NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. MacKenzie***, 2007 NSCA 10

Date: 20070125
Docket: CAC 266773
Registry: Halifax

Between:

Daniel John MacKenzie

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Roscoe, Bateman and Cromwell, JJ.A.
Appeal Heard:	January 16, 2007, in Halifax, Nova Scotia
Held:	Appeal of conviction dismissed; leave to appeal sentence granted but appeal dismissed per reasons for judgment of Bateman, J.A.; Roscoe and Cromwell, JJ.A. concurring.
Counsel:	Appellant by written submission only Daniel A. MacRury, Q.C., for the respondent

Reasons for judgment:

[1] Daniel John MacKenzie appeals both conviction and sentence in relation to a charge of break and entry with intent (s. 348(1)(a) **Criminal Code of Canada**, R.S.C. 1985, c. C-46). The property in question was an upper flat at 1876A Vernon Street.

[2] The flat's owner was out of town. His mother, Genanne Beck, had stopped by to check on the property. She found the entry door open and a man standing inside the dwelling. She looked through the kit bag he had with him to ensure nothing had been taken from the apartment. He provided an innocent explanation for his presence. Ms. Beck told him to leave the premises, which he did. She then contacted the police. The police apprehended Mr. MacKenzie on a nearby street. He was charged.

[3] Mr. MacKenzie was represented by counsel at trial. The only issue was identity. Ms. Beck did not pick Mr. MacKenzie from a photographic lineup prior to trial, but provided positive dock identification. Her description of him given to police at the time of the offence did not exactly match his appearance. While she described the kit bag he was carrying and the hat he was wearing, she neglected to make any reference to writing that was visible on each. Mr. MacKenzie did not testify and no other defence evidence was called. It was the theory of the defence that Mr. MacKenzie had not been identified as the person in the flat.

[4] The judge was alive to the dangers of dock identification but was satisfied that the circumstantial evidence coupled with Ms. Beck's positive identification provided sufficient basis for a conviction. Mr. MacKenzie was sentenced to three years (after credit for time served) on the break and enter, with a concurrent three month sentence for a breach of recognizance.

[5] In his written submission Mr. MacKenzie professes his innocence. Despite his defence at trial, he now says he was, in fact, the person Ms. Beck encountered in the flat. He did not break in but was there looking for a person named Vienot from whom he had purchased a guitar several years before. He hoped to raise some money by selling the instrument back to Veinot. Mr. MacKenzie maintains that the entrance door of the premises was wide open when he approached the flat. He entered to get out of the rain and, hopefully, find the guitar owner. In two

lengthy written submissions on the appeal Mr. MacKenzie details the frailties of the Crown's case.

[6] His appeal of conviction centres upon his allegation of ineffective assistance of counsel. His principal complaint is that his lawyer advised him not to testify. He alleges, as well, that his counsel did not spend sufficient time with him in preparing the case.

[7] Commonly we would require the allegations of ineffective assistance to be placed before us as evidence, usually by affidavit, with notice to trial counsel (**R. v. G.R.S.** (1996), 148 N.S.R. (2d) 175; N.S.J. No. 69 (Q.L.)(C.A.)). In view of the fact that Mr. MacKenzie is self-represented and the material allows us to fairly assess the substance of his complaints we will do so.

[8] An appellant who contends that his counsel has not conducted his defence with a reasonable degree of skill must establish: (a) counsel at the trial lacked competence; and (b) it is reasonably probable that but for such lack of competence, the result of the proceedings would have been different. **(R. v. G.R.S., supra** at para. 15).

[9] The standard for assessing counsel's competence was addressed by the Supreme Court of Canada in **R. v. G.D.B.**, [2000] 1 S.C.R. 520 where Major, J., for the Court, wrote:

> 27 Incompetence is determined by a reasonableness standard. The analysis proceeds upon a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. The onus is on the appellant to establish the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The wisdom of hindsight has no place in this assessment.
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> 28 Miscarriages of justice may take many forms in this context. In some instances, counsel's performance may have resulted in procedural unfairness. In others, the reliability of the trial's result may have been compromised.
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> 29 In those cases where it is apparent that no prejudice has occurred, it will usually be undesirable for appellate courts to consider the performance component of the analysis. The object of an ineffectiveness claim is not to grade

> counsel's performance or professional conduct. The latter is left to the profession's self-governing body. If it is appropriate to dispose of an ineffectiveness claim on the ground of no prejudice having occurred, that is the course to follow (*Strickland, supra*, at p. 697).

