PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R v Scheiring*, 2022 NSPC 7

Date: 20220304
Docket: 8481039-40
Registry: Kentville

Between:

R.

v.

Natalie Scheiring

APPLICATION TO WITHDRAW GUILTY PLEA

Judge:	The Honourable Judge Ronda van der Hoek, JPC
Heard:	March 2, 2022, in Kentville, Nova Scotia
Decision:	March 4, 2022
Charge:	s. 266 *Criminal Code* s. 264.1(1) *Criminal Code*
Counsel:	Tim Peacock, for the Applicant Ms. Scheiring Lauran Haas, for the Crown

By the Court: (orally)

Introduction:

[1] On the trial date, Ms. Scheiring [hereinafter the Applicant] was represented by counsel who entered a change of plea to guilty to one count of committing an assault on Tatyana Moehrenshlager on November 20, 2020.

[2] The Applicant brings application to withdraw the guilty plea that she says was uninformed.

[3] The Crown opposes the application arguing the Applicant was represented by a competent QC who advised her of the consequences of entering a guilty plea and acted on her instructions. The charge was read to the Applicant, and she affirmed her change of plea.

The Issue:

[4] Has the Applicant established on a balance of probabilities that her plea was uninformed?

Decision:

[5] After careful consideration the Court concludes the Applicant has not discharged the burden. She was informed of the consequences of changing her plea to guilty to a criminal charge.

Evidence led on the Application:

[6] The Applicant and her previous counsel, Mr. Greer, filed affidavits that were supplemented by brief *viva voce* testimony. The recording of the court appearance was played on the record, and it makes good sense to start there.

The Proceeding:

[7] Mr. Greer advised the Court he and his client had discussions, the Crown waived off its witness, and she is entering a plea of guilty to the first count on the two-count information.

[8] The Clerk reads the charge to the Applicant and the Court asks the Applicant to confirm her change of plea to guilty to assault. The Applicant confirms she is doing so.

[9] The Court undertakes the s. 606(1.1) CC plea confirmation enquiry, and the Applicant provides affirmative answers to the following: she is entering the plea freely and voluntarily, understands she is giving up her right to a trial, understands the elements of the offence, and knows the Court is not bound to accept a jointly recommended sentence.

[10] The Victim Impact Statement (VIS) is released to counsel and the Court takes a recess to review. Mr. Greer says his client can either stay online via MS Teams during the recess or he can call her if he needs to speak to her directly.

[11] Following the recess the Crown reads the facts of a particularly violent assault, and a contest arose as defence counsel worked to add mitigating facts. Ultimately, *albeit* reluctantly, the Crown accepts those additional facts- that the complainant first slapped the Applicant across the face, in response to a verbally abusive name leveled at her, prior to the Applicant assaulting the complainant.

[12] The Crown presented a joint sentence recommendation. During defence counsel's submission the Court heard about possible impacts to the Applicant arising from international travel and was told she is an American citizen. Concerned about possible immigration consequences, the Court enquired and was told counsel "thinks" she is a dual citizen.

[13] The Court also wanted to know more about the Applicant such as her age. Defence counsel asked his client to provide the answer and she told the Court she is 22 years old. Still not clear on the immigration situation, the Court ordered the preparation of a presentence report, and the matter was scheduled to return. The Applicant actively participated in choosing a next date and time to work around her class schedule.

The Applicant's Affidavit:

[14] The Applicant's affidavit was filed on the application, and she was presented for cross examination.

[15] She says a week or two before trial, counsel contacted her by telephone and email. He presented a few options "each with their own specific outcomes". She

specifically recollected a telephone conversation wherein she understood a Peace Bond was not available having been rejected by the complainant.

[16] The next best option was "a similar idea called a discharge". She understood a discharge "was a way for me not to have to go to court and I would just have to follow some conditions, such as having no contact with the complainant, have a few meetings with the probation officer and possibly refrain from alcohol". She considered and accepted that option, confirmed her instructions, and "assumed it meant that I did not even have to go to court, and I could move on from this without having a criminal record or a conviction". (Applicant's Affidavit at paragraph 8)

[17] On the morning of September 27, 2021, she received a telephone call from her lawyer offering the option to come to court in person or attend by video. She attended by MS Teams.

