PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Taylor*, 2018 NSPC 40

Date: 20180307
Docket: 2930647
2930648/2930649
Registry: Amherst

Between:

Her Majesty the Queen

v.

Walter Francis Taylor

DECISION (SECTION 11(B) APPLICATION)

Judge: The Honourable Judge Rosalind Michie

Heard: 24 January 2018, in Amherst, Nova Scotia

Decision: 7 March 2018

Charges: Sections 5(1), 5(2) and 5(2) CDSA

Counsel: Mr. Douglas Shatford, for the Crown (respondent)
Mr. Robert Rideout, for the Accused (applicant)

By the Court:

Introduction

[1] Walter Taylor is charged with trafficking in a Schedule 1 substance, to wit: methamphetamine on November 18, 2015 at Amherst, Nova Scotia, contrary to section 5(1) of the **Controlled Drugs and Substances Act (CDSA)**; possession for the purpose of trafficking in a Schedule 1 substance, to wit: methamphetamine, contrary to section 5(2) of the **CDSA** and possession of less than 3 kg of cannabis for the purpose of trafficking contrary to section 5(2) of the **CDSA**.

[2] Mr. Taylor has made application for a stay of proceedings, alleging that his right to a trial within a reasonable time has been infringed contrary to section 11(b) of the *Canadian Charter of Rights and Freedoms,* which provides;

> *Any person charged with an offence has the right to be tried within a reasonable amount of time.*

[3] What is a reasonable amount of time? This was addressed in *R. v. Jordan*, 2016 SCC 27 wherein an 18 month ceiling was set for Provincial Court trials, 30 month for Superior Court matters, beyond which delay is considered to be presumptively unreasonable.

[4] Judge Anne Derrick (as she then was) in *R. v. Mahar*, 2017 NSPC 9, paragraph 7 set out a "roadmap" to follow when conducting a "Jordan" delay analysis:

1) Calculate total delay.
2) Deduct delay attributable to the Defence. (This can be waived by the Defence and/or delay caused solely by Defence conduct.) (Jordan, paragraphs 61 and 63).
3) Determine if the remaining delay – the net delay – is above the presumptive ceiling.
4) If the net delay is above the presumptive ceiling, has the Crown shown exceptional circumstances?
5) If there are exceptional circumstances, which the Crown could not mitigate, that caused delay, this delay gets deducted from the net delay.
6) If the delay that remains is below the presumptive ceiling, the burden shifts to the Defence to show that the delay is unreasonable.
7) If the delay remains above the presumptive ceiling, a stay is warranted.

CASE CHRONOLOGY

Dates	**Endorsements**	**Duration**
Nov. 20, 2015 to Jan. 11, 2016	Nov 20/15 - - Date Information sworn Jan 11/16 - first appearance. Disclosure provided directly to accused, returned from original Defence counsel who could not represent accused due to conflict.	52 days (1 month, 3 weeks)
Jan 12, 2015	Accused present with new counsel. Feb	80 days

to Feb 8,2016	8/16 - Election to Provincial Court, trial set for first 2 dates all parties were available, Oct 11 and 13, 2016.	(2 months, 19 days)
Feb. 9, 2016 to Sept. 7, 2016	Interim period between plea and Crown request for adjournment on Sept 7/16.	292 days (9 months, 18 days)
Sept.8, 2016 to May 24, 2017	Crown requests adjournment due to 3 unavailable witnesses. Defence opposed adj. request. Court offered May 9-10, Crown was available, Defence not available; May 23-24 trial dates set.	551 days (18 months)
May 25, 2017 to Sept. 20, 2017	New Judge appointed Mar. 31, 2017; first day sitting May 1,2017. Day 1 of trial completed on May 23, Judge unavailable for day 2 of trial. Sept 20, 2017 set for trial continuation, the first date available for all parties.	670 days (22 months)
Sept. 20, 2017 to Jan. 23, 2018	Jordan raised Sept. 20, displaced trial; Crown prepared to proceed with final witness, Defence objected; adj. for Jordan hearing Oct 19, 2017. Oct 19 2017 – adjourned for Jordan hearing and trial continuation to Jan. 23, 2018, court requested 1 further day adj. to Jan 24, 2018. Defence waiver, Sept. 20 to Jan 23, 2018.	796 days (26 months)

