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(Winnipeg Centre)
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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

HER MAJESTY THE QUEEN,	)	Appearances:
	)	
	)	Paul Girdlestone and Lori Hunter
- and -	)	for the Crown
	)	
LUCAS GUNNER DUCK,	)	
accused.	)	Karl Gowenlock and
	)	Chelsea Suderman
	)	for the accused
	)	
	)	JUDGMENT DELIVERED ORALLY:
	)	July 7, 2022

Motion to Withdraw Guilty Plea

GREENBERG J.

[1] Lucas Duck seeks to withdraw his guilty plea to a charge of manslaughter in connection with the beating death of Lorne Green. He was originally charged with murder. Although Mr. Duck has no recollection of the event, he has never denied causing the death of Mr. Green. This is not surprising since he was essentially caught in the act. Police arrived at the scene while the offence was still in progress.

[2] Mr. Duck had consumed a large quantity of alcohol on the day of the offence, the effects of which, according to a psychiatric report filed at the sentencing hearing, were exacerbated by a traumatic brain injury ("TBI") that Mr. Duck had suffered a few months before the offence. Had the matter gone to trial, defence counsel would have argued that the combination of the brain injury and the alcohol effectively made Mr. Duck incapable of forming the intent for murder. The Crown ultimately agreed to accept a plea to manslaughter.

[3] I was scheduled to deliver my reasons for sentence on May 18, 2022. On May 13, 2022, the Supreme Court issued its reasons in ***R. Brown***, 2022 SCC 18 and ***R. v. Sullivan; R. v. Chan***, 2022 SCC 19, striking down s. 33.1 of the ***Criminal Code***. That section prevented an accused who had committed a violent offence from relying on self-induced intoxication to negate general intent or voluntariness. So, the section removed the defence of automatism where that state was brought on by self-induced intoxication.

[4] At the outset of the hearing on May 18, 2022, I asked defence counsel whether, in view of the Supreme Court decisions, Mr. Duck wished to reconsider his guilty plea. After taking time to consider his position, Mr. Duck decided to seek leave to withdraw his plea so that he can advance the defence of automatism. The Crown opposes the motion.

[5] This is an unusual case. While there is no dearth of authorities on withdrawal of a guilty plea, most of the reported cases have to do with situations where new evidence comes to light (see e.g. ***R. v. Catcheway***, 2018 MBCA 54 (CanLII)); situations where the accused's plea was uninformed because he did not appreciate the consequences of

conviction (***R. v. Wong***, 2018 SCC 25, [2018] 1 SCR 696); or, situations where the accused felt coerced to plead guilty because of the cost of maintaining innocence (see e.g. ***R. v. McIIvride-Lister***, 2019 ONSC 1869 (CanLII)). Counsel did not refer me to any cases where the accused sought to withdraw a guilty plea because of a change in the law regarding the substantive offence or an available defence. However, as Scott C.J.M. said in ***R. v. Jawbone***, [1998] M.J. No. 235 (C.A.) (QL), in commenting on the court's discretion to allow the withdrawal of a guilty plea:

> 6 ...The circumstances justifying the exercise of such a discretion are not confined to circumstances where there is a suggestion of impropriety or error in the formal plea itself, rather "valid grounds" (see R. v. Bamsey, [1960] S.C.R. 294, at 298; 32 C.R. 218; 30 W.W.R. 552; 125 C.C.C. 329) for the accused being permitted to withdraw his plea should not be too narrowly defined or rigidly applied. The essential question to be determined in each case is whether it is justified in the interests of justice.

[6] The Crown did refer to the decision in ***R. v. Kivell***, 1990 CanLII 2007 (BC CA) where the accused was not allowed to withdraw his plea to second degree murder after the Supreme Court, in ***R. v. Vaillancourt***, [1987] 2 SCR 636, struck down provisions of the ***Criminal Code*** dealing with "constructive murder". However, the Court in that case found that the ***Vaillancourt*** decision did not apply to the accused because he was no longer "in the system". He did not seek to withdraw his guilty plea until six years after conviction.