In the Courtroom:

[18] The Applicant recollects her matter being called, her lawyer standing up and indicating she wished to change her plea to guilty. She says she was "startled to hear those words as I did not understand that I would be entering a guilty plea… I believe it was clear from my prior communications with Mr. Greer that I did not wish to plead guilty". (Applicant's Affidavit at paragraph 10)

[19] Following Mr. Greer's representation to the Court, the Applicant says the Court addressed her directly. Asked if she was agreeing with what Mr. Greer had said and if she understood the consequences of changing her plea to guilty. The Applicant says, "feeling overwhelmed and confused, I did not wish to get in trouble by saying something different than my lawyer, so I simply agreed". (Applicant's Affidavit at paragraph 11)

[20] During cross examination by the Crown, the Applicant agreed there was a break in proceedings during which she did not try to contact counsel to communicate any concerns.

[21] Also on cross examination, she denied Mr. Greer was instructed by email "to open the door to *negotiations"*. When the Court referenced counsel's affidavit and asked the Applicant if she had done so with respect to "resolution" as written in his affidavit, she agreed she did so. She denied receiving an email from Mr. Greer

about pleading guilty, instead she believes the discussion about plea was undertaken on the phone.

[22] No correspondence between the Applicant and Mr. Greer was filed on the application.

[23] The Court asked, after hearing Mr. Greer say she was pleading guilty, what she thought that meant. *She said she was unsure if that was under the umbrella of the discharge.* Asked about her response during the s. 606 plea confirmation, she said she understood that she was confirming what she agreed with her lawyer.

[24] In her affidavit the Applicant says the matter proceeded and things were said that she was unaware of such as a discussion about whether this matter would result in a criminal record. She says she was "really frightened" as she had understood a discharge was similar to a peace bond and the charges would be dropped after she agreed to the conditions.

[25] She recalled the Court asking counsel about her citizenship and she was concerned that her counsel was unaware she had dual citizenship. She says she had discussed that earlier with counsel, but it appeared to have slipped his mind.

After Court:

[26] The Applicant says immediately after the proceeding she reflected on what happened and felt that she did not fully understand the process or the possible consequences of what had occurred. Had she known the proceeding ultimately involved changing her plea to guilty she never would have done so. Had she known she could interject to say something different than her lawyer, she would have done so. Unfamiliarity with the legal system and a wish to remain respectful of the proceedings resulted in her "simply acquiesc[ing] during the proceeding". (Applicant's Affidavit at paragraphs 13 and 14)

Mr. Greer's Affidavit:

[27] Mr. Greer's affidavit explains his early representation of the Applicant, their discussion about the charges, review of disclosure on the telephone, and her instructions to enter not guilty pleas and set the matter for trial. After doing so he was unsuccessful in reaching the Applicant who he understood had returned to the United States.

[28] They spoke a few weeks before trial discussing a Crown application for remote testimony from the complainant and Mr. Greer advised her the Crown was not interested in resolving with a Peace Bond. They discussed the possibility of "a discharge as a resolution, and as a way of ensuring she would not be saddled with a record of conviction in the long term". Mr. Greer says the Applicant accepted it as the best option in the circumstances.

[29] Mr. Greer says he "sent an email describing what probation would entail and what the counselling would likely involve and did mention that it would involve a guilty plea, although I did not reference a criminal record in writing". He also says he is confident he would have briefed the Applicant with respect to the s. 606 *Criminal Code* factors including a discussion of the facts she would accept. (Mr. Greer's Affidavit at paragraphs 4 – 7)

[30] Mr. Greer says he reviewed his file and "although I followed my usual procedures when obtaining instructions from a client, I did not obtain instructions from Ms. Scheiring in person or over video link…. [i]n hindsight, I can see that this could cause some confusion because the usual practice of receiving instructions in writing before entering ability [sic] plea and the ability to pick up on social cues from the client to confirm that she clearly understood were missing". (Mr. Greer's Affidavit at paragraph 8)

[31] He concedes that the discussions he had with the Applicant, pre-Covid, would have been face-to-face and not over the phone, adding he would have confirmed instructions in writing pre-Covid. He says in the last 18 months this practice has lapsed somewhat and he is having more of these types of conversations with his clients over the phone. He says he believed the Applicant understood what was being proposed and that they both understood her instructions. He does concede that he did not secure instructions in writing.

The Court Appearance:

[32] Mr. Greer expected the matter to be short in duration and did not have a lengthy conversation with the Applicant prior to court. He did, however, take a moment to tell her that he spoke to the Crown, and everything was "as we discussed".

[33] His instructions were to present a joint recommendation for a conditional discharge.

[34] In his testimony, asked if it was his understanding she would plead to count one and not count two, Mr. Greer confirmed that was her instruction.

After Court:

[35] Mr. Greer confirms later that same day, and in the days that followed, that the Applicant suggested she pled guilty without the necessary acceptance of responsibility.