ANALYSIS

1. CALCULATE TOTAL DELAY

[5] Total delay is calculated from the date the information is sworn until the end of trial. The trial in this matter is not concluded, as Defence raised the Jordan issue mid-trial, so an end date must be determined. In written submissions, Defence counsel submitted that the calculation of the total time would be from the date of

the laying of the information, which was on November 18, 2015 until September 20, 2017, the date when the Jordan issue was raised by Defence, and the continuation of the trial was displaced pending a ruling on the Jordan application. At that time, further delay was waived by Defence. The total delay as calculated by Defence counsel is 23 months. I note that there appears to be a miscalculation of the time period between November 20, 2015 and September 20, 2017. This time period is actually 22 months, and not 23 months, as stated by Defence in written submissions.

[6] The Crown submitted that the total delay would be from the laying of the information to January 23, 2018, the date set for the Jordan hearing and trial continuation. The Court requested that the hearing be adjourned one day, moving the end date ahead one further day to January 24, 2018. The total would be 796 days or 26 months as set out in the previous table. I find that the total delay in this matter would include the time period from the laying of the information until January 24, 2018, a total of 796 days or 26 months.

2. DEDUCT DELAY ATTRIBUTABLE TO THE DEFENCE

[7] This can include explicit or implicit waiver by the Defence and/or delay caused by the conduct of the Defence, as discussed in paragraphs 61 and 63 of

Jordan. This delay is deducted from the total delay to determine the "net delay". Defence waiver can be implicit or explicit, but it must be clear and unambiguous.

[8] The Defence submits that one month of delay should be attributable to Mr. Taylor, specifically the time period between the first appearance on January 11, 2016 and the next appearance date on February 8, 2016. This was a Defence requested adjournment to retain and instruct new counsel after it was determined that the original counsel was in a conflict and could not continue to act for the accused. This, in Defence counsel's estimation, would bring the net delay down to 22 months (21 months per the court's calculation), which exceeds the presumptive 18 month ceiling.

[9] The Crown calculated total Defence delay of at least four and a half months stemming from three separate events:

1) Two weeks Defence delay between May 9-10, 2017, the trial dates that were originally offered to Defence, dates that the Crown was available, but Defence was not available until May 23 and 24, 2017, the dates that were ultimately set for trial (*Transcript of Court Proceedings, Sept. 7, 2016, pp 6-7)*; and

2) The four month time period between September 20, 2017 and the new January 23, 2018 Jordan hearing/trial date. The Crown submits that Defence waived the delay for this time period and that it should therefore be deducted from the total delay.
3) Implicit waiver from September 8, 2017 when the Crown requested, and was granted an adjournment to May 23, 2017, the trial date that was set after Defence indicated he was not available before January 2017, and also declined to accept earlier dates offered by the Court.

[10] In support of the Crown's position that Defence had waived delay, the Crown provided a letter written by the Crown to the Court and Defence Counsel on September 21, 2017 confirming that delay was waived by the defence, and requesting an adjournment of the October 19, 2017 Jordan hearing date that had been set the previous day, due to the fact that the Crown would need more time to obtain a transcript of court proceedings and had also not yet received formal notice of the Jordan application and associated documentation. The Crown did not receive a reply to this letter.

[11] The Crown also submitted a letter to the Court which was written by the Crown to Defence counsel on December 6, 2017, which again confirmed the position of the Crown vis-à-vis Defence waiver. The letter confirmed the January

23, 2018 Jordan hearing date, confirmed the Crown's understanding that delay had been waived by Defence counsel, and proposed to continue the trial on that same date and confirmed that the Crown expert witness would be present and ready to testify on January 23, 2018. The Crown did not receive a reply to this letter.

[12] I reviewed the audio recording of Court proceedings on September 20, 2017 and confirmed that Defence explicitly waived delay from September 20, 2017 until January 23, 2018.

[13] The Crown also raised the fact that Defence counsel used the September 21, 2017 date as the end date for calculating the total Jordan delay time period.

