:

Francis William Holloway

Appellant

v.

His Majesty the King

Respondent

Judge:	Farrar J.A.
Motion Heard:	June 12, 2024, in Halifax, Nova Scotia in Chambers
Held:	Motion dismissed
Counsel:	Francis Holloway, appellant, self-represented Scott Millar, for the respondent

Decision:

[1] The proposed appellant, Francis Holloway, moved for an extension of time to file a Notice of Appeal.

[2] The matter was heard in telephone chambers on June 12, 2024. After hearing argument by Mr. Holloway and Scott Millar, on behalf of the Crown, I reserved decision.

[3] For the reasons that follow, I would dismiss the motion.

Background

[4] On April 6, 2023, before Provincial Court Judge Diane McGrath, Mr. Holloway plead guilty to five counts of possession for the purpose of trafficking under s. 5(2) of the *Controlled Drugs and Substances Act* (*CDSA*), and two counts under s. 145 of the *Criminal Code*. Six further counts under the *CDSA*, *Criminal Code*, and *Revenue Act* were withdrawn or dismissed. Two months later, on June 8, 2023, before the same judge, he entered into a joint recommendation on sentence. The joint recommendation was accepted by the court.[1]

[5] Prior to taking the pleas on April 6, Judge McGrath informed Mr. Holloway she had been the issuing judge on one of the search warrants connected to the charges. She assured Mr. Holloway that she did not recall the contents of the ITO in support of that warrant and it would have no bearing on any sentence she imposed. When asked for comment, Mr. Holloway stated, "Yes, I'm fine with that".

[6] Crown counsel read the facts of each incident into the record at the sentence hearing. They can be summarized as follows:

1. With respect to the December 14, 2021 offences (s. 5(2) of the CDSA for cocaine, oxycodone, and methylphenidate), police executed a search warrant on Mr. Holloway's residence and saw him inside carrying two bags, which he promptly placed into a mop bucket. Those bags were later found to contain cocaine. A total of 89 grams of cocaine (Schedule I), 60 oxycodone pills (Schedule I), and 15 methylphenidate 10 mg pills (Schedule III) were seized, along with $1,000, 13 cartons of unstamped cigarettes, digital scales

[1] The Crown, in its submissions, provided the audio recordings of both appearances before the Provincial Court.

with cocaine residue, and various other paraphernalia. When Mr. Holloway was arrested "he was covered in cocaine". He had powder cocaine on his arms and clothing and on and inside his shoe. An expert report was commissioned and opined that on the basis of the seizures, Mr. Holloway was a high-level to street-level trafficker.

2. With respect to the February 15, 2022 offences (s. 5(2) of the CDSA for cocaine, and s. 145 of the Criminal Code), Mr. Holloway had been released on conditions following the December offences. A search warrant was executed on his residence, and he was found on the couch with a crack pipe and cocaine in front of him. A large block of cocaine was seized from the jacket he was wearing, totaling 56 grams. A further gram of powdered cocaine and 3.5 grams of crack cocaine were seized.

3. With respect to the June 23, 2022 offences (s. 5(2) of the CDSA for cocaine and s. 145 of the Criminal Code), Mr. Holloway had been released three weeks earlier in connection with the two prior offence dates. A search warrant was executed at his residence and Mr. Holloway was found in possession of 56 grams of cocaine, 28 methylphenidate pills, a digital scale with cocaine residue, $560, and various other trafficking paraphernalia.

[7] When asked, following each recitation of facts, if Mr. Holloway took issue with any of the facts, his counsel said, "No". Mr. Holloway was present and remained silent.

[8] Judge McGrath accepted a joint recommendation of five years' incarceration. She sentenced Mr. Holloway to three years and twenty-five days going forward, concurrent on each *CDSA* conviction. This sentence represented a five-year sentence minus credit for the period Mr. Holloway had spent on remand. These calculations – including enhanced credit – were referenced by Crown counsel as part of their submissions on the joint recommendation. Judge McGrath noted that, given the seriousness and circumstances of the offences – including multiple offences over multiple dates, several in breach of release conditions – but for the joint recommendation, she would have imposed a significantly higher sentence.

[9] The deadline for Mr. Holloway to file a Notice of Appeal was July 17, 2023. He ultimately filed a proposed Notice of Appeal on December 13, 2023, some five months late, along with a motion to extend the time to file an appeal.

[10] Mr. Holloway's proposed Notice of Appeal lists three grounds:

> 1. Inadequate defence by my lawyer
> 2. Conflict of interest by the judge
> 3. Corruption by law enforcement officers – over $4000 of my funds unaccounted for & the amt of drugs highly inflated.

