Citation: R v Simpson, 2024 MBCA 82
Date: 20241024
Docket: AR23-30-09967

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Mr. Justice David J. Kroft
Madam Justice Anne M. E. Turner

B E T W E E N :

	)	***E. J. Roitenberg, K.C.***
HIS MAJESTY THE KING	)	*for the Appellant*
	)	
Respondent	)	***D. Sahulka***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard:*
ROBERT WARREN SIMPSON	)	***April 26, 2024***
	)	
(Accused) Appellant	)	*Judgment delivered:*
	)	***October 24, 2024***

BEARD JA

I. THE ISSUES

[1] The accused appeals his convictions and seeks to set aside his guilty pleas on the basis that he was the victim of a miscarriage of justice under section 686(1)(a)(iii) of the *Criminal Code*, RSC 1985, c C-46, because he was unaware of the collateral consequence of certain of those pleas. The collateral consequence was the lifetime suspension of his driver's licence under section 264(1.1) of *The Highway Traffic Act*, CCSM c H60 [the *Act*].

[2] The guilty pleas were entered by the accused on June 21, 2017, which was the first day of his preliminary inquiry. At that time, he pled guilty

to five counts of tampering with a vehicle identification number (VIN), pursuant to section 353.1(1) of the *Criminal Code*; four counts of possession of property obtained by crime over $5,000, pursuant to sections 354(1) and 355 of the *Criminal Code*; and one count of trafficking property obtained by crime, pursuant to section 355.2 of the *Criminal Code*. On September 28, 2017, he received a global sentence of a 15-month conditional sentence order, followed by a nine-month supervised probation order, a stand-alone restitution order of $10,265.32 in favour of Manitoba Public Insurance Corporation (MPIC) and victim surcharges totalling $2,000.

[3] The accused has also filed a motion to admit fresh evidence, under section 683(1) of the *Criminal Code*, to establish the grounds for the withdrawal of his guilty pleas.

II. THE FACTS

[4] The facts underlying the convictions were established by way of an agreed statement of facts that was presented to the Court at the plea inquiry; those facts are not in dispute.

[5] In March 2016, the police received a tip that the accused was selling stolen trailers. On checking the MPIC records, the police learned that the accused had sold two trailers through new vehicle accounts in his wife's name. The police received information about the sale of other stolen trailers, and they were monitoring online advertisements for trailer sales. They found an advertisement for the sale of a trailer by Connor Trembath (Mr. Trembath), known to be an accomplice of the accused. They arranged to meet Mr. Trembath to purchase the trailer. He arrived with the accused, and both were arrested.

[6] The accused cooperated with the police and provided details of the five trailers that he admitted to stealing. He explained how he would remove the VINs, register the trailers as being homemade with MPIC through a new vehicle account set-up in his wife's name, obtain a new VIN and then sell them. He told the police where they were stolen and the names and contact information for the purchasers.

[7] The accused stated that he set up the accounts in his wife's name because he owed money for a fine, so MPIC put a hold on accounts in his name. His wife denied knowing that the trailers were stolen. The police acknowledged that there was no evidence to suggest otherwise, but they queried whether she could have been implicated in the scheme through wilful blindness.

[8] The Crown accepted pleas to a reduced number of charges and did not proceed with any charges against the accused's wife. At the time that the pleas were entered, there was an agreement to a range of sentence, but no agreed joint recommendation to a specific sentence. A pre-sentence report (the PSR) was prepared and filed for the sentence hearing, which was acknowledged to be positive. At the sentence hearing, the parties presented a joint recommendation on sentence, which was accepted by the sentencing judge.

[9] During the sentencing submissions, the Crown and defence counsel both made reference to the convictions having an impact on the accused's driver's licence, as did the sentencing judge in his reasons. No one, however, stated that the effect would or could be a lifetime suspension or that a

suspended driver could appeal that suspension to The Licence Suspension Appeal Board (the Board) under sections 278-279 of the *Act*.

[10] Due to an administrative oversight, the accused's lifetime suspension was not implemented until November 2022, five years after the convictions, when a letter was sent to the accused advising him that, based on certain of the convictions, he was suspended for life from obtaining a driver's licence.

