Citation: R v Henderson, 2026 MBCA 28
Date: 20260331
Dockets: AR24-30-10146;
AR25-30-10255

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Madam Justice Karen I. Simonsen
Mr. Justice David J. Kroft

B E T W E E N:

	)	***M. E. Lavitt*** *and*
	)	***A. C. Smith***
HIS MAJESTY THE KING	)	*for the Crown*
	)	
Appellant/Respondent	)	***Z. M. Jones***
		for the Accused
- and -	)	
	)	*Appeals heard and*
DEANNA LEE HENDERSON	)	*Decision pronounced:*
	)	***January 16, 2026***
(Accused) Respondent/Appellant	)	
	)	*Written reasons:*
	)	***March 31, 2026***

KROFT JA (for the Court):

[1] The accused pled guilty to, and was sentenced respecting, certain firearm and drug offences.

[2] Before us were three matters: a Crown sentence appeal; the accused's conviction appeal in which she seeks to have her guilty pleas set aside; and, related to the conviction appeal, a fresh evidence motion. The accused's conviction appeal centred on whether, at the time she entered her guilty pleas, she knew the effect and consequences of those pleas. The accused's conviction appeal proceeded first, recognizing that if, following

submissions, we allowed the conviction appeal and the guilty pleas were set aside, the Crown's sentence appeal would be rendered moot.

[3] At the conclusion of the hearing, the accused's fresh evidence motion was granted and her conviction appeal was allowed with brief written reasons to follow. These are those reasons.

Background

[4] At the sentencing hearing, the accused, who was represented by legal counsel (defence counsel) (who was not appeal counsel), pled guilty to possession of a restricted firearm with readily accessible ammunition (see *Criminal Code*, RSC 1985, c C-46, s 95 [the *Code*]), possession of a firearm while prohibited from doing so by reason of a prohibition order (see s 117.01(1)) and possession of methamphetamine for the purpose of trafficking (see *Controlled Drugs and Substances Act*, SC 1996, c 19, s 5(2)) (the offences).

[5] There was no joint recommendation in respect of the sentences. The Crown sought consecutive sentences totalling six years, reduced to 1,221 days in custody (three years and four months) after credit of 969 days for time served in pre-sentence custody (pre-sentence custody), making a conditional sentence order (CSO) unavailable. Defence counsel acknowledged that the offences attracted a total sentence approximating five years, which, after taking pre-sentence custody into account, could be reduced to two years less a day, making a CSO available. He requested that the sentencing judge impose a CSO.

[6] The sentencing judge imposed the following consecutive sentences:

a) 1,095 days (three years) for possession of a restricted weapon, reduced to 126 days after crediting the accused for pre-sentence custody;

b) 148 days (five months) for possession of a firearm in breach of a prohibition order; and

c) 455 days (fifteen months) for possession of methamphetamine.

This resulted in a net sentence of two years less a day, which the sentencing judge determined should be served by a CSO, followed by three years' supervised probation.

[7] It is clear from the record of the sentencing hearing (the record) that defence counsel and the sentencing judge believed that a CSO was an available sentencing option. Moreover, at no time during the proceedings did either the federal or the provincial Crown alert the Court otherwise.

[8] Before us, it was agreed by both the Crown (who was not the Crown at the sentencing hearing) and the accused, correctly in our view, that the CSO was an illegal sentence. As noted by the Supreme Court of Canada in *R v Fice*, 2005 SCC 32, a CSO is not available to an accused where a sentence of two years or more (that is, a penitentiary sentence) is appropriate and, further, a court cannot make a CSO available by applying pre-sentence custody to reduce a penitentiary sentence to one of less than two years and then grant a CSO (see paras 4, 39; see also *R v Isaac*, 2025 MBCA 94 at paras 64-68, 74).

[9] It is this misapprehension of the law by all counsel and the sentencing judge that is at the core of the matters before us.

Fresh Evidence

[10] In addition to relying on the record, the accused moved before us to admit an affidavit, affirmed by her, as fresh evidence in support of her conviction appeal. The Crown consented to the admission of the fresh evidence, reserving the right to challenge the weight afforded to it. Crown consent aside, the admission of fresh evidence in a hearing where a miscarriage of justice is alleged is within the discretion of the Court where the Court believes that it is in the interests of justice to do so (see *R v Desrochers*, 2019 MBCA 120 at paras 6, 8 [*Desrochers*]). Such is the case here. Further, the Crown chose to not cross-examine the accused on her affidavit to challenge it.

[11] In her affidavit, the accused affirmed, among other things, that, prior to entering the guilty pleas, defence counsel told her "to get some time in, meaning serve some time in custody, and he would try to get [her] house arrest, or a [CSO]." She also affirmed that she pled guilty because she felt responsible for what happened; was not truthful in her statement to the police but she did not need to talk about what happened at the police station because defence counsel was asking for "house arrest"; understood that the Crown and defence counsel would be asking for different sentences but, ultimately, it would be up to the judge to decide the sentence; understood that, while not guaranteed, house arrest or a CSO were legally possible outcomes; would not have pled guilty had she known that a CSO was not possible; and, had she

known she was facing jail time, would have elected to go to trial, where there would be some chance of being acquitted.