[11] The affidavit attached to his motion failed to provide any details in support of these grounds.

[12] On January 3, 2024, Justice Anne Derrick, sitting in Chambers, asked Mr. Holloway to file a supplemental affidavit by January 31, 2024 to provide a factual basis for his motion. With the Crown's consent, that affidavit was accepted for late filing on February 2, 2024. In it, Mr. Holloway provided the following as foundation for his grounds of appeal:

> *i) Inadquate defence by my lawyer*
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> 11. I have concerns that I was ineffectively represented by my trial lawyer, Mr. Tony Mozvik. I understand that there is a protocol for bringing an allegation of ineffective assistance of counsel. I wish to have a lawyer review my file and assess the merit of this ground of appeal given that I do not have legal training to do so myself. I wish to discuss my concerns in confidence with the reviewing lawyer.
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> *ii) Conflict of interest by the Judge*
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> 12. The Honourable Judge Diane L. McGrath both issued the search warrant that led to my arrest and served as my sentencing judge. I believe her actions created a conflict of interest or apprehension of bias. I wish to have a lawyer review my file and assess the merit of this ground of appeal given that I do not have legal training to do so myself.
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> *iii) Corruption by law enforcement*
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> 13. I have concerns about corruption of law enforcement officials in my case. These include: (i) The quantity of drugs supposedly found during the search was highly inflated; and (ii) over $4,000 went missing as a result of the search and was unaccounted for by

> the police. I do not think this was a fair process. I wish to have a lawyer review my file and assess the merit of this ground of appeal given that I do not have legal training to do so myself.
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> […]
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> 15. I am particularly concerned about the trial judge's failure to appropriately apply remand credit towards my sentence. I wish to have a lawyer review my file and assess the merit of this ground of appeal given that I do not have legal training to do so myself.

[13] Following receipt of his affidavit, Mr. Holloway was given a deadline of February 28, 2024 to file a brief in support of his application. With the assistance of Legal Aid, a brief was filed on February 22, 2024.

Issues

[14] There is one issue: is it in the interest of justice for this Court to exercise its discretion to extend the time to file a Notice of Appeal in the circumstances of this case?

Analysis

[15] An appellant is required to file a Notice of Appeal within 25 days of the imposition of sentence.[2] A judge of the Court of Appeal has the discretion to extend that deadline where the interests of justice require.[3] In *R. v. T.M.*, Derrick J.A. outlined the relevant factors to consider:

> [16] The factors to be considered in the exercise of discretion to grant an extension of time are well-established: the applicant must have demonstrated a *bona fide* intention to appeal within the appeal period; they must have a reasonable excuse for the delay; the question of prejudice to the opposing party must be addressed; and the merits of the proposed appeal assessed. "Ultimately, the discretion must be exercised according to what the interests of justice require" (*R. v. R.E.M.*, 2011 NSCA 8, para. 39).

[16] On the motion, the Crown conceded Mr. Holloway had a *bona fide* intention to appeal within the appeal period and it would not be prejudiced if the motion was

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[2] *Civil Procedure Rule* 91.09(1).
[3] Section 678(2) of the *Criminal Code*; *Civil Procedure Rule* 91.04*; R. v. T.M.*, 2022 NSCA 22 at ¶15.

granted. Therefore, the issue became whether Mr. Holloway's proposed grounds of appeal have merit.

Merits of the Proposed Grounds of Appeal

[17] In order to satisfy the Court of the merit criterion, Mr. Holloway must raise an arguable issue: a ground of appeal, which, if established, appears of sufficient substance to be capable of convincing a Panel of the Court to allow the appeal.[4]

[18] I am not satisfied Mr. Holloway raises an arguable issue on any of the grounds he proposes.

[19] If he is permitted to proceed with this appeal, he will be asking this Court to strike his guilty pleas. There is nothing on the record to suggest the stringent test to do so could be met.

[20] In *R. v. Wong*, 2018 SCC 25, the Supreme Court of Canada explained the importance of the guilty plea in our justice system:

> [3] The plea resolution process is also central to the criminal justice system as a whole. The vast majority of criminal prosecutions are resolved through guilty pleas and society has a strong interest in their finality. Maintaining their finality is therefore important to ensuring the stability, integrity, and efficiency of the administration of justice. Conversely, the finality of a guilty plea also requires that such a plea be voluntary, unequivocal and informed. And to be informed, the accused "must be aware of the nature of the allegations made against him, the effect of his plea, and the consequence of his plea" (*R. v. T. (R.)* (1992), 10 O.R. (3d) 514 (C.A.), at p. 519).