[11] The accused has not appealed his suspension to the Board; instead, he has appealed his convictions to this Court and seeks to withdraw his guilty pleas. He argues that, if his appeal is successful and the convictions are quashed, this Court should enter a judicial stay of proceedings, which would lead to an acquittal.

[12] The Crown's position is that there was no miscarriage of justice, so the appeal should be dismissed. If the appeal is granted, the Crown's position is that the appropriate remedy is to order a new trial.

III. MOTION FOR FRESH EVIDENCE

[13] As noted, the accused brought a motion to adduce fresh evidence to establish the grounds for the withdrawal of his guilty pleas. That evidence consisted of his own affidavit (the accused's affidavit) and a statement on behalf of his then-lawyer (who is not his lawyer for the appeal) about the information that he gave to the accused regarding the effect of his guilty pleas on his driving privileges.

[14] The Crown agrees with the accused that the motion meets the requirements for the admission of fresh evidence on appeal, as set out in *R v Cerna*, 2020 MBCA 18 at para 22 and *R v Richard (DR)*, 2013 MBCA 105 at paras 199-206. Indeed, the majority decision in *R v Wong*, 2018 SCC 25, indicates that an accused "must file an affidavit" establishing the grounds for the withdrawal of a plea (at para 6; see also para 30). I would agree with the parties that the accused's fresh evidence in this case should be admitted, and I would admit that evidence.

IV. THE STANDARD OF REVIEW AND THE LAW

[15] In this case, both the argument to withdraw the guilty pleas and the motion to admit fresh evidence are original proceedings in this Court; as a result, there is no lower court decision under review and, therefore, no applicable standard of review.

[16] The principles applicable to the withdrawal of a guilty plea on appeal on the basis that the accused was not aware of legally relevant collateral consequences of the plea were clarified in the majority decision in *Wong* (see paras 4-35) and summarized by the Ontario Court of Appeal in *R v Girn*, 2019 ONCA 202 at paras 50-52, 65-70. This Court reviewed and applied those principles in *Cerna* at paras 19-20. Those are the principles that apply in this appeal. I will not restate them here; however, to succeed on such an application, an accused must establish:

(i) that, in fact, they were unaware of a legally relevant consequence of entering the plea at the time of pleading guilty; and

(ii) subjective prejudice.

[17] To establish subjective prejudice, an accused must file an affidavit establishing a reasonable possibility that they would have either:

(i) elected to plead not guilty and gone to trial; or

(ii) pled guilty, but with different conditions.

V. ANALYSIS

[18] The Crown accepts that the lifetime suspension of an accused's driver's licence flowing from a conviction under the *Criminal Code* would be a legally relevant collateral consequence, and it acknowledges that, based on the fresh evidence, the accused was not aware of that consequence. I would agree with those conclusions.

[19] The issue on appeal is whether the accused has established subjective prejudice. Both parties focussed their arguments on whether the accused established that he would have elected to plead not guilty and gone to trial if he had known of the collateral consequence of his pleas, so I will address that issue first.

[20] The determination of the accused's claim that he would have pled not guilty and gone to trial looks at what the accused would have done at the time he entered his pleas. As explained in *Wong*, "[t]he inquiry is therefore subjective to the accused, but allows for an objective assessment of the credibility of the accused's subjective claim" (at para 6). *Wong* further states that "[t]o assess the veracity of that claim, courts can look to objective, contemporaneous evidence" (*ibid*), that is, evidence of objective circumstances that are contemporaneous with the guilty plea, as well as at the

contents of the accused's affidavit and cross-examination, if there was one (see *ibid* at para 28).

[21] The Court in *Girn* explained the objective assessment of the accused's subjective claim as follows (at para 70, referencing *Wong* at paras 26, 28):

> A final point concerns the consequences of focusing the prejudice analysis on the subjective choice of the accused. It does not follow from this focus that a court must automatically accept an accused's claim. The credibility of the claim is at large, not a given. The court must measure the accused's claim about what his subjective and fully informed choice would have been against the objective circumstances as revealed by the evidence. Relevant factors in this assessment include, but are not limited to:
>
> (i) the strength of the Crown's case;
>
> (ii) any concessions or statements from the Crown about its case (for example, a willingness or refusal to participate in a joint submission or reduce the charge to a lesser included offence);
>
> (iii) any available defence; and
>
> (iv) the strength of connection between the plea of guilty and the collateral consequence (where the collateral consequence depends on the length of the sentence, a court may have reason to doubt the veracity of the claim).

