

IN THE COURT OF APPEAL OF MANITOBA

BETWEEN:

<i>HIS MAJESTY THE KING</i>)	<i>J.-R. D. Kwilu</i>
)	<i>for the Applicant</i>
)	
<i>Respondent</i>)	<i>D. N. Queau-Guzzi</i>
)	<i>for the Respondent</i>
<i>- and -</i>)	
)	<i>Chambers motion heard and</i>
<i>EFUA BONIFACE ORIBHABOR</i>)	<i>Decision pronounced:</i>
)	<i>December 19, 2024</i>
<i>(Accused) Applicant</i>)	
)	<i>Written reasons:</i>
)	<i>January 8, 2025</i>

TURNER JA

[1] The accused moved for an extension of time to file a notice of application for leave to appeal his sentence pursuant to section 678(2) of the *Criminal Code*, RSC 1985, c C-46 [the *Code*].

[2] At the hearing, I denied the accused’s motion with reasons to follow. These are those reasons.

Background

[3] On April 17, 2024, after trial in Provincial Court, the accused was convicted of flight from peace officer, pursuant to section 320.17 of the *Code*. The Provincial Court judge (the PC judge) found that the accused led the police on a high-speed chase through the icy streets of downtown Winnipeg.

The chase ended only after the accused's vehicle crashed and after a short foot pursuit.

[4] Prior to the sentencing hearing, a pre-sentence report was prepared. Counsel did not request the preparation of any other reports.

[5] On July 24, 2024, the accused was sentenced to three months of custody and one year of supervised probation. From July 24, 2024, he had thirty days to file his notice of application for leave to appeal his sentence. He filed his notice of motion to extend time on December 5, 2024 (approximately three and one-half months after the deadline).

[6] The accused is a foreign national from Nigeria, in Canada on a student visa. While he was in custody, the Canadian Border Services Agency issued a report regarding his inadmissibility in Canada. Subsequently, a deportation order was issued.

[7] The materials filed by the accused on this motion address alleged errors made in coming to a fit and appropriate sentence. At the hearing of the motion, I confirmed that he was not seeking an extension of time to file a notice of appeal of the conviction; rather, he was only seeking an extension of time to file a notice of application for leave to appeal his sentence. Counsel for the accused confirmed that to be the case.

[8] As to sentence, the accused says that the PC judge erred in law by not considering the collateral immigration consequences of the sentence imposed and erred in not ordering an Impact of Race and Culture Assessment (IRCA) report.

Analysis

[9] Extensions of time are not granted automatically. The onus is on the applicant to show why they should receive an extension (see *R v Mohammed* (1989), 52 CCC (3d) 470 at 476, 1989 CanLII 7168 (MBCA)).

[10] The criteria considered on such a motion include (1) was there a continuous intention to appeal from the time the appeal period started, (2) is there a reasonable explanation for the delay, and (3) are there arguable grounds of appeal (see *R v DBR*, 2005 MBCA 21 at para 6 [*DBR*]).

[11] The overarching consideration is whether, in all the circumstances, justice requires that an extension of time be granted (see *R v Arganda*, 2011 MBCA 24 at paras 6-7; *R v Roberge*, 2005 SCC 48 at para 6).

Continuous Intention to Appeal and a Reasonable Explanation for the Delay

[12] The accused asserts that he instructed counsel (not the same counsel as on this motion) (former counsel) to file an appeal. The only information before me on this issue is the accused's affidavit, where he asserts: "I instructed my [former counsel] to appeal. Upon my release, when I inquired about it, I was informed that an appeal was not filed. At this first opportunity, I started my active effort to retain a culturally competent lawyer to file my appeal."

[13] The accused has not provided any further evidence to show when he instructed former counsel to appeal or whether he followed up with counsel while he was serving his sentence. In addition, the accused was released from custody on September 23, 2024, yet he has not provided any evidence as to

why it took almost two and one-half months after his release to file this motion.

[14] While the accused asserts that he had a continuous intention to appeal and that he has a reasonable excuse for the delay, there is a dearth of evidence to support this claim and his actions indicate otherwise. I am not satisfied that he has met the onus on either criterion.

Arguable Grounds of Appeal

[15] The test for arguable grounds of appeal is a lower standard than that it will “probably succeed” (*DBR* at para 7). It is a low threshold that is meant to ensure the appeal is not frivolous (see *ibid*).

[16] As noted above, the accused asserts that the PC judge misunderstood the collateral immigration consequences he was facing and erred in not ordering an IRCA report.

[17] The sentence imposed by the PC judge had no impact on the collateral consequence of the accused’s immigration status. Pursuant to section 36(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, it was the conviction for an offence of serious criminality, not the quantum of sentence, that triggered the deportation proceedings and deportation order. Former counsel correctly stated as much in his submissions at the sentencing hearing:

What he’s been convicted of and if the sentence is anything other than a discharge is a conviction for . . . an offence that has a potential sentence of ten years. Now . . . it doesn’t matter . . . what the sentence is. It doesn’t matter if it’s . . . proceeded summarily or indictable, any hybrid offence that could . . . get 10 years it’s

considered serious criminality and that's even for a permanent resident. . . .

[E]ven had he been a permanent resident would put him in a category where . . . a removal order could be placed on hi[m] without the right of appeal.

[18] Even if a panel of this Court reduced the accused's sentence on appeal, the immigration consequences would not be remedied.

[19] There is no doubt that IRCA reports are useful tools for a sentencing judge in coming to a fit and appropriate sentence for an offender. However, the accused has not presented any authority to support his assertion that it is an error in law for a sentencing judge to proceed without such a report when there was no request for it, as was the case here.

[20] The PC judge considered the accused's background and specifically addressed that he comes from a cultural minority, which can present challenges and difficulties. She specifically referred to this as "IRCA factors" that she was considering in crafting an appropriate sentence.

[21] The accused has not satisfied me that there are arguable grounds of appeal in the circumstances.

Conclusion

[22] For the foregoing reasons, I denied the accused's motion for an extension of time to file a notice of application for leave to appeal.