[12] The Crown submits that, on its face, the accused's affidavit is not credible and little or no weight should be placed on it. The Crown strenuously argues that this Court should draw a negative inference from the fact the accused did not file an affidavit from defence counsel.

[13] We find that the Crown's credibility concerns are materially undermined by its decision to not cross-examine the accused on her affidavit and to consent to its admission. Perhaps more significant when considering the accused's credibility is that most of her statements that are relevant to her appeal are consistent with the manner in which the sentencing proceeded, as reflected in the record. Defence counsel began his sentencing submissions by arguing that the accused had already served two and two-thirds years in pre-sentence custody, so his client was seeking a CSO for the balance of her sentence, which he said would be an effective sentence of five years.

[14] As for the absence of an affidavit from defence counsel, appeal counsel explained, in reply, that the issue of filing such an affidavit had been expressly raised during a pre-hearing meeting for directions and resolved on the basis that, although no affidavit from defence counsel would be filed, he agreed with events as described in the accused's affidavit. The Crown did not respond to deny appeal counsel's explanation. This Court's pre-hearing record confirms appeal counsel's description of the pre-hearing meeting. These circumstances further undermine the Crown's credibility arguments and call upon us to caution counsel against inviting this Court to draw inferences that do not correspond with events leading up to a hearing.

[15] For these reasons, we admitted the accused's affidavit as fresh evidence, which we found to be credible.

The Law: Setting Aside a Guilty Plea

[16] To be valid, a guilty plea must be voluntary, unequivocal and informed (see *R v Wong*, 2018 SCC 25 at para 3 [*Wong*]). The validity of a guilty plea is presumed, and the onus to prove otherwise rests with the accused (see *R v Robinson*, 2020 MBCA 12 at para 42 [*Robinson*]; *Wong* at para 65).

[17] The focus of the arguments before us is whether or not the accused's guilty pleas were informed. A plea will not be informed if the accused was not aware of the nature of the allegations against them, the effect of the plea and the consequences of the plea, including the criminal consequences (see *Robinson* at para 42; *Wong* at paras 3-4). Criminal consequences include conviction consequences and sentence consequences (see *ibid* at para 41).

[18] In order to set aside a guilty plea on the basis that it was not informed, the accused must demonstrate that they were unaware of information that they needed to have in order to enter an informed plea, and that, as a consequence, they suffered subjective prejudice amounting to a miscarriage of justice. Subjective prejudice involves proof that there was a reasonable possibility that the accused, if informed, would have either elected to plead not guilty and gone to trial, or plead guilty with different conditions (see *R v Gordon*, 2025 ONCA 201 at paras 19-21 [*Gordon*]; *R v Simpson*, 2024 MBCA 82 at para 16; *R v Espinoza-Ortega*, 2019 ONCA 545 at paras 35-36 [*Espinoza-Ortega*]; *Wong* at para 6).

[19] The Crown argues that *Wong* should be read narrowly, only applying when the accused alleges that they were not aware of a collateral consequence of a plea and conviction. It argues that, while the accused's position is that she was not aware of the criminal consequences of her pleas, her failure to raise any unknown collateral consequences means that *Wong* does not apply.

[20] We do not agree. *Wong* does not establish a new or different regime for setting aside a plea alleging uninformed collateral consequences, as opposed to criminal consequences. Wagner J (as he then was), for the Court on this point, explained that provincial appellate courts were divided as to whether legally relevant consequences were limited to criminal consequences or included collateral consequences (see *ibid* at paras 69-70). The Court unanimously held that the consequences would include collateral consequences (see *ibid* at paras 4, 76, 78) so the existing principles were extended to apply to collateral consequences.

[21] While *Wong* has been applied many times since its release, the Crown has provided no cases that support its argument. In fact, the jurisprudence shows that *Wong* has been applied in many circumstances where the uninformed consequences were criminal in nature, not collateral (see e.g. *Gordon* at paras 19, 23-24; *Darveau v R*, 2022 QCCA 1475; *Espinoza-Ortega; R v Alabi*, 2014 ONCA 195; *R v Al-Diasty*, 2003 CanLII 41570 (ONCA); *R v Armstrong* (20 December 1996), Toronto C21013 (ONCA), 1997 CanLII 1487 (ONCA) [*Armstrong*].

[22] The Crown's argument in the present case was specifically rejected by the British Columbia Court of Appeal in *R v Zaworski*, 2022 BCCA 144 at paras 48-49:

> When a miscarriage of justice based on an allegedly invalid plea is raised on appeal, resolution of the appeal is generally governed by the analytical framework established in *Wong*.
>
> Although [the accused] alleges a basis for invalidity that is different from the ones advanced in *Wong* and *Lam*, I see no principled reason why the same two-pronged analysis should not apply. [The accused] contends that his plea was invalid at law. He also says the invalidity gave rise to irremediable prejudice. This is, essentially, a *Wong* argument.