[7] In this case, the Crown concedes that Mr. Duck is still in the system. As a result, he is entitled to the benefit of the law as recently interpreted. As explained in ***R. v. Wigman***, [1987] 1 SCR 246:

> 29. Provided that he is still in the system, an accused charged with an offence is entitled to have his or her culpability determined on the basis of what is held to be the proper and accurate interpretation of the Code. The same reasoning was inevitably though implicitly adopted in *Ancio*. Obviously, the respondent *Ancio* was still in the system; once it is established in the case at bar that the appellant is still in the system, then the rationale for applying to him the ruling in *Ancio* is the same as the one which was taken for granted in *Ancio* with respect to the respondent *Ancio*.
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> 30. This rationale is grounded in the principle that an accused should not be convicted on the basis of the interpretation of a statute which, at the appropriate time, is known to be wrong. An apt expression of this principle can be found in the following passage written by Lord Goddard C.J. on behalf of the full Court of Criminal Appeal in *R. v. Taylor*, [1950] 2 K.B. 368, at p. 371.
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> > This court ... has to deal with questions involving the liberty of the subject, and if it finds, on reconsideration, that in the opinion of a full court assembled for that purpose, the law has been either misapplied or misunderstood in a decision which it has previously given, and has been sentenced and imprisoned it is the bounden duty of the court to reconsider the earlier decision with a view to seeing whether that person had been properly convicted.

[8] I note that Parliament has re-enacted s. 33.1 with changes to address the concerns of the Court in ***Brown***. However, as the new provision is not stated to be retrospective, it is presumed to be prospective and, therefore, inapplicable to Mr. Duck (***R. v. Dineley***, 2012 SCC 58).

[9] In my view, it is in the interests of justice to allow Mr. Duck to withdraw his guilty plea so that he may pursue a defence of automatism. Defence counsel raised the issue of automatism at a pre-trial early in the proceedings. I assume that that defence was not pursued because it was not available in law.

[10] The Crown argues that Mr. Duck should not be allowed to withdraw his guilty plea because he forfeited his right to a trial in a process that was fundamentally fair. To be sure, there is no suggestion that Mr. Duck's plea was involuntary or uninformed or that he was not represented by competent counsel. But, he pleaded guilty on the basis of a

law that was not valid. The declaration in ***Brown*** regarding the constitutionality if s. 33.1 has the effect of invalidating the provision from the time of its enactment (***Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur***, 2003 SCC 54, [2003] 2 SCR 504, at para. 28).

[11] The Crown also argues that Mr. Duck is not entitled to raise automatism at this stage because he did not himself challenge the validity of s. 33.1 before deciding to enter a guilty plea. The Crown says that defence counsel should have been aware, when trial dates were set, that the ***Brown***, ***Chan*** and ***Sullivan*** cases were pending. I note that, while the Ontario Court of Appeal in ***Chan*** and ***Sullivan*** struck s. 33.1, the Alberta Court of Appeal in ***Brown*** upheld it. So, it would not have been clear to the defence that there was merit to a challenge. In any event, in holding that changes in the law apply to cases in the system, the Supreme Court did not suggest that those changes only apply to cases in the system where the accused had himself challenged the validity of the previous law. In ***Wigman***, the accused appealed his conviction for attempt murder. After his conviction, but before his appeal was heard, the Supreme Court issued a decision that changed the law related to the *mens rea* of that offence. The Court held that the accused was entitled to rely on the change in the law even though it was not raised in his factum.

[12] The Crown argues that, even if ***Brown*** applies to Mr. Duck's case, he has not presented evidence to show that he has a viable defence. In particular, they say that he has not presented evidence to show that his actions were involuntary. Indeed, they say that his guilty plea is an admission that they were not. But, that guilty plea was based on law that did not allow him to argue that his actions were involuntary.

