Date: 20210517
Docket: CR 19-01-37301
(Winnipeg Centre)
Indexed as: R. v. Hall
Cited as: 2021 MBQB 105

COURT OF QUEEN'S BENCH OF MANITOBA

IN THE MATTER OF: AN APPLICATION TO WITHDRAW GUILTY PLEAS

B E T W E E N:

HER MAJESTY THE QUEEN,	)	Counsel:
	)	
respondent,	)	ASHLEIGH C. SMITH
	)	for the respondent
- and -	)	
	)	MITCHELL G. ENRIGHT
CRAIG DORLAND ROBERT HALL,	)	for the (accused) applicant
	)	
(accused) applicant.	)	JUDGMENT DELIVERED:
	)	May 17, 2021

TURNER J.

I. INTRODUCTION

[1] Craig Hall pled guilty to four counts of robbery on January 6, 2020. He now seeks to withdraw three of the guilty pleas on the grounds they were not truly informed and withdrawal of the guilty pleas is in the interests of justice.

[2] It is important to outline what this application is not about. Mr. Hall made it clear he is not asserting that his pleas were involuntary. He also made it clear he is not arguing that previous counsel was ineffective.

[3] The main thrust of Mr. Hall's argument is that previous counsel did not review all the disclosure with him and the material provided by previous counsel was missing several items of disclosure per the Crown's file inventory. As such, Mr. Hall claims his guilty pleas were not fully informed and he should be allowed to withdraw them.

[4] Although Mr. Hall's application initially sought to withdraw all four guilty pleas he entered on January 6, 2020, during the course of this hearing he acknowledged his guilt on the April 3, 2018 offences. As such, Mr. Hall does not seek to withdraw that guilty plea.

II. BACKGROUND

[5] Mr. Hall was charged with 127 counts related to alleged robberies between February 9 and April 3, 2018. The matter proceeded through a preliminary inquiry on April 1, 2019, at which the only witness was Mr. Hall's co-accused, Julie Penner. Ms. Penner and Mr. Hall were in a romantic relationship at the time of the alleged robberies.

[6] A 41-count Indictment was filed and was set to proceed to trial starting January 6, 2020. That morning, Mr. Hall pled guilty before me to four counts of robbery. At the time, he was represented by Mr. Kavanagh and Ms. Nagy. The Crown was to enter a stay to the remaining 37 counts in the Indictment at Mr. Hall's sentencing.

[7] At the time the pleas were entered, an agreed statement of facts was read in by the Crown and filed. That agreed statement of facts became exhibit M1 at this application hearing.

[8] The agreed statement of facts outlined the offences in detail. Following is a summary of the facts:

- On March 8, 2018, Mr. Hall entered The Joint at 3223 Portage Avenue wearing a mask and carrying a handgun-style BB gun. He took $520 from the register.

- On March 17, 2018, Mr. Hall entered the Fabutan at 1833 Grant Avenue wearing a mask and carrying what the employee believed to be a handgun. He took $150 from the register.

- On March 24, 2018, Mr. Hall entered the Subway restaurant at 5-660 Osborne Street wearing a sweater with a hood that zipped up to create a mask and holding a gun in his hand. He took $300 from the safe and $110 from the register.

- On April 3, 2018, Mr. Hall entered the Subway restaurant at 172 St. Anne's Road wearing the same sweater as the robbery on March 24. He took an unspecified amount of cash from the restaurant and fled in a waiting vehicle. The vehicle was driven by Ms. Penner. Police initiated a traffic stop. Mr. Hall fled from the vehicle on foot and was subsequently apprehended.

[9] Mr. Hall signed the agreed statement of facts and initialled three amendments that were made to the document during the course of his court appearance on January 6, 2020.

[10] After the facts were read in, Mr. Hall entered his four guilty pleas.

[11] Mr. Kavanagh went through a thorough plea inquiry with Mr. Hall on the record before me. Mr. Hall confirmed the following:

- Mr. Hall and Mr. Kavanagh discussed the evidence of the case.
- Discussions had been ongoing with the Crown attorney for some time and they were concluded the previous day.
- Mr. Hall instructed Mr. Kavanagh to accept the deal presented by the Crown attorney, which would have Mr. Hall plead guilty to four counts of robbery.
- Mr. Hall accepted all the elements of those four offences.
- Mr. Hall admitted the facts that had been read in by the Crown attorney.
- Mr. Hall entered the guilty pleas voluntarily, and no one forced him to plead guilty.
- Mr. Hall gave up his right to have a trial and his ability to bring any motions.
- Mr. Hall and Mr. Kavanagh discussed that a sentence would be imposed upon Mr. Hall.
- Mr. Hall understood there would not be a joint recommendation as to the sentence to be imposed and the sentence would be up to me as the sentencing judge.