[23] It is clear that the principles in *Wong* generally apply to applications to set aside a guilty plea, including those alleging uninformed criminal consequences. It is also clear from the jurisprudence that, important to an application to set aside a guilty plea, is the broad question of whether to do so is in the interests of justice. In *Robinson*, this Court specifically included among the grounds for setting aside a guilty plea "other circumstances [that] [made] it justified, in the interests of justice, to permit a withdrawal of the plea" (at para 42; see also *Desrochers* at para 8).

[24] We decline the Crown's invitation to adopt the suggested narrow approach to the application of the principles in *Wong*.

Analysis and Decision

[25] The Crown argues that, even if the CSO was illegal, the accused has not rebutted the presumption of valid pleas because she was sufficiently informed about the criminal consequences of her guilty pleas.

[26] In support of its position, the Crown relies on certain undisputed facts, as set out in the accused's affidavit, including that, during the plea inquiry, the sentencing judge explained that the sentencing decision was his to make and his decision might differ from submissions by counsel; the accused knew that a CSO was not guaranteed; the accused had legal counsel; there is no allegation of ineffective assistance of counsel; and, at the time of sentencing, the accused was not a stranger to the criminal justice system.

[27] Its position is that these admissions demonstrate that the accused was not "uninformed as to the jeopardy she faced"; rather, she was just "disappointed by the concession that it was an illegal sentence."

[28] The jurisprudence does not support the Crown's position.

[29] In *Armstrong*, the appellant was advised by her trial lawyer that she was eligible for a conditional discharge and that the lawyer would urge the trial judge to grant a discharge when, in fact, a discharge was not an available sentence. The Court concluded that "the appellant's pleas were predicated in part on a significant misunderstanding of the potential consequences of those pleas" (*ibid* at 2). Notwithstanding that there had been no guarantee of a conditional discharge, the Court set aside the pleas, quashed the convictions and ordered a new trial.

[30] Similarly, in *Gordon*, the Court granted the accused's motion to set aside his guilty pleas and ordered a new trial on the basis that the accused was uninformed due to the misinformation that he received from his lawyer, notwithstanding the warnings from his lawyer and the judge that he might not receive the sentence promised by his lawyer.

[31] These cases demonstrate the fact that an accused was aware when pleading guilty that the judge was not bound by sentencing submissions is not determinative of an application to set aside a guilty plea where the accused was uninformed of the available consequences due to an error or misunderstanding on the part of counsel.

[32] The significance of an error regarding the availability of a conditional sentence was underlined by the Supreme Court in *R v Nahanee*, 2022 SCC 37 [*Nahanee*] and *R v Anthony-Cook*, 2016 SCC 43. The majority in *Nahanee* stated (at para 47):

> Sentencing judges should only allow for the withdrawal of guilty pleas in exceptional circumstances, such as where counsel have made a fundamental error about the availability of the proposed sentence (*Anthony-Cook*, at para. 59). For example, this would occur where a period of incarceration is mandated by the *Criminal Code*, but the parties have erroneously proposed non-custodial sentences with differing terms and conditions.

[33] Simply put, the evidence relied upon by the Crown in the present case does not diminish the fact that, leading up to the accused entering her pleas, and thereafter, the parties proceeded on the basis that, although a penitentiary sentence was warranted, a CSO became a legal possibility after deducting the pre-sentence custody. The accused's election to plead guilty occurred in that context. Even though she knew that she might not receive a CSO, the fact that it was an impossibility was never discussed with her—in fact, quite the opposite. We are satisfied that the accused was unaware of a legally relevant criminal consequence of entering her pleas, namely, that she would be serving a custodial sentence and that the CSO being proposed by defence counsel was not legally available.

[34] Furthermore, we are satisfied that the accused has established subjective prejudice. That is, based on her affidavit, we accept that she would have either elected to plead not guilty and gone to trial or pled guilty with different conditions had she known that a CSO was not available.

[35] Before concluding, we note that, despite acknowledging the illegality of applying pre-sentence custody to qualify for a CSO, the Crown repeatedly suggested there was a scenario where a CSO might have been imposed on the facts of this case. While we seriously question that proposition, at the end of the day, the legal path to that result was not articulated with sufficient clarity to enable us to determine the matter.

[36] We appreciate the importance of "stability, integrity, and efficiency of the administration of justice" (*Wong* at para 3). At the same time, we are satisfied that, in the circumstances of this case, it is in the interests of justice to set aside the accused's guilty pleas.

[37] For these reasons:

a) the accused's conviction appeal was allowed and her related fresh evidence motion was granted;

b) the accused's guilty pleas were set aside; and

c) a new trial was ordered on the charges to which the accused pled guilty.

[38] Because of these rulings, it necessarily followed that the Crown's sentence appeal was rendered moot.

Kroft JA

Beard JA

Simonsen JA