PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Thibault*, 2022 NSPC 16

Date: 20220519
Docket: 783060
Registry: Kentville

Between:

Her Majesty the Queen

v.

Colton Thibault

Decision on Application to Withdraw Guilty Pleas

Judge:	The Honourable Judge Ronda van der Hoek
Heard:	February 16 and May 16, 2022, in Kentville, Nova Scotia
Decision	May 19, 2022
Charge:	Sections 268, 270(1), 88, 733.1(1) of the Criminal Code of Canada
Counsel:	Self-represented Nathan McLean, for the Crown

By the Court:

Cases considered: *R. v. Symonds* 2018 NSCA 34; *R. v. Henneberry*, 2017 NSCA 71 with specific attention to paras 12 to 20; *R. v. T.(R.)*, 1992 CanLII 2834 (ONCA); *R. v. Arcand*, 2000 SKCA 60; *R. v. White*, 2009 NSSC 313 at para. 10; *R. v. Buchanan*, 2016 NSPC 45; *R. v. Clermont*, 1996 CanLII 10244 (NSCA); *R. v. Rosen*, 1979 CanLII 59 (SCC); *R. v. Murphy*, 1995 NSCA 49 (CanLII)

Introduction:

[1] On the trial date, Mr. Thibault changed his pleas to guilty to three counts on a five count Information- aggravated assault, assault police, and breach a condition of a Probation Order. He was represented by counsel and a s. 606 plea confirmation hearing was held. A presentence report was ordered, and the matter was scheduled for sentencing on March 5, 2020.

[2] A few days after changing his pleas, Mr. Thibault fired his lawyer and filed notice of an application to withdraw the guilty pleas. Mr. Thibault says his counsel "blackmailed" him into entering those pleas and he wishes to proceed to trial.

[3] The Crown rejects the assertion of blackmail, says the pleas were voluntary and should stand.

[4] Mr. Thibault waived solicitor client privilege and the Court heard testimony from former counsel, Mr. Williams. Mr. Thibault and his mother also testified.

The Issue:

[5] Were the guilty pleas invalid?

Decision:

[6] After carefully reviewing the evidence of the witnesses, my own detailed notes, and the audio recording of Mr. Thibault's testimony, the Court is not satisfied he has discharged his burden to establish the invalidity of the pleas. The application is dismissed, and the pleas stand.

The Law on the Issue:

[7] Guilty pleas entered in open court are formal admissions of the essential elements of the offences. A trial judge may choose to conduct an inquiry into the validity of a plea pursuant to s. 606 of the *Criminal Code* but need not do so when an accused is represented by counsel. Some judges always do so if the plea comes on the date of trial; some counsel ask for a judicial plea inquiry in the regular course, while others ask only if they have concerns about their client's commitment to the decision to plead guilty. What is clear, a plea inquiry is

certainly no impediment to bringing an application to withdraw a guilty plea and is simply a factor for the application judge to consider.

[8] Our Court of Appeal in *R. v. Symonds* 2018 NSCA 34, reconfirmed the particular factors relevant to such applications in the appellate court, as they were set out a year earlier in *R. v. Henneberry*, 2017 NSCA 71 (CanLII). The factors are, or course, equally applicable to an application before a court of first instance, with the obvious exception of the factors applicable only on appeals. A Court has discretion to grant the application if the applicant discharges his onus to establish on a balance of probabilities that the plea was invalid. A valid plea is voluntary, unequivocal, and informed. (See *R. v. Clermont*, 1996 CanLII 10244 (NS CA) and also *R. v. T.(R.).*, 1992 CanLII 2834 (ON CA)).

[9] A guilty plea may be struck where an accused establishes he received wrong advice. There is no such allegation that Mr. Thibault received wrong advice from Mr. Williams. (*R. v. White* 2009 NSSC 313 at para. 10 and *R. v. Buchanan*, 2016 NSPC 45 for general principles)

Voluntariness:

[10] A voluntary plea is arrived at by one's own free will, which "refers to the conscious volitional decision of the accused to plead guilty for reasons which he or she regards as appropriate" (*R. v. Rosen*, 1979 CanLII 59 (SCC)).