[12] During the course of entering his guilty pleas and the plea inquiry, Mr. Hall neither hesitated in his answers, qualified his answers, nor appeared in any way to be unclear about what he was agreeing to. I accepted his guilty pleas.

[13] A pre-sentence report ("PSR") was ordered, and the matter was put over for sentencing.

[14] On January 31, 2020, a probation officer e-mailed the Crown attorney and Mr. Kavanagh to advise that during the interview for the PSR, Mr. Hall said that he was not the person who committed the robberies and that he was not guilty. Mr. Hall also said that he had received a letter indicating there would be a suicide attempt if he did not plead guilty and that was the reason he entered his pleas. As a result, the PSR process was suspended.

[15] Mr. Kavanagh testified that he spoke to Mr. Hall about the PSR and advised him he would not be able to continue as his lawyer if he did not want to proceed with his guilty pleas. Mr. Hall agreed Mr. Kavanagh did not pressure him to continue with the PSR and Mr. Kavanagh told him he had to decide how to proceed. Mr. Hall testified that, although he did not recall exactly, it makes sense he said that he wanted to continue with the PSR because the probation officer attended a second time to continue the interview.

[16] On February 24, 2020, the probation officer e-mailed the Crown attorney and Mr. Kavanagh to say that someone would return to Milner Ridge Correctional Centre ("MRCC") to interview Mr. Hall. However, in an e-mail sent March 6, 2020, the probation

officer advised that at the interview on March 5, Mr. Hall again asserted that he was not guilty and he ended the interview prematurely.

[17] Mr. Kavanagh withdrew as counsel on May 12, 2020. The matter was adjourned for Mr. Hall to seek new counsel and to set a sentencing date or a date on which his application to withdraw his guilty pleas could be heard.

[18] On February 1, 2021, Mr. Hall filed his application to withdraw his guilty pleas. I heard the application on April 21, 2021. Mr. Hall, Mr. Kavanagh and Ms. Nagy testified at the hearing.

III. GOVERNING PRINCIPLES

[19] The governing principles regarding the withdrawal of a guilty plea were outlined in ***R. v. Manimtim***, 2002 MBQB 235 (CanLII) at para. 9, and recently reiterated in ***R. v. Robinson***, 2020 MBCA 12 (CanLII) at para. 42:

> The following principles underlie an application to set aside a guilty plea before sentence:
>
> - a guilty plea entered in open court is presumed to have been voluntary and valid, especially where the accused was represented by counsel;
>
> - the accused has the burden of proof to establish that the guilty plea should be set aside and a plea of not guilty entered;
>
> - there is no requirement that the facts be read to the accused and that there be an express admission of the elements of the offence before the accused enters a guilty plea, especially where the accused has legal counsel;
>
> - the grounds for setting aside a guilty plea include the following:
>
> (i) the plea was not voluntary and unequivocal;
>
> (ii) the plea was not informed, in that the accused was not aware of the nature of the allegations made against him or her, the effect of the plea and the consequences of the plea; or

> (iii) other circumstances make it justified, in the interests of justice, to permit a withdrawal of the plea;
>
> - there is evidence of a viable defence.

[20] In ***R. v. Alec***, 2016 BCCA 282 (CanLII), the Court also articulated the high threshold that must be met to permit a guilty plea to be withdrawn:

> [78] As noted in *R. v. Moore*, 2004 BCPC 560 at para. 22, "to permit accused persons to vacillate between claims of innocence, guilt and renewed claims of innocence would cause great mischief." … The inquiry must take account of prejudice to the public's interest in certainty, finality and the expeditious resolution of criminal matters….

IV. ANALYSIS

A. Were the guilty pleas informed?

[21] In order for a plea to be informed, the accused must be aware of the nature of the allegations, the effect of the plea, and the consequences of the plea. I agree with the statement of the sentencing judge in ***Robinson***, as quoted by the Manitoba Court of Appeal (at para. 40), the requirement to be "informed does not mean every stone has been unturned or that [the accused] ought to be in possession of every scintilla of information."

1. Mr. Hall's meetings with Mr. Kavanagh

[22] Mr. Hall stated that he only met with Mr. Kavanagh in person twice prior to entering his guilty pleas: once in lock-up at the courthouse prior to the preliminary inquiry and once at MRCC the day before entering his pleas. In his affidavit, Mr. Hall estimated that he spoke to Mr. Kavanagh approximately twenty-five times.