IMPLIED WAIVER OF DELAY:

[14] Justice Jamie Saunders in *R. v. Mouchayleh*, 2017 NSCA 51 para. 20 discussed waiver of periods of delay, and noted that:

> *While waiver must be clear and unequivocal, with full knowledge of the right waived and its consequences, counsel may be taken to have waived on behalf of an accused. (emphasis added) In R. v. Askov, [1990] 2 S.C.R. 1199 at p. 1229, the Court quoted Sopinka J. in R. v. Smith, [1989] 2. S.C.R. 1120:*
>
> *Agreement by an accused to a future date will in most circumstances give rise to an inference that the accused waives his right to subsequently allege that an unreasonable delay has occurred. While silence cannot constitute waiver, agreeing to a future date for a trial or a preliminary inquiry would generally be*

> *characterized as more than silence. Therefore, absent other factors, waiver of the appellant's s.11(b) rights might be inferred based on the foregoing circumstances.*

[15] The Court in *Mouchayleh* also noted that the Trial Judge found that delays in filing documents, multiple failures of the accused to appear on scheduled dates and lengthy adjournments by Defence counsel to review brief disclosure led her to conclude that there was implied waiver based on the actions of the accused and counsel. She concluded that defence was in no hurry to have the trial heard on its merits. Judge Buchan had this to say:

> *As noted in Askov [1990] 2 S.C.R. 1199, the Section 11(b) right is one which can often be transformed from a protective shield to an offensive weapon in the hands of the accused.* ***The purpose of Section 11(b) is to expedite trials and minimize prejudice and not to avoid trials on the merits. The actions, or in this case the inactions by the accused, are inconsistent with the desire for a timely trial****. While there is no legal obligation on the accused to assert their right, inaction may be relevant in assessing the degree of prejudice, if any, that an accused has suffered as a result of delay.*

[16] In *R. v. Spears*, 2017 NSPC 51, Judge Derrick found that defence counsel had implicitly waived delay when they elected to keep the trial dates that had been set in long trial court when there was the possibility of canvassing and offering the Defence earlier dates for trial. This was found to be more than mere acquiescence or simply "accepting the inevitable" trial dates, and that by turning down the offer

to canvass earlier dates, this constituted implied waiver. Judge Derrick also noted, at paragraph 18 of *Spears* that:

> *The absence of anything in the record indicating whether the Crown was available or if there may have been earlier dates in Courtrooom #6 is not material in my view.* ***What is material is that the Defence showed no interest in having the issue of possible earlier trial dates explored. Judge Buchan extended an offer to look into earlier dates and the Defence chose to accept the trial dates in her court. I find this constituted an implicit waiver of the delay ….***

[17] In oral submissions made on January 24, 2018, the Crown submitted that there was implicit waiver of the delay by Mr. Taylor between September 8, 2016 and May 24, 2017.

[18] On September 7, 2016 the Crown requested an adjournment of the October 11 and 13, 2016 trial dates due to the unavailability of three Crown witnesses. Defence objected to the adjournment request and indicated that it was ready to proceed to trial on the scheduled dates. The adjournment was ultimately granted by the Court and new trial dates were canvassed. The presiding Judge was live to the Jordan issues and anxious to have the matter heard as quickly as possible. The efforts of the Court in this regard can be seen in the transcript of proceedings, dated September 7, 2016, a portion of which is reproduced below:

> ***THE COURT****: You know, my preference would be to try to get as much of the trial done as possible, and then try to find a short period of time… (page 3, lines 12-13)*
>
> And later at page 5, lines 13 and following;
>
> ***THE COURT****: So, in those circumstances I will grant the Crown's request to adjourn Mr. Taylor's trial. It was originally scheduled for two days. Is that still the expected?*
>
> ***MR. RIDEOUT****: Yes, because I think the defence will be calling evidence, Your Honour.*
>
> ***THE COURT****: **And you're not available until January at the earliest?***
>
> ***MR. RIDEOUT****: **Yes, Your Honour**.*
>
> ***THE COURT****: I think the earliest that we could accommodate a two day trial in the normal course would be in April or May**. Is Mr. Taylor under any particular strict release conditions? So he has no need for me to try and squeeze it in on sequential Fridays or something like that?***
>
> ***MR. RIDEOUT****: **No, Your Honour**.*

[19] Based upon the foregoing, I find that Defence counsel was in no rush to move this matter forward. Mr. Rideout declined the offer of canvassing earlier trial dates which the Trial Judge was willing to make available to him. The Court was also advised by Defence that he was not available for trial until January of 2017, so no dates were canvassed in the intervening three months and one week between September 20, 2016 and January 1, 2017, a total of two months and three weeks (80 days).