[11] 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 mental illness that could impair decision making.

[12] 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 emotions does not render a plea involuntary: *R. v. T. (R.)* at paragraph 18.

The Evidence:

[13] Mr. Williams testified that prior to the January 13, 2020 trial date, he and his client met and discussed trial strategy in October and March 2019. Mr. Williams assessed the strength of the Crown's case and told Mr. Thibault his lack of memory of the incident/offences meant he was not in a good position to defend against the charges. As such, his only option was to challenge the testimony of the Crown

witnesses, but the Crown's case was strong and there were very few inconsistencies in those statements.

[14] Mr. Williams said he was asked by Mr. Thibault to consider a number of issues: the possibility the victim might have pulled a knife on Mr. Thibault before being stabbed; that Mr. Thibault may have been threatened while he was asleep; and the manner in which he was awoken might represent a defence. Mr. Williams testified that without a memory of any of these things, Mr. Thibault positing, "I would only stab someone who pulled a knife on me" was not a particularly valuable position to take, however it could be teased out on sentencing. Finally, regardless of how he was awoken, Mr. Thibault stabbed the victim through a door and so means of waking did not matter.

[15] Mr. Williams says he also explained that the defense of not criminally responsible was unavailable to Mr. Thibault because self-induced automatism by alcohol was not an available defence to the charges. (It is worth noting that the decision in *R. v. Brown*, 2022 SCC 18 was not available to Mr. Williams at the time, in any event, there was no medical evidence available to support a defence for Mr. Thibault). Mr. Williams explained to Mr. Thibault that stabbing someone through a door would, in any event, not be seen to fall within an available defence.

[16] Mr. Williams also testified that the two discussed the risks and the benefits of pleading guilty before a trial- a reduced sentence. And, after having these "hard discussions about considering resolution," he recognized his client was struggling so told him to take the Christmas holiday to decide how he wished to proceed.

[17] On January 10, 2020, the Friday before trial, there were two phone calls between Mr. Thibault and counsel. On the first, they spoke for an hour and half and Mr. Thibault's mother also participated. Mr. Williams agreed he told Mr. Thibault, "You need to hurry up" because the trial is fast approaching, and instructions were needed before January 13. Mr. Williams noted Mr. Thibault's memory was not improving and, while it was an emotional situation, he was "circling and coming to terms with his situation." Mr. Williams left Mr. Thibault with legal advice. Forty minutes later the second call took place, with Mr. Thibault relaying instructions-change his pleas to guilty. Mr. Williams was satisfied there was no cognitive dissonance and confirmed Mr. Thibault fully understood what he was doing. On cross-examination Mr. Williams also agreed that he had spoken to Mr. Thibault's mother during the January 10 phone calls. Satisfied with his instructions, he did not expect there would be a need to meet before court on January 13.

At Court:

[18] Mr. Williams recalled attending Court where Mr. Thibault was nervous and acting unsure despite his earlier instructions. As a result, they went to an interview room at the Courthouse and reviewed everything once again. Mr. Williams told Mr. Thibault, “It’s your choice, but you have no evidence due to a lack of memory.” Mr. Williams reminded Mr. Thibault that he had the Crown’s sentencing position from earlier conversations should Mr. Thibault enter guilty pleas rather than proceed to trial. His client was aware a federal sentence of up to five years “was on the table” should the matter proceed to trial, but a lengthy provincial sentence would be considered if he did not. They discussed the Crown wanting a presentence report before making a sentence recommendation and Mr. Williams told Mr. Thibault the report should be thorough. Mr. Thibault maintained his instructions. Mr. Williams told Mr. Thibault the Court would likely ask questions during the change of plea, but did not tell him what to say. He told him, “The judge would have to be satisfied with accepting the plea”. To minimize anxiety Mr. Williams told Mr. Thibault before court the questions he would be asked, having also done so on an earlier occasion. Mr. Williams says there were no threats nor intimidation by him.