[23] Mr. Kavanagh testified that once he was hired as counsel, he had an initial meeting with Mr. Hall at which they discussed the elements of the offences with which he was charged in a general way. They did not get into the specifics at the first meeting. Over the course of their lawyer-client relationship, they had Live Video Interview ("LVI") meetings and phone calls; however, Mr. Kavanagh did not provide a specific number of meetings or calls. He agreed they only had two in-person meetings.

[24] In their LVI and phone conversations, Mr. Kavanagh and Mr. Hall discussed the nature of the allegations, issues of Mr. Hall's criminal record, Mr. Hall's relationship with Ms. Penner, and the principles articulated in ***R. v. W.(D.)***, [1991] 1 S.C.R. 742. They also discussed the possibility of any third-party suspects and the possibility of severance of counts; however, Mr. Hall instructed counsel not to pursue either issue.

[25] At their first in-person meeting prior to the preliminary inquiry, Mr. Kavanagh read part of Ms. Penner's police statement to Mr. Hall.

[26] During the meeting at MRCC prior to the trial, Mr. Kavanagh and Ms. Nagy met with Mr. Hall. They showed him photos taken from video surveillance and a video from the Winnipeg Police Service helicopter during the April 3, 2018 incident. They discussed that, in their opinion, a court could draw strong inferences regarding the other offences from the circumstances of the April 3 incident. They noted in particular the similarities amongst the incidents: the mask and clothing worn, the height and build of the perpetrator, the video surveillance evidence from the various locations, and the witnesses' evidence from the various locations.

2. Missing disclosure

[27] Mr. Hall now argues that his pleas could not have been sufficiently informed because there was disclosure missing from Mr. Kavanagh's file. Mr. Hall relies on an e-mail from Mr. Enright, as new counsel, sent to Mr. Kavanagh listing seventy-two pieces of disclosure that were apparently missing from the file provided when the change of counsel occurred (Exhibit M8). These items include officers' notes, officers' narratives, and a variety of other items.

[28] When Mr. Enright first asked Mr. Kavanagh for these items, Mr. Kavanagh made efforts to locate them. When he was not able to do so, he asked his assistant to contact the Crown's office to have them sent to Mr. Enright directly. Mr. Enright confirmed that he had received all the listed items from the Crown's office.

[29] Mr. Kavanagh testified that he did not recall specifically which of those items of disclosure he did or did not receive from the Crown. He said that much of the disclosure was sent to him electronically and disclosure came in bits and pieces. His practice was to review the disclosure as it came in and decide what was relevant and required for trial preparation. Mr. Kavanagh would only print what was needed for trial and he would then have it organized in folders. It was those folders he passed on to new counsel.

[30] In reviewing the list of items during his testimony, Mr. Kavanagh stated that some of the items were likely not relevant to the issues to be raised at the trial. He said that he would expect some of the officers' notes and narratives would be from officers who simply followed up on requests for surveillance footage from various locations and

sometimes the Crown would advise that an officer did not have any notes. He also surmised that some of the items related to charges that were to be stayed. He could not give a definitive answer as to the exact nature of the items without reviewing them. The items were not presented to Mr. Kavanagh during his testimony.

[31] Despite the fact that Mr. Hall is now in possession of all seventy-two listed items of disclosure, none were presented on the application to show they would have made a difference in Mr. Hall's guilty pleas. From my review of the list of items, I note that some items would likely make very little difference to the elements of the offences—for example, the annotator notes for Mr. Hall's statement and Ms. Penner's statement. Mr. Hall had disclosure of the complete statements while Mr. Kavanagh was counsel; therefore, the annotator notes would not likely make any difference.

[32] Keeping in mind the onus is on Mr. Hall to show his guilty pleas were not informed, nothing was presented on the application to show the listed items would have made any difference to Mr. Hall's pleas.

3. Copies of the disclosure not provided to Mr. Hall

[33] Mr. Hall asserts that he requested copies of the disclosure a dozen times but Mr. Kavanagh never provided him with copies. He argues that he did not have the opportunity to meaningfully review the disclosure either himself or during the meetings he had with Mr. Kavanagh.

[34] Mr. Kavanagh acknowledged that Mr. Hall asked that copies of the disclosure be provided to him while in custody at least twice, but he does not recall Mr. Hall asking

twelve times. Mr. Kavanagh testified that at the start of their relationship, he explained to Mr. Hall that it was not his practice to provide hard copies of disclosure to a client. He further explained that he was aware of problems with copies of disclosure "drifting around" within an institution.