[20] I find that this portion of the delay, two months and three weeks is attributable to the Defence, per Judge Derrick's reasoning in *Spears*, and it should be deducted from the total delay. Defence counsel declined Judge Buckle's offer of sequential Fridays and attempts to offer earlier trial dates, confirming his unavailability until January, 2017. Mr. Rideout was content to canvass dates after January, when he might have been able to find available dates. I have selected January 1, 2017 as the date beyond which Mr. Rideout may have been available for trial dates, if they had been available and offered to him. As it stood, there were none available until May 9 and 10, 2017, that was the next date that the Crown was available for trial but Defence was not. This is a total time of 129 days, or four months and one week, which is not Defence delay and therefore counts toward the Jordan ceiling.

[21] I note that this was not the only time that Defence counsel was not concerned about delay and moving the matter forward on its merits. On September 20, 2017 Defence counsel objected to the Crown proceeding with day two of the trial on that date, preferring to displace the trial in favour of time to perfect a Jordan application and to receive an advanced ruling on the Jordan issue, rather than having the trial proceed on that day. The Jordan application was adjourned until October 19, 2017.

On October 4, 2017 the Crown brought the matter forward and requested further time to obtain transcripts and to receive the Jordan application and related filings from Defence counsel that had not yet been received. The Jordan hearing was adjourned until January 23, 2018.

[22] It is often difficult to make an exact allocation of who is responsible for the delay in every situation. This is a good example. Had the offer of earlier trial dates been accepted by Defence counsel an earlier date may have been found and the matter may well have been concluded within the Jordan timelines. Justice Moldaver had this to say in *Jordan*:

> *91 Determining whether the time the case has taken markedly exceeds what was reasonably required is not a matter of precise calculation. Trial Judges should not parse each day or month, as has been the common practice since Morin, to determine whether each step was reasonably required. Instead, trial judges would step back from the minutiae and adopt a bird's-eye view of the case. All this said, this determination is a question of fact falling well within the expertise of the trial judge (Morin, per Sopinka J., at pp. 791-792).*

[23] **Defence delay to obtain new counsel due to conflict**: I do not find that the one month delay between the first appearance of the accused and the February 8 appearance date should be attributable to Defence actions. In *R. v. Cody* 2017 SCC 31, the Supreme Court discussed Defence delay as follows:

> *However, not all delay caused by defence conduct should be deducted under this component. In the presumptive ceilings, this court recognized that an accused person's right to make full answer and defence requires that the defence be permitted time to prepare and present its case. To this end, the presumptive ceilings of 30 months and 18 months have "already accounted for [the] procedural requirements" of an accused person's case (Jordan, at para. 65; see also 53 and 83).* ***For this reason, "defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay" and should not be deducted****. (Jordan, at para. 65)(emphasis added).*

[24] I find that this one month period of delay is not unreasonable and was not a "tactic" or strategy used to frustrate or unnecessarily prolong proceedings. The Crown submitted that one month is not an excessive delay to obtain new counsel and references the decision of Judge Scovil in *R. v. Brown*, 2017 NSPC 27 wherein he found that 45 days is a reasonable amount of time within which to enter a plea and allocated delay in excess of that time period to the Defence.

[25] I find that the delay attributable to the Defence which is to be deducted from the total delay is as follows:

Defence Caused delay: two weeks (14 days), between the May 9-10, 2017 trial dates which were offered and May 23-24, 2017 trial dates that were ultimately set, due to Defence unavailablilty.

Explicit waiver by defence: four months (126 days), from Sept 20, 2017, when the Jordan issue was raised to January 23, 2018.

Implicit waiver by defence: Two months and three weeks (80 days), the time period between October 14, 2016 and January 1, 2017 wherein Defence counsel indicated he was not available, and therefore no earlier dates were canvassed.

Total delay attributable to Defence: Seven months and one week (220 days). When this is deducted from the total 26 month delay (796 days), the net delay is eighteen months and three weeks (576 days).

3. DETERMINE IF THE REMAINING DELAY IS ABOVE THE PRESUMPTIVE CEILING

[26] I have determined that the net delay in this case is 18 months and three weeks, which exceeds the 18 month presumptive Jordan ceiling.

4. IF THE NET DELAY IS ABOVE THE PRESUMPTIVE CEILING HAS THE CROWN SHOWN EXCEPTIONAL CIRCUMSTANCES?

What factors are to be considered "Exceptional Circumstances" and therefore deducted from the total delay?