The Law:

[36] Judge Brecknell in *R. v. Hallam*, 2003 BCPC 333, set up the background to the analysis quite nicely:

> [33] I agree with the Crown's submission that withdrawal of a guilty plea is not a matter of right to an accused. An application to withdraw a guilty plea must be carefully considered and is rarely granted.
>
> [34] The reasons for that are manifold. To permit accused persons to vacillate between claims of innocence, pleas of guilty and renewed claims of innocence would cause great mischief. It would create chaos in the criminal justice system if it were permitted to occur regularly because it would interfere with the willingness of Crown to enter into discussions with counsel for the accused surrounding resolution of outstanding charges because the Crown could never be certain that if a plea bargain was struck the accused would adhere to it.
>
> [35] Furthermore, if withdrawal of guilty pleas were permitted without careful consideration by the Court to ensure that granting such applications were in the interests of justice the Court would be failing in its duty to ensure fairness not only to the accused but also to complainants and witnesses who quite rightly would feel a certain sense of relief when a guilty plea was entered.

[37] Our Court of Appeal in *R. v. Symonds* 2018 NSCA 34, reconfirmed the relevant factors set out a year earlier in *R. v. Henneberry* 2017 NSCA 71. A guilty plea entered in open court is a formal admission of the essential elements of the offence. A trial judge may conduct an inquiry into the validity of a plea pursuant to

section 606 of the *Criminal Code*, but need not do so when a defendant is represented by counsel who indicates those considerations were canvassed before hand. Such may also be inferred in appropriate circumstances without a detailed discussion on the topic. (*R. v. Henneberry* 2017 NSCA 71 at paras. 12 and 13) Indeed s. 606(1.2) provides "the failure of the court to fully inquire whether the conditions set out in subsection (1.1) are met does not affect the validity of the plea".

[38] The Court has discretion to grant the application if the Applicant discharges her onus to establish, on a balance of probabilities, that the plea was invalid. A valid plea is voluntary, unequivocal, and informed. (*R. v. T.(R.)*, 1992 CanLII 2834 (ON CA))

Informed:

[39] An informed plea necessitates an awareness of the criminal consequences of the plea as well as the legally relevant collateral consequences. A legally relevant collateral consequence will typically be one that is state imposed, flows fairly directly from the conviction or sentence, and impacts the serious interest of the accused. (*R. v. Wong*, 2018 SCC 25)

[40] A Court must consider whether there was a lack of awareness of the effect of the plea. (*Adgey v. The Queen*, 1973 CanLII 37 (SCC), [1975] 2 S.C.R. 426; *Brosseau v. The Queen*, 1968 CanLII 59 (SCC), [1969] S.C.R. 181; *R. v. Bamsey*, 1960 CanLII 35 (SCC), [1960] S.C.R. 294.)

[41] In this case, the Applicant argues she did not understand she was pleading guilty to committing a crime and likewise did not accept the factual foundation for that plea. It appears she expected some type of extra judicial proceeding and outcome to occur.

[42] While she does not appear to be arguing her plea was also involuntary and/or equivocal, it is useful to also set out what those considerations entail.

Voluntariness:

[43] A voluntary plea is arrived at by one's own free will, it "refers to the conscious volitional decision of the accused to plead guilty for reasons which he or she regards as appropriate" (*R. v. Rosen*, [1980] 1 SCR 961 at p. 974)

[44] A guilty plea entered in open court will be presumed voluntary unless the contrary is shown. Voluntary pleas are untainted by improper threats, bullying or any improper inducement to plead guilty. That may include pressure brought to bear by a lawyer or a family member, coercion or oppression, the presence of a plea bargain or other inducement, or the effects of drugs or mental illness that could impair decision-making.

[45] Anxiety may also count if it rises to the level where it impairs the ability to make a conscious volitional choice, however the mere presence of these emotions does not render a plea involuntary: *R. v. T(R.)* 1992 CanLii 2834 (ONCA) at paragraph 18.

Unequivocal:

[46] A guilty plea is meant to be unequivocal, and not conditional. A guilty plea provides certainty and finality in the criminal proceedings. "When an accused enters a plea of guilty and the trial judge accepts the plea, the court, the prosecution, and the public are led to believe that the accused is accepting responsibility for having committed the offence" (*R. v. Duong*, 2006 BCCA 325 (CanLII) at paras. 9 and 10)

Factors to consider on such an application:

[47] The Newfoundland Court of Appeal in *R. v. Stokely*, 2009 NLCA 38 at paragraph 7, set out a helpful list of factors to consider. The Court is cautioned to be vigilant to ensure a defendant not be permitted to abandon a position when things do not play out as they expect. Factors to be taken into account include whether:

1. the defendant was represented by experienced counsel;

2. was apprised of her position in law and thus understood the nature of the charge to which she plead;

3. the defendant had a valid defence;

4. the plea was given under undue pressure;

5. the experience of the defendant with the criminal justice system; and

6. whether the plea was entered personally.