[35] Neither Mr. Hall nor Mr. Kavanagh testified that Mr. Hall expressed any displeasure with the representation Mr. Kavanagh was providing. Mr. Hall testified that he had fired previous counsel in the past (not Mr. Kavanagh) for not following his instructions; however, he acknowledged that at no time did he discuss firing Mr. Kavanagh for not providing him with copies of the disclosure.

[36] I accept that Mr. Hall and Mr. Kavanagh may have had only two in-person meetings during the course of their relationship during which Mr. Hall could have had hands-on access to the disclosure. However, it is clear to me that the nature of the allegations, the elements of the offences and the potential issues that could be raised were discussed over the course of a number of LVI meetings and phone calls.

[37] In addition, Mr. Hall was present at the preliminary inquiry at which Ms. Penner testified. As a result, Mr. Hall would have been fully aware of the evidence Ms. Penner would give at trial.

[38] In all the circumstances, Mr. Hall has not demonstrated that the fact he did not get hard copies of the disclosure meant he did not understand the case against him and therefore his guilty pleas were not informed.

4. An awareness of the consequences of the plea

[39] Mr. Hall relies on the Supreme Court of Canada's decision in ***R. v. Wong***, 2018 SCC 25, [2018] 1 S.C.R. 696, to support his position that, in these circumstances, he was not fully informed when he entered his guilty pleas.

[40] I cannot agree that Mr. Hall's circumstances are the same as those at issue in ***Wong***. Mr. Wong, a permanent resident of Canada, pled guilty to a count of trafficking in cocaine and was sentenced to nine months' imprisonment. Before entering his plea, Mr. Wong was not aware this conviction would render him inadmissible to Canada and he would have no right to appeal any removal order made against him.

[41] The majority of the Supreme Court of Canada stated:

> [1] This case concerns the proper approach for considering whether a guilty plea can be withdrawn *on the basis that the accused was unaware of a collateral consequence stemming from that plea*, such that holding him or her to the plea amounts to a miscarriage of justice….
>
> [emphasis added]

[42] They held that the accused should be required to establish subjective prejudice:

> [6] … Meaning, accused persons who seek to withdraw their guilty plea *on the basis that they were unaware of legally relevant consequences at the time of the plea* must file an affidavit establishing a reasonable possibility that they would have either (1) opted for a trial and pleaded not guilty; or (2) pleaded guilty, but with different conditions. To assess the veracity of that claim, courts can look to objective, contemporaneous evidence. The inquiry is therefore subjective to the accused, but allows for an objective assessment of the credibility of the accused's subjective claim.
>
> [emphasis added]

[43] ***Wong*** must be read in the context that the Court was dealing with an accused who was not aware of the legal consequences of his plea. At paragraphs 19 and following, the Court stated that an accused must demonstrate he or she would have either (1) pleaded differently, or (2) pleaded guilty, but with different conditions. When the decision is read as a whole, the Supreme Court of Canada held that an accused must demonstrate whether he or she would have acted differently *had he or she known of the collateral consequences of a guilty plea*.

[44] Mr. Wong was not aware of the very serious consequence that he would not have a right to appeal his removal from Canada. In contrast, Mr. Hall was very much aware of the consequences of his guilty pleas. In his affidavit and his testimony, he was clearly aware that he would be facing a lengthy penitentiary sentence. He knew that after the trial, the Crown would be seeking a sentence as high as sixteen years. On a guilty plea, he knew that the Crown was prepared to submit a joint recommendation of ten years or would ask for no more than twelve years if there was not a joint recommendation.

[45] Mr. Hall has not provided any evidence that he was unaware of the consequences of his guilty pleas or that he was unaware of any collateral consequences.

5. <u>The letter</u>

[46] In October 2018, Mr. Hall received a letter from David Penner, Ms. Penner's brother (Exhibit M6). In summary, the letter states that Mr. Penner wanted Mr. Hall to plead guilty because Ms. Penner was going to commit suicide if she had to deal with the charges and cannot do jail time. Mr. Hall testified that when he received the letter, he was upset

and was not "right in the head". He testified that the letter affected him, and he was upset and emotional about it. He and Ms. Penner had been in a relationship for two-and-a-half years and he still cared about her.

[47] There may be circumstances in which such a letter could render an accused's plea not being voluntary. The threat that someone will commit suicide unless a plea is entered could certainly be a factor that would pressure someone to plead guilty. The case at bar is not one of those circumstances. Mr. Hall received the letter well over one year before his pleas were entered. The letter did not dissuade him from putting Ms. Penner through the preliminary inquiry in April 2019. Most importantly, Mr. Hall made it clear he is not asserting that his guilty pleas were not voluntary.