[19] Mr. Williams says he sat at counsel table, Mr. Thibault was behind him, and Mr. Williams entered the three guilty pleas. Mr. Thibault was asked to personally

confirm his pleas and responded positively at the s. 606 *Criminal Code* confirmation hearing. Mr. Williams says Mr. Thibault may have been crying in the courtroom.

Mr. Thibault's cross examination of Mr. Williams:

[20] Mr. Thibault asked Mr. Williams to acknowledge an email dispute between the two prior to court wherein he fired Mr. Williams and told him not to attend the Courthouse. Mr. Williams agreed an email was sent but not received by him until after Court. As a result, he was unaware Mr. Thibault wanted to fire him. Mr. Williams also confirmed that when he arrived at the courthouse, he was not told he was fired and would have come off the file if there had been such a direction. He said he does not speak to clients who want to fire him and obtain new counsel. He says their issue was the pleas pursuant to the resolution agreement, and while he was prepared to concede that there *may* have been a discussion about firing, there was no clear indication Mr. Thibault wanted to fire him. When they entered the courtroom, it was with instructions obtained after Mr. Thibault vented his frustration and his mother helped him to settle and think about things.

[21] Mr. Williams, asked about Mr. Thibault's mental health, says he was aware of a severe alcohol disorder and had spoken with Nova Scotia Legal Aid about

eligibility for the Court Monitored Mental Health Court, but Mr. Thibault was ineligible because that court requires a diagnosis of mental disorder which he did not have. Rather, Mr. Thibault is an alcoholic and despite Mr. Thibault expressing suicidal thoughts, those were expressed in connection to the case and being wronged by the justice system. He does not ever recall Mr. Thibault receiving a diagnosis that would qualify for the mental health court.

[22] With respect to the pivotal question of voluntariness, Mr. Williams says "I would have told him if this matter goes to trial, he will likely be convicted but he can go to trial if he wants to and risk it". He acknowledged that Mr. Thibault grudgingly pled guilty, was not happy, but understood the legal advice. Mr. Williams did not deny feeling frustrated because the two spent so much time discussing the case and, after taking instructions, Mr. Thibault wanted to reverse course after a deal had been made. Mr. Williams says he was concerned about the situation and took what he described as a "tough love" approach. He explained that it was the trial date, and Mr. Thibault could not "be waffling", and if he did not accept responsibility, he would have to face the consequences. Asked if there was any cause for pause in his dealings with Mr. Thibault, Mr. Williams says his client was emotional and upset but nothing made him think he was not acting on his own

free will. He was dealing with a tough reality which obviously led to those emotions.

[23] Asked about who chose the charges Mr. Thibault would plead guilty to, Mr. Williams says he believed the Crown did so, adding it was decided in the context of the plea discussions.

[24] Asked about the consequences of not entering the pleas, Mr. Williams testified, “it was clear from the top what was being sought by the Crown and there was a good possibility Mr. Thibault was going to be going to jail for two years or five”.

[25] Asked if he blackmailed Mr. Thibault, Mr. Williams flatly denied doing so, adding “I told him he’d lose, and the Crown would seek federal time if the matter proceeded to trial”.

[26] Asked about the facts Mr. Thibault was prepared to accept, Mr. Williams says, “Mr. Thibault did not have a clear recollection of the facts” and Mr. Williams was thinking about challenging some of the facts that were not elements of the offences. Mr. Thibault did, however, accept that he stabbed the victim through a door, in the stomach, and punched a police officer.