[22] The test that was adopted by the majority in *Wong* for determining whether there was subjective prejudice is whether "there was a realistic possibility that the accused would have run the risk of a trial, if he or she had been informed" (at para 35, quoting from *R v Taillefer*, 2003 SCC 70 at para 90) (emphasis in original).

[23] In this case, the accused's affidavit states that, "[h]ad [he] known [that the] guilty pleas would result in an automatic lifetime suspension from driving, [he] would have pleaded not guilty and had a trial on the matters, despite the fact that [he] could have gone to jail following the trial" and that he "would have fought these charges if it meant [he] had a chance at avoiding a lifetime driving suspension".

[24] This evidence establishes the accused's claim that he would have acted differently if he had known of the collateral consequence of certain of his pleas (see *Wong* at paras 6, 36-39). The issue is whether the accused's affidavit and/or the contemporaneous evidence establish the veracity of that claim. In this case, the contemporaneous evidence is found in the accused's affidavit, the PSR, the plea submissions, the sentencing submissions and the sentencing reasons.

[25] The only evidence in the accused's affidavit of his circumstances at the time of the pleas is his statement that "during 2015-2016, [he] was under extreme stress and financial hardship as [he] had recently become an owner of a failing auto performance shop".

[26] The PSR is inconsistent as to the accused's financial circumstances at the time of his pleas. At one place, the report states that the accused "surmised all of the offences committed were the result of his financial and emotional struggles and his inability to make positive choices", while it later states that "[h]e explained [that] the business is doing well and he is doing what he 'loves' to do".

[27] The only reference to the accused's financial circumstances in the sentencing submissions was made by defence counsel, who stated that the

accused "is a businessman. It appears [that] he had everything going for him but then there's these charges." The sentencing judge made no reference to the accused's financial circumstances, other than to say that "the motivation really was a financial motivation. They were looking for quick money".

[28] Important and relevant statements in the PSR related to the business are that the accused was "the owner and only employee" and that the accused "suggested his business would 'be gone' if he was unable to go to work on a daily basis as his equipment is leased as is the business/shop space." The PSR also points out that the accused "does stress about his financial obligations and noted he also makes maintenance payments to his ex-partner for his eldest son."

[29] I will now address the factors set out at para 21 herein.

[30] The strength of the Crown's case: In my view, the Crown had a very strong case. The police caught the accused and Mr. Trembath at the scene, trying to sell a stolen trailer on which the VIN had been removed to an undercover police officer. The accused provided a very detailed statement in which he admitted his guilt, provided the details of the operation and assisted in locating the stolen trailers. There is no evidence to suggest that the voluntariness or admissibility of that statement was at issue at the time that the pleas were entered.

[31] Any concessions or statements from the Crown about its case: As the Crown stated at the plea hearing, "we were able to come to a plea agreement specifically on the counts which allows for a specific range of sentence". As part of the plea, the Crown stayed five of the 15 charges against the accused. In its sentencing submissions, where there was a joint sentence

recommendation, the Crown stated that there was "a meeting of the minds" and "[i]t's a situation where there's been a *quid pro quo*."

[32] Further, the admitted facts include that the accused's wife registered the trailers in her name, but that she denied knowing that they were stolen, and that "it is possible that she could have been implicated through wilful blindness." In the end, she was not prosecuted.

[33] Any available defence: There is no evidence to suggest that the accused had any defence. That said, it is clear that an accused does not have to demonstrate a viable defence in order to withdraw a plea. As stated in *Wong*, "the choice to proceed to trial may simply be throwing a 'Hail Mary'. But a remote chance of success at trial does not necessarily mean that the accused is not sincere in his or her claim that the plea would have been different" (at para 20). That said, this remains a relevant factor.