[48] In the end, the letter is not relevant to the question of whether Mr. Hall's guilty pleas were informed.

6. A face-to-face meeting with Ms. Penner

[49] In his affidavit, Mr. Hall states that he spoke to Mr. Kavanagh on the phone after their in-person meeting at MRCC. During that call, Mr. Hall said that he would be prepared to accept the resolution offered by the Crown if he could have a face-to-face meeting with Ms. Penner. He further asserts that Mr. Kavanagh assured him this would be done. In his direct examination at the application hearing, Mr. Hall stated that Mr. Kavanagh "guaranteed" a face-to-face meeting with Ms. Penner.

[50] On cross-examination, Mr. Hall stepped back from that assertion and agreed Mr. Kavanagh said he was "pretty sure" he could arrange a face-to-face meeting. Mr. Hall

also acknowledged that, at the time, he was bound by a condition to have no contact or communication with Ms. Penner.

[51] Mr. Kavanagh was clear in his testimony that he never guaranteed a face-to-face meeting with Ms. Penner. He had spoken to Ms. Penner's lawyer around the time of the preliminary inquiry about deleting the no-contact condition, but that had not come to fruition. He also testified that the Crown would have to consent to removing the no-contact condition. He testified that he told Mr. Hall he would push for a face-to-face meeting once the pleas were entered but certainly never guaranteed such a meeting would occur.

[52] Ms. Nagy confirmed that during the meeting at MRCC, there were discussions about a face-to-face meeting with Ms. Penner. She said that Mr. Hall was told a different Crown attorney was assigned to Ms. Penner's file and she and Mr. Kavanagh would approach that Crown attorney but could not make any guarantee the meeting would happen.

[53] I have no hesitation in accepting that there was no promise or guarantee Mr. Hall would get to meet with Ms. Penner face-to-face. As such, it cannot be said that Mr. Hall's guilty pleas were uninformed on this factor. In fact, he was informed that a meeting was a possibility, but not a guarantee.

[54] I find Mr. Hall has not demonstrated his guilty pleas were not informed. Mr. Hall has not met his onus to establish the guilty pleas should be set aside.

B. Is a withdrawal of the guilty pleas justified in the interests of justice?

[55] Despite a guilty plea being voluntary and informed, there may be circumstances in which the withdrawal of a guilty plea may be justified in the interests of justice. It would be a miscarriage of justice to allow a guilty plea to stand if there is a reasonable doubt as to the guilt of the accused.

[56] In ***R. v. Cabral***, 2005 MBQB 60 (CanLII), Beard J. (as she then was) stated:

> [8] *To make such a determination, the court must have some evidence and/or argument to support that conclusion.* In this case, there is nothing beyond a denial by the accused that he committed the offences and the explanation that he plead guilty to spare himself a longer sentence. His affidavit does not provide any basis for that denial - for example, he does not state that it is a case of mistaken identity, that the complainant consented, that he had an honest but mistaken belief in consent or that there were no assaults. *While an accused is not required to lead any evidence at trial where the crown has the burden of proof, in this motion the accused has the burden of proof, so he must either present evidence or point to factors already before the courts beyond a bare denial of guilt in order to succeed.* In this case, he has done neither.
>
> [emphasis added]

[57] In the matter at bar, I consider the following factors:

- Mr. Hall is 34 years old; therefore, I would not say he is a youthful offender.

- Mr. Hall has extensive experience with the criminal justice system in that he has thirty previous convictions on his criminal record, including three previous robbery convictions.

- Mr. Hall had experienced legal counsel when he entered his guilty pleas.

- Mr. Hall was well aware of the nature of the charges to which he pled guilty, having heard and signed the agreed statement of facts.

- Mr. Hall was well aware of the sentencing consequences of his guilty pleas.

- Mr. Hall has been in custody on these matters since his arrest on April 3, 2018; therefore, he was not rushed into a decision about a plea.

[58] Other than Mr. Hall's assertion in his affidavit that he is "innocent of the vast majority of the charges to which [he has] entered pleas", he does not present any evidence and he indicates that he entered his pleas "due to fear of more serious consequences if [he] were to proceed to trial".

[59] Keeping in mind the onus is on Mr. Hall to show that allowing his guilty pleas to stand would be against the interests of justice, he has not presented any evidence or pointed to any factors to show he is not guilty of the three offences in question.

V. CONCLUSION

[60] For all the reasons set out above, Mr. Hall's application to withdraw his guilty pleas is denied.

_____J.