The Evidence of Mr. Thibault:

[27] Mr. Thibault says he arrived at the Courthouse not expecting Mr. Williams who had, the day before, been fired by email. He was stressed and knows his memory is not great due to childhood trauma, but thinks he spoke with Mr. Williams for less than half an hour and at 11:40 am entered guilty pleas. Mr. Thibault says his mother was present during the meeting and he did not want to go through with entering those pleas.

[28] Mr. Thibault says Mr. Williams told him he would go behind Mr. Thibault's back to make sure he got five years, so Mr. Thibault felt there was nothing he could do about it in the end. He wishes he had worn a body camera that day, but he never thought he "would be thrown under the bus like that". He also testified that Mr. Williams told him he could not fire him, or he would tell the judge he quit, but there would be questions from the judge. He said Mr. Williams's words reduced him and his mother to tears, adding his mother also pressured him, and he felt he had no choice but to plead guilty. He says Mr. Williams went "all out to get me to enter guilty pleas". Mr. Thibault says he is not confused about this because two days later Mr. Williams resigned.

[29] Mr. Thibault also says he was under pressure from Mr. Williams to negotiate a deal. Mr. Thibault says he was threatened by Mr. Williams who took advantage of his mental illness. While at Court crying, he did not expect blackmail from his

lawyer. That said, Mr. Thibault testified that he was informed at the time that pleas had to be entered voluntarily, and knew he was pleading guilty.

[30] Under cross-examination Mr. Thibault agreed with the Crown that he understood the charges he was pleading guilty to, and agreed he met with Mr. Williams a number of times to review disclosure. Asked about the email firing of Mr. Williams, Mr. Thibault conceded that when he saw Mr. Williams in court on January 13, he knew Mr. Williams had not seen the email. He said his intention was to fire Mr. Williams, maintaining he told him that he wanted to take the matter to trial. He agreed that he continued meeting with Mr. Williams, adding that Mr. Williams said he was not firing him, and if he did, he would make his life hell. He explained that they were both angry at each other and "at each other's throats". Mr. Thibault also acknowledged that jail was a possible sentence upon entering guilty pleas, however, says he would not have entered those pleas if Mr. Williams had not threatened him. He says it was all too much and he did not have other advice from a lawyer and his "mental health [was] overborne".

[31] Asked if he was crying that day in Court, Mr. Thibault explained that he was angry and both he and his mother cried. Asked about the s. 606 inquiry and his positive answers, Mr. Thibault said "When I read the transcript my heart dropped. I

wish I could've had a moment, that moment over to say what was going, I was going through. But without evidence…"

[32] Asked about memory problems, he agreed his memory is not good and that may impact his recollection of what occurred. Mr. Thibault's answers about memory ranged from "I suppose anything is possible", "perhaps" to "I was pretty sure they happened". Finally, he testified that hearing the s. 606 inquiry, "opened my eyes and I realized I was probably screwed", adding he put his foot in his mouth because he was threatened.

[33] The Crown entered the audio recording of the s. 606 plea inquiry into the record as the sole exhibit.

The evidence of Mrs. Thibault:

[34] Mr. Thibault's mother testified. She was present or closely connected to his conversations with Mr. Williams. She did not recall any of the purported threats. She agreed the situation was very stressful for her son and she had to calm him and help him focus. She did not want him to go to jail "for a long time".

[35] She recalled believing, in the early days, that the matter would proceed to trial, but says on the Friday before trial Mr. Williams encouraged her son to plead guilty and accept the deal that would see him avoid a federal sentence.

[36] She says her son tends to go along with people if pressured, and acknowledged she too put some pressure on him to avoid federal time. She says she thought she was being helping but should have let him go to trial.

[37] She says, while quite sad at the time, she ultimately supported Mr. Thibault making the decision to change his pleas.

[38] In her opinion the guilty pleas were not voluntarily entered because Mr. Williams "kept telling him he could not win" at trial. She also agreed Mr. Williams was presenting "a full picture" and she did not hear her son tell him he was fired, nor did she hear Mr. Williams threaten her son.