[34] The strength of the connection between the pleas of guilty and the collateral consequence: This is not a case where the collateral consequence was triggered by the length or discretionary nature of the sentence. Rather, the entry of certain of the guilty pleas triggered a mandatory lifetime suspension of the right to obtain a driver's licence, so the connection was strong. While the withdrawal of the guilty pleas would end the mandatory suspension, it would be reinstated if he were convicted at a subsequent trial.

[35] There are two further circumstances that are, in my view, relevant to the analysis of the reasonable possibility that the accused would have pled not guilty if he had known the collateral consequence of the pleas. The first is the admission by defence counsel at the sentence hearing that "[s]imilar research on my end shows really that this [case] could have gone any way

such as a custodial disposition, or noncustodial, that it all fell down to the presentence report". If this is correct, the PSR, which followed the guilty pleas, was key to the argument for a non-custodial sentence, so the risk of a custodial sentence was higher when the guilty pleas were entered.

[36] The second circumstance is the availability and potential utility of an appeal to the Board to have the licence suspension reduced, with or without conditions, or cancelled completely.

[37] The Crown acknowledged that the accused's circumstances, as set out in the PSR, were positive. That report stated that the accused's criminal involvement was "minimal", consisting of a charge for an alcohol-related driving offence when he was 17 (about 16 years before these offences) and a short, intermittent sentence. The PSR noted that he had no institutional misconduct concerns while serving that sentence in 2002, no failing to comply issues with prior supervision offences and no compliance concerns while on release for the current offences. The accused was assessed as a low risk to reoffend. Finally, the report recommended that there was no need for involvement with either Probation Services or a community supervision order in relation to the sentence for these pleas. Another positive circumstance would be the guilty pleas, themselves.

[38] At the time of these offences, the accused was married with two young children and was paying maintenance to support an older child. He owned his own business and was the sole employee.

[39] Judicial experience suggests that, given the accused's very dated criminal record, his positive PSR, low risk to reoffend and supportive personal circumstances, an appeal to the Board would not have been an exercise in

futility. In my view, the availability of a licence suspension appeal to the Board, in the circumstances of this case, is a significant circumstance that is relevant to the analysis of the reasonable possibility that the accused would have pled not guilty and proceeded to trial.

[40] At the time of these offences, the accused's driver's licence had been suspended for the non-payment of fines, and he was operating his business without his licence. Defence counsel did not point to any evidence that suggested that he could not have continued to do so. On the other hand, he was the only employee of the business, and his business would "be gone" if he were unable to go to work on a daily basis. This would have left him completely unable to meet his financial obligations to his current family or to his oldest son, which was stressing him.

[41] Given the certain and catastrophic effect of a jail sentence on his business and livelihood, in my view, there is no reasonable possibility that the accused would have chosen to proceed to trial, taking the admitted risk of receiving a custodial jail sentence and suffering the loss of his business and livelihood, rather than pleading guilty, taking the joint recommendation of a conditional sentence and appealing the mandatory lifetime suspension to the Board. In short, in my view, the accused's evidence, when considered in the context of the contemporaneous evidence and all of the circumstances, does not demonstrate a reasonable possibility that he would have pled not guilty had he been aware of the collateral consequence of his guilty pleas.

[42] Subjective prejudice can also be established if the accused establishes a reasonable possibility that they would have pled guilty, but with different conditions.

[43] While defence counsel argued this as an alternative position at the appeal hearing, there was no evidence to support that position. The accused does not say, or even suggest, in his affidavit, that he would have taken this course of action, and there is nothing in the evidence of the contemporaneous circumstances that could establish a reasonable possibility that he would have done so. As in *Wong*, this is fatal to his argument that he was prejudiced in this way (see paras 6, 36-37, 39).

[44] For these reasons, I am of the view that the accused has not established any subjective prejudice due to his being unaware of the collateral consequence of his guilty pleas.

VI. DECISION

[45] In conclusion, I would find that the accused has not established that he suffered subjective prejudice giving rise to a miscarriage of justice because he was not advised that certain of the guilty pleas would lead to a lifetime suspension of his driver's licence. I would, therefore, dismiss the accused's appeal.

[46] Having dismissed the appeal, it is not necessary to consider the arguments on the appropriate remedy.

Beard JA

I agree: Kroft JA

I agree: Turner JA