[27] *Jordan* set out two categories of exceptional circumstances which could be used by the Crown to rebut presumptively unreasonable delay; 1) discrete events beyond the Crown's control and 2) complex cases.

[28] Neither Crown nor Defence asserts that the case at bar was particularly complex, so I will concentrate on the discrete events that the Crown has argued are

present in this case. The first is the realization by original Defence counsel that they were in conflict, and the subsequent requirement for a further one month adjournment to obtain new counsel. The second discrete event is the appointment of a new Provincial Court Judge who had a scheduling conflict and was unavailable for the second day of trial that was set by the preceding Trial Judge. In support, the Crown filed the Order In Council dated March 31, 2017 which proclaimed the Judicial appointment. I would add to this that although I was appointed March 31, 2017, I was required to relocate to Cumberland County from another jurisdiction and did not commence sitting as the presiding Judge in Amherst until May 1, 2017, 22 days before the trial was scheduled to start on May 23, 2017.

[29] Judicial delay has been addressed by the courts in post-*Jordan* cases in two different ways when considering the time required to deliberate or render a decision in an attempt to balance the important constitutional principles of trial within a reasonable time and Judicial independence.

[30] In *R. v. K.G.K.* 2017 MBQB 96, judicial delay was not counted against the total delay. The Court excluded consideration of judicial delay from the Jordan framework and applied the test set out in *R.v. Rahey* [1987] SCR 588 wherein the Supreme Court found that unreasonable judicial delay was delay that was found to

be “shocking, inordinate and unconscionable”. In *Rahey*, the delay was a period of 11 months taken by the Trial Judge to deliver a decision that could have been done in a matter of days.

[31] The reasoning of the court in *K.G.K.* was followed by Judge Timothy Landry in *R. v. Leblanc* (unreported 2017) wherein he considered how to characterize the judicial delay required to deliberate and render a decision on a *Charter* application. Judge Landry determined the seven and a half month delay, which included almost four months for counsel to file briefs, was not an unreasonable delay and was not “shocking, inordinate or unconscionable”. Accordingly, he did not consider Judicial delay in his s.11(b) analysis, deducting it from the total delay.

[32] In *R.v Mamouni* 2017 ABCA 347, paras. 54-56, the Court took a different approach, finding that consideration for the time taken for Trial Judges to make rulings and render decisions was already contained in the Jordan presumptive ceilings and that any deductions on account of Judicial delay should be included in the Jordan timeline and categorized as due to “exceptional circumstances” which would include discrete events or complex cases as contemplated in the *Jordan* and *Cody* analysis and considered on that basis, rather than outside of the Jordan framework.

[33] There must be a balance between the right to a trial within a reasonable time and the necessity for Judicial independence, which includes the time to effectively prepare and deliver decisions and properly manage scheduling issues as they arise. In the present case, I was a newly appointed Judge sitting for just three weeks before the first day scheduled for trial, which was started on May 23, 2017. I was scheduled to attend Judicial training, which I determined to be a priority given my very brief time sitting as a Provincial Court Judge. Indeed, I think it would be difficult to argue that the training of newly appointed Judges should not be a priority. The trial dates for this matter were set months in advance of my appointment by another presiding Trial Judge. The Crown could not have anticipated the new Judicial appointment, nor the scheduling conflict, and other than making itself available for future trial dates as soon as practicable - it could do little else to remedy this unforeseen circumstance.

[34] Accordingly, although it seems inappropriate to make a ruling on court delay that was a result of my own actions, the courts have affirmed that this is required of me, and I find that the delay was an exceptional circumstance, a discrete event per *Jordan* and *Mamouni*, and that the four month period between May 25 and September 20, 2017 should be deducted from the calculation of the total delay.

I also find that the one month period between January 12 and February 8, 2016 that arose as a result of a Defence requested adjournment to obtain new counsel was also an exceptional circumstance, a discrete event that was beyond the control of the Crown to remedy and should therefore be deducted from the total delay.

[35] The total delay due to these two discrete events is five months, which when subtracted from the net delay of 18 months and three weeks brings the delay down to 13 months and three weeks, which falls well below the Jordan ceiling for delay. If the delay that remains is below the presumptive ceiling, the burden shifts to the Defence to show that the delay is unreasonable. The Defence has not met this burden and accordingly, I find that there is no section 11(b) *Charter* violation.

Rosalind Michie, JPC.