[13] The Crown suggests that, in order to withdraw his plea, the accused must point to expert evidence to support the defence of automatism. To be sure, the Supreme Court in ***Brown*** said that medical or scientific evidence will usually be required to establish the defence. The Crown points to the fact that the psychiatric report that was filed at the sentencing hearing does not indicate that Mr. Duck's actions were involuntary. Although Mr. Duck's state of mind was at issue, as automatism was not an available defence when the report was prepared, the psychiatrist did not address the issue. Mr. Duck would not, at this stage, be able to produce expert evidence to support a defence of automatism. Such reports take time to procure. In any event, Mr. Duck need not establish his innocence in order to be entitled to pursue a defence.

[14] The difficult issue before me is what is the threshold that Mr. Duck must meet to be allowed to withdraw his plea. While the onus is on the accused to satisfy the court that it is in the interests of justice to allow him to do so, the nature of that onus is unclear. In my view, he need not show that the defence which he wishes to advance will succeed. The threshold cannot be higher than what he must show to be allowed to pursue the defence at trial. That threshold is whether the defence has an air of reality to it. Defence counsel suggested that this was the test to be applied here. However, that test is usually applied by considering all of the evidence to be presented at trial. As I said, the Court in ***Brown*** said that medical or scientific evidence is required to support the defence of automatism. But, as I explained, Mr. Duck cannot be expected to provide expert evidence at this stage considering that the law only changed weeks ago.

[15] In ***Brown***, the Court said that most degrees of intoxication will not provide a defence of automatism. Nor is the defence established by the fact that the accused "blacked out" and has no memory of the offence. But the case at bar is not simply a case of extreme intoxication. In my view, it is Mr. Duck's TBI that puts the defence in play here. I note that in the ***Chan*** case, where the court ordered a new trial, there was evidence of a mild brain injury in addition to the ingestion of drugs.

[16] It is not disputed that Mr. Duck suffered a TBI. A few months before the offence, he was the victim of a group assault that resulted in multiple skull fractures. His brain injury was described as moderate to severe. And there is evidence that his behaviour and cognitive functioning changed after he incurred the injury. His mother reported to the psychiatrist who conducted the assessment on Mr. Duck that Mr. Duck's mood changed after the TBI; that he was more easily irritated and more disorganized; and, that he had difficulties with memory and comprehension. The psychiatrist himself noted cognitive impairment.

[17] There is evidence that Mr. Duck had a significant amount to drink before the offence and he obviously became very violent. But people who had consumed alcohol with him before he suffered a TBI said that he had not previously been a violent drunk. Ted Green, who was present at the scene, said the accused was a "good guy to drink with". Another friend testified at the preliminary hearing that Mr. Duck was not one to initiate violence but that after his TBI, he was more aggressive, especially after consuming alcohol.

[18] There is also evidence that, at the time of the offence, Mr. Duck had lost touch with reality. Mr. Duck assaulted several other people in the house before he assaulted Mr. Green. Mr. Green said that, during the offence, Mr. Duck had a weird look on his face and it appeared as though someone else was controlling his body.

[19] Mr. Duck told police who attended the scene that the victim was Preston Turtle. He did not realize he had assaulted Lorne Green, a person whom he knew well. One of the officers who attended the scene said that the accused had a "delusional look", "a thousand-yard stare". Another officer said that he had a smile on his face. Mr. Duck thanked the officers for showing up before something bad happened.

[20] The Supreme Court in ***Brown*** gave some guidance as to the nature of the defence of automatism. The accused must show that his consciousness was so impaired as to deprive him of all willed control over his actions (par. 50). But the nature of the evidence that Mr. Duck will have to produce to meet that threshold is unclear. Suffice it to say, I am satisfied that there is enough evidence before me to conclude that not allowing Mr. Duck to pursue the defence would result in a miscarriage of justice.

[21] Courts are generally slow to allow an accused to withdraw a guilty plea because of the concern about finality. When I asked the accused whether he wished to consider a change to his plea, he took a month to think about it. He has already been in custody almost three years. As defence counsel noted, it is not in his interests to withdraw his plea if he has no chance of success at trial. Of course, I am not determining whether the defence of automatism will be successful. The only issue for me is whether the accused

has shown that he should have an opportunity to present that defence. In my opinion, he has.

[22] I am granting Mr. Duck's motion to withdraw his plea of guilty to manslaughter.

_____J.