[48] Our Court of Appeal in *R. v. McCollum*, 2008 NSCA 36 also encourages the trier to consider whether a defendant was represented by counsel prior to and at the time of the guilty plea as a significant factor.

[49] *R. v. Wong* 2018 SCC 25 addressed "meaningful different course" and a reasonable possibility the Applicant would have taken it, as a consideration. The suggestion here is the Applicant would not have plead guilty. Objectively she was informed about the Crown's application to have remote testimony that the Crown says would likely not have been successful, and instructed her counsel to change her plea to one count for a joint recommendation on the trial date. It is objectively clear the matter was never going to trial that day, resolution was confirmed. She would plead guilty and seek a discharge.

Analysis:
Assessing the evidence of the Applicant:

[50] Hearing the Applicant testify, the Court discerned an effort to be evasive and unhelpful. She presented as an intelligent, careful person. English is her first language, she is in the third year of a science degree, she does not suffer from impairments to her intellect. Her answer to the question about negotiations v. resolution struck the Court as evasive and an effort to provide minimal information.

[51] The Court asked the Applicant: After hearing Mr. Greer say you were pleading guilty, what did you think that meant. *She said she was unsure if that was under the umbrella of the discharge.* It was, I find, apparent to her she needed to plead guilty to receive a discharge.

[52] The Court is not required to undertake a s. 606 plea confirmation when a person is represented by counsel, although this Court regularly does so as a matter of course when a plea is changed on the date of trial. The Court did not ask if she understood the consequences of a change of plea, I find it was not necessary to do so: see s. 606(1.1). I note the Applicant answered all the Court's questions positively agreeing her guilty plea was voluntary, providing her age, speaking about a best date to return for sentencing and offering a time that worked for her class schedule. There was no hint of any concern about how things were proceeding.

Assessing the evidence of Mr. Greer:

[53] While Mr. Greer's effort to be fair was appreciated, the Court does not accept that the use of phone and not meeting in person might have hindered this particular client in her understanding of her instructions. She is not mentally fragile, or undereducated, she is well spoken and careful. The Court does not accept this lawyer, gifted with the QC designation, was hindered in his ability to explain discharge and plea bargain provisions to an educated client. He obtained a decent joint recommendation and a beneficial outcome. There is no magic in reading social cues about pleading guilty to seek a discharge to avoid a criminal record. I find Mr. Greer explained the process and took informed instructions from the Applicant.

Conclusion:

[54] In my view, the Applicant lacked credibility in her assertion that she would not have plead guilty had she know she was admitting to a criminal offence and "may obtain a record of conviction". The evidence viewed objectively simply does not support same. This is particularly so in light of being represented by competent counsel who I find explained her options and acted on her instructions. Although Mr. Greer says he did not take those instructions in writing or speak to her face to face, he was entitled to rely on his verbal instructions.

[55] In light of my conclusion the Applicant was informed, I also note she accepted to change her plea for a benefit- one charge did not proceed, and the Crown joined in recommending a discharge. This, in my view, also supports the objective accuracy of her informed change of plea.

[56] The Court is not satisfied it is reasonably possible the Applicant was unaware a change of plea to guilty was a necessary precursor to advancing her sentence position. Being "unsure if that was under the umbrella of discharge", does not establish she was uninformed.

[57] On balance, I am not satisfied the plea was uninformed and that she did not appreciate its effect; *R. v. Anthony Cook*, 2016 SCC 43 of which her counsel was well aware, practically ensured the sentence recommendation would be accepted by the Court.

[58] While it is not necessary to conclude what motivates an application such as this, I strongly suspect the Court ordering a PSR after asking questions, led to

concern on the part of the Applicant that the joint recommendation may not be accepted. That of course is not the case as the Court was simply concerned about the risk of immigration consequences. (Unlike *Wong*, *supra*, the Applicant does not rely on same in this application.)

[59] Finally, the Applicant does not credibly suggest she had a valid defence, personally confirmed her guilty plea, instructed her counsel, and engaged verbally with the Court throughout. In the result, the Applicant has not established on a balance of probabilities her plea was uninformed.

[60] The matter can proceed with or without a presentence report at your pleasure Mr. Peacock.

Application denied
van der Hoek J.