[21] A guilty plea is a formal admission of the essential elements of an offence. In order to overturn a guilty plea, a prospective appellant is "required to establish a subjective prejudice". In *Wong*, the Court found that the appellant must establish:

> [6] […] a reasonable possibility that they would have either (1) opted for a trial and pleaded not guilty; or (2) pleaded guilty, but with different conditions. To assess the veracity of that claim, courts can look to objective, contemporaneous evidence. The inquiry is therefore subjective to the accused, but allows for an objective assessment of the credibility of the accused's subjective claim.

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[4] *R. v. T.M.*, 2022 NSCA 22 at ¶18.

[22] On the date he entered pleas, Mr. Holloway was fully aware of the consequences of pleading guilty. He also had two months to reflect on any issues with his guilty pleas before he was sentenced. He raised no concerns. None of the proposed grounds of appeal contain a realistic, arguable issue that would warrant setting aside his guilty pleas. I will review each of the grounds and explain why.

Ineffective Assistance of Counsel

[23] It is settled law that counsel are presumed competent, and the burden to prove otherwise is a heavy one, requiring proof of a miscarriage of justice. In *R. v. Symonds*, 2018 NSCA 34, Bourgeois J.A. wrote:

> [22] The principles relating to claims of ineffective assistance of counsel are also not in dispute. These were set out by Saunders, J.A. in *R. v. West*, 2010 NSCA 16:
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> > [268] The principles to be applied when considering a complaint of ineffective assistance of counsel, are well known. Absent a miscarriage of justice, the question of counsel's competence is a matter of professional ethics and is not normally something to be considered by the courts. Incompetence is measured by applying a reasonableness standard. There is a strong presumption that counsel's conduct falls within a wide range of reasonable, professional assistance. There is a heavy burden upon the appellant to show that counsel's acts or omissions did not meet a standard of reasonable, professional judgment. Claims of ineffective representation are approached with caution by appellate courts. Appeals are not intended to serve as a kind of forensic autopsy of defence counsel's performance at trial. […]
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> [Emphasis in original.]

[24] Mr. Holloway was represented by a very senior, experienced member of the criminal bar, who negotiated a reasonable sentence on the charges Mr. Holloway was facing. Mr. Holloway provides no support for his allegation of ineffective assistance beyond expressing "concerns".

[25] Mr. Holloway's expression of concern does not raise an arguable issue.

Reasonable Apprehension of Bias

[26] Mr. Holloway complains that Judge McGrath may have been biased because she issued one of the search warrants related to his offences, and then, months

later, accepted his guilty pleas and the joint recommendation on sentence. There is no basis in law for this assertion. Trial judges regularly hear *Charter* applications, *voir dires*, and other hearings wherein they become privy to evidence that is inadmissible at the trial they might later preside over. In smaller communities, it is not unusual for a trial judge to have issued a warrant and later preside over a trial that has arisen from that very warrant.

[27] The strong presumption of judicial impartiality is one of the foundations of our justice system. Judge McGrath demonstrated her impartiality and integrity by announcing to Mr. Holloway in open court, before he entered his pleas, that she had issued one of the search warrants, but that she did not recall it and it would have no bearing on her decision on sentencing. Mr. Holloway stated he was "fine with that". When asked for comment at the sentence hearing, two months later, he raised no concerns. Again, this does not rise to the level of an arguable issue.

Corruption by Law Enforcement

[28] Mr. Holloway's stated concerns regarding missing funds and inflated drug amounts are nothing more than bald assertions. He had every opportunity to raise them at the plea stage and again at the sentencing stage. The fact he chose not to is telling. Mr. Holloway is no stranger to courtroom procedure. He has a lengthy criminal record: 26 offences dating back to 1989, including four offences under s. 5(2) of the *CDSA*. He listened to the facts read into court detailing both drug and cash amounts seized and agreed to them. He cannot now claim he is concerned some of the facts may be inaccurate. There is no arguable issue raised by this proposed ground.

Remand Credit

[29] As noted earlier, the Crown provided the audio recording of the sentencing with its submissions. The audio clearly demonstrates that Mr. Holloway's time on remand was credited at the enhanced rate, resulting in a significant reduction in his sentence going forward. The custodial aspect of Mr. Holloway's sentence imposed for these offences has already concluded. This proposed ground raises no arguable issue.

Conclusion

[30] Mr. Holloway entered his guilty pleas voluntarily and fully informed of the consequences. Bald accusations and "concerns" cannot amount to arguable issues.

The interests of justice are not served by the use of Court resources to pursue them. The motion is dismissed.

Farrar J.A.