[39] Finally, her son was not on any medications at the time of the pleas, and when she is under stress "it's like I do not hear too much".

Analysis:

[40] Mr. Thibault's application to withdraw his guilty pleas rests on involuntariness brought about by purported threats from Mr. Williams. But for

those threats he says he would have proceeded to trial. Despite Mr. Thibault's assertion the threats were delivered in the presence of his mother, she has no recollection. Mr. Williams categorically denies threatening Mr. Thibault.

[41] In order to consider the submission, the Court must make findings of fact. Mrs. Thibault testified in a demure and unassuming manner. She clearly cares for her son. While present for many of the solicitor client meetings, she did not recall any of the threatening words allegedly uttered by Mr. Williams. Overall, she was a credible and reliable witness. She was also fair in her testimony that her son was having difficulty deciding what to do and she encouraged him to the accept the reality of his difficult legal position. Some leeway in questioning was granted to Mr. Thibault who was unrepresented, but that did not serve to render the proceeding unfair. Despite having an interest in the outcome of the application, Mrs. Thibault did not overstate or simply agree with suggestions put to her by her son. While her son was in a difficult position, the Court find his mother did not hear threats from Mr. Williams, despite being in the same room, and merely offered her son emotional support.

[42] Mr. Williams testified and benefitted from his file notes that detailed his many meetings with Mr. Thibault. He was a reliable and credible witness whose evidence was fair and unsuccessfully challenged on cross examination. It is a

difficult task to support a client and explain when a case is weak and also support a client who must make a difficult choice. He did those things and was surprised when Mr. Thibault equivocated on the trial date. Not unlike *R. v. Arcand* 2000 SKCA 60, where there is no memory of the offence, a lawyer "offered his professional advice to the accused, suggesting in effect that [the victim's] version of what had occurred impressed him as credible and that a guilty plea would form a mitigating factor on sentencing… [o]thers may have handled the matter differently, offering different advice, but we cannot say that the lawyer's handling of the matter was incompetent, or that his advice was bad, or that he pressured Mr. Arcand to change his plea". (para. 11)

[43] The evidence if clear that after a meeting that did not involve threats, Mr. Thibault reconfirmed his instructions. In the courtroom Mr. Williams requested a s. 606 plea enquiry, but there is no evidence he did so because he was unsure about Mr. Thibault's intention. Mr. Williams appears in this court regularly and knows it is in the habit of doing so whether or not a person is represented by counsel when a change of plea comes on the date of trial. So, nothing can be read into Mr. Williams' request that the Court engage the process. It was clear from his evidence, as well as the court recording, that Mr. Thibault wept during the process

in Court, also not unusual given the serious charge of wounding. It cannot be presumed tears indicate mental disorders.

[44] Mr. Thibault did not lead evidence that "there was a serious question as to his mental state at the time of entering the plea". While he appeared fragile at times and often overwhelmed in the Courtroom during this application, there was no evidence that any issues he may have suffered from rose to the level of impairing his free will at plea. (*R. v. Murphy*, 1995 NSCA 49 (CanLII)) The presence of mental health conditions, even anxiety, can result in a lack of voluntariness, and the Court does not discount the possibility that it might, if established by sufficient evidence, rise to the level of impacting free will. However, there was no such foundation laid in this application that would support such a conclusion. Rather, the evidence supports the conclusion Mr. Thibault recognized his hopeless situation, accepted his counsel's advice, and accepted a best outcome brokered through counsel, an advantageous outcome that would meet his primary objective-reducing the likelihood he would receive a federal sentence of incarceration. His plea was voluntary. He agreed that he understood the facts upon which the plea was entered. He knew a thorough presentence report would assist in managing his risk.