[10] As noted above, at trial the defence was a simple one - it was not Mr. MacKenzie who Ms. Beck encountered in the flat. Trial counsel for Mr. MacKenzie vigorously cross-examined each Crown witness with the goal of casting doubt upon the identity of the perpetrator. A review of the record does not support Mr. MacKenzie's allegation that his counsel was not adequately prepared for the trial and did not capably advance his position. As set out above, Mr. MacKenzie maintains that counsel's advice that he not testify was faulty. Had he taken the stand, says Mr. MacKenzie, he would have provided his innocent explanation for his presence in the flat. Inferentially, he believes that explanation would have given rise to a reasonable doubt and led to an acquittal.

[11] A wide latitude is afforded to trial counsel in deciding appropriate trial strategy and conduct (**R. v. Jim**, [2003] B.C.J. No. 1663 (Q.L.)(C.A.)). On the record before us, counsel's advice not to testify appears to be a reasonable tactical decision. The pre-trial identification evidence was vulnerable to attack and would appear to have provided Mr. MacKenzie's best hope for an acquittal. On the other hand, his story as to how he came to be in the apartment strained credulity. In view of the nature of his explanation and taking into account Mr. MacKenzie's lengthy criminal record, including convictions for related offences, counsel's advice is not surprising. In any event, Mr. MacKenzie is no stranger to the justice system, and was fully capable of accepting or rejecting counsel's suggested course of action. (See, for example, **R. v. MacKenzie** (2004), 226 N.S.R. (2d) 390; N.S.J. No. 363 (Q.L.) (C.A.) and **R. v. MacKenzie** (2004), 224 N.S.R. (2d) 63; N.S.J. No. 200 (Q.L.) (C.A.)).

[12] Additionally, Mr. MacKenzie's innocent explanation for his presence in the flat was before the court through the evidence of Ms. Beck. Clearly, it did not raise a reasonable doubt with the judge.

[13] I am not persuaded that Mr. MacKenzie was denied the effective assistance of counsel.

[14] Mr. MacKenzie submits, as well, that his sentence is excessive. The standard of review on an appeal of sentence is a deferential one. Absent an error in principle, the failure to consider a relevant factor or an overemphasis of the

appropriate factors, we may only intervene to vary a sentence if it is demonstrably unfit (**R. v. C.A.M.**, [1996] 1 S.C.R. 500).

[15] In passing sentence, the judge considered a myriad of relevant matters: this was a break into a private residence; Mr. MacKenzie has a recent prior conviction for the same offence; he has a lengthy record of some thirty-two convictions, many of them property related; his drug related convictions reveal that he has a substance abuse problem; the community is not safe from Mr. MacKenzie; the offence had a significant impact on the victim, Ms. Beck; Mr. MacKenzie has historically not and does not now take responsibility for his actions. The judge could also have noted that Mr. MacKenzie was on a recognizance at the time of this offence which recognizance allowed him to be at large while awaiting trial on another break and enter charge arising in June of 2005. The judge rightly concluded there was a need for both specific and general deterrence. He commented that a four year sentence would not be out of the range but acceded to the Crown's submission that the term be three years after credit for time served.

[16] Mr. MacKenzie is forty-four years old. As demonstrated by his extensive record, to this point he has chosen a life of crime rather than pursuit of an honest living. Break and entry into a dwelling carries a maximum punishment of life imprisonment. On sentencing, his counsel had requested 3:1 credit for his time served in custody before trial. The judge did not specify in his sentencing remarks the rate at which he credited the pre-trial custody. The more usual credit is double. In either case, I am not satisfied that the sentence is demonstrably unfit for this crime and this offender. The judge reviewed all appropriate factors and was alive to the principles of sentencing.

[17] I would dismiss the appeal of conviction. While I would grant leave to appeal sentence I would dismiss that appeal.

Bateman, J.A.

Concurred in:

Roscoe, J.A.

Cromwell, J.A.