[45] While Mrs. Thibault suggested that she pressured her son, the Court finds she did no more than support him in making the best decision in a difficult situation. Mr. Williams' evidence also supports this conclusion. She was supportive and calming to her son. The Court concludes neither person brought pressure on Mr. Thibault to plead guilty. Mr. Williams was prepared to walk away had he been fired, and he told Mr. Thibault the choice to go to trial was his to make. (While it is not clear Mr. Williams would have taken the matter to trial that day, given he had been appearing for a change of plea, the Court need not speculate on his course of action had Mr. Thibault decided not to maintain his guilty pleas during the plea enquiry.) The evidence simply does not support coercion or oppression by either party.

[46] Mr. Thibault asserts, and I accept his evidence, that he was weeping at the time he entered the guilty pleas. Such an emotional reaction regarding the possibility of incarceration for crimes one does not recall committing would have a serious effect on any person appearing before a court. But I also accept the evidence of Mr. Williams that they arrived at court prepared for the change of plea and that decision came after many meetings, Mr. Williams appears to have obtained a best possible outcome in the circumstances, and Mr. Thibault's anxiety arose, no doubt, because he could not recall the incidents of the night due to his

level of intoxication. His matter was scheduled for trial, and he logically felt anxious with all the crown witnesses likely present and ready to testify. Most accused persons would be anxious at the prospect; the charges are serious, indictable and involve wounding. However, the fact that he was anxious does not, on its own, rise to the level of rendering the pleas involuntary.

[47] Mr. Williams was clear that he did not believe Mr. Thibault's plea was other than voluntary. He acknowledged that Mr. Thibault was having difficulty coming to terms with his decision. He was not invested and was prepared to withdraw. He did not threaten Mr. Thibault to maintain his instructions, but simply acted upon instructions he had obtained. The Court accepts that Mr. Williams would not have assisted in entering the pleas on behalf of Mr. Thibault if the reality was otherwise.

[48] Mr. Thibault was not offered an inducement that affected voluntariness. Rather he was offered choices and choose the best one. There was real risk to proceeding to trial on five counts, the Crown's case was strong, the inconsistencies in the witness statements weak, and there were no viable defences. There is no doubt the agreement reduced Mr. Thibault's risk for a lengthy period of incarceration and two charges would be dismissed.

[49] Mr. Thibault changed his pleas to guilty on the day of trial for reasons he thought made sense to him at the time. He understood the process and communicated to Mr. Williams his acceptance of the facts and the sentence position of the Crown. It was then Mr. Thibault's responsibility to ensure the presentence report was thorough.

[50] It has been said that it is not necessary a voluntary decision be a wise one, or even one that would have been made at a later date. The Court accepts he was anxious, just like many other accused persons who come before the court, but there is no credible evidence that he was threatened such that his plea was involuntary.

[51] His plea was entered with experienced counsel and there is a presumption it was valid. The presumption has not been rebutted. He has failed to convince the Court on the balance of probabilities the plea was invalid and should be withdrawn. There was no evidence the pleas were equivocal; he acknowledged the basic facts understanding some aggravating or mitigating issues could be raised at sentencing. He understood the effect of the pleas and also knew a firm sentence had not been worked out in advance, but federal time was no longer on the table.

Conclusion:

[52] Consumption of alcohol at the time of an offence can make recall impossible and Mr. Thibault had to decide what to do in the presence of a self-induced lack of memory brought about by alcohol consumption. There are often memory issues for both accused and victims, rendering cases trying and difficult to manage. That said, victims are entitled to certainty in these difficult cases. The victim has been spared a trial and I am completely satisfied Mr. Thibault, competently represented and apprised of his choices, was aware of what he risked and gave up for the change of pleas. I am likewise satisfied he knew the consequences of entering a change of plea on the day of trial and was not threatened by Mr. Williams to do so.

[53] The Court has the discretion to permit withdrawal of a guilty plea, and I decline to do so as Mr. Thibault has not persuaded me on the balance of probabilities that his pleas were involuntary, equivocal, or uninformed. The application is dismissed, and sentencing can proceed.

[54] Judgment accordingly.

van der Hoek PCJ