NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. McNeil*, 2019 NSCA 8

Date: 20190207
Docket: CAC 470956
Registry: Halifax

Between:

Morgan James McNeil

Applicant

v.

Her Majesty the Queen

Respondent

Judge:	Bourgeois, J.A.
Motion Heard:	January 24, 2019, in Halifax, Nova Scotia in Chambers
Held:	Motion dismissed
Counsel:	Morgan James McNeil, appellant in person Timothy S. O'Leary, for the respondent Jamie L. Tax, for LIANS, watching brief only

Decision:

[1] On September 15, 2016, Morgan James McNeil plead guilty to manslaughter in relation to the death of Laura Jessome. On November 14, 2016, Mr. McNeil was sentenced to seven years' imprisonment to be served consecutively with an eight-year sentence he was already serving for unrelated matters.

[2] Mr. McNeil wants to appeal both his conviction and sentence. Because he was well past the prescribed time limit for filing an appeal, he has brought a motion for extension of time that would permit him to file an appeal. Although dated February 24, 2018, the motion was not filed with the Court until July 4, 2018. I heard the motion on January 24, 2019.

[3] For the reasons that follow, I would dismiss Mr. McNeil's motion.

Background

[4] In May of 2012, Laura Jessome was strangled to death. Mr. McNeil and a co-accused, Thomas Barrett, were charged with second degree murder. A lengthy trial was scheduled to commence in September 2016. Mr. McNeil made a motion to have his trial held separately from Mr. Barrett's. Although not initially granted, the trials were ultimately severed due to Mr. Barrett's difficulties in retaining counsel. This delayed his ability to proceed to trial at the same time as Mr. McNeil.

[5] On the first day of his trial, Mr. McNeil entered a not guilty plea to second degree murder, but plead guilty to the included offence of manslaughter. An Agreed Statement of Facts, signed by Mr. McNeil, his lawyer Patrick MacEwen, and Crown counsel, was read into the record before the trial judge. After confirming with Mr. McNeil that he was voluntarily admitting guilt, his plea was accepted by the trial judge.

[6] The Agreed Statement of Facts provided:

> In May of 2012 Morgan McNeil was staying with Tom Barrett at Barrett's home on West St., Glace Bay, Nova Scotia. Barrett and McNeil contacted Curtis Blinkhorn requesting Laura Jessome's phone number. Blinkhorn refused to provide Barrett and McNeil with Laura's number but rather gave their number to Laura leaving it up to her as to whether or not she wanted to contact them. That was the extent of Blinkhorn's involvement in the matter.

> On May 2nd Barrett made contact with Laura Jessome, who agreed to come to Barrett's house. The plan was for the three of them to do drugs and party.
>
> The following morning, Barrett and McNeil were doing drugs. Laura also wanted some drugs but Barrett refused to supply them. Laura became angry and an argument ensued. Laura stormed out of the apartment and up the stairs. Barrett ordered McNeil to bring her back. McNeil ran after Laura, grabbed her and pulled her back down the stairs into the apartment.
>
> Once back in the apartment Tom Barrett grabbed Laura Jessome and strangled her to death with a ligature.
>
> The Crown concedes that Morgan McNeil did not cause Laura Jessome's death nor did he know that Tom Barrett intended to kill her. It was, however, through the recklessness of his action of prohibiting her from exiting the building and returning her to Tom Barrett's apartment, that provided Barrett with the opportunity to kill Laura Jessome.

[7] Mr. McNeil does not take issue with the accuracy of the above. In addition, Mr. McNeil also acknowledges that as part of the agreement to plead guilty to the lesser charge of manslaughter, he requested written assurance from the Crown that he would not be called as a Crown witness at the Barrett trial. The Crown acceded to that request.

[8] Mr. Barrett's trial was scheduled to commence the following August. On August 30, 2017, the Crown withdrew the murder charge against Mr. Barrett and he entered a guilty plea to being an accessory after the fact. On October 31, 2017, Mr. Barrett was sentenced to 60 months of custody.

[9] Mr. McNeil attempted to file a Notice of Appeal in December 2017 and was advised by the Registrar that he was out of time for doing so. He was further advised that he would need to bring a motion seeking an extension of time to file his appeal. He has done so and has attached a draft Notice of Appeal to his motion materials.

[10] From the draft Notice of Appeal and his submissions and evidence before me, Mr. McNeil's complaints can be summarized as:

- His lawyer unduly pressured him to plead guilty;
- The Crown did not live up to the plea bargain they reached with him, given how they later dealt with Mr. Barrett; and

- Given his conviction for manslaughter, and receipt of a sentence harsher than that received by Mr. Barrett, he is concerned people will believe he killed Ms. Jessome.

[11] Mr. McNeil was cross-examined by the Crown. I further heard evidence from Mr. MacEwen and Kathryn Pentz, Q.C., Chief Crown Attorney, Cape Breton Region. I will reference aspects of their evidence in the analysis to follow.

The Law

[12] Section 678(2) of the *Criminal Code* and *Civil Procedure Rule* 91.04 permit a judge of the Court of Appeal, before or after the expiry of the period, to extend the time for filing and service of a notice of appeal. The factors which should be considered are well-known and summarized by Justice Beveridge in *R. v. R.E.M.*, 2011 NSCA 8 as follows:

> [39] Both in Nova Scotia, and elsewhere, the criteria to be considered in the exercise of this discretion has been generally the same. The Court should consider such issues as whether the applicant has demonstrated he had a *bona fide* intention to appeal within the appeal period, a reasonable excuse for the delay, prejudice arising from the delay, and the merits of the proposed appeal. Ultimately, the discretion must be exercised according to what the interests of justice require. (See *R. v Paramasivan* (1996), 155 N.S.R. (2d) 373; *R. v. Pettigrew* (1996), 149 N.S.R. (2d) 303; *R. v. Butler*, 2002 NSCA 55; *R. v. Roberge*, 2005 SCC 48.)

[13] In my view, my conclusions regarding the existence of a *bona fide* intention to appeal, and the merits of the proposed appeal, are conclusive in relation to the outcome of the motion. As such, my analysis will be confined to those factors.

Analysis

Did Mr. McNeil have a bona fide intention to appeal during the appeal period?

[14] I am satisfied based on all the material before me that Mr. McNeil did not form a *bona fide* intention to appeal during the appeal period. He did not consider appealing his conviction during the necessary time frame and, although he did consider appealing his sentence, he did not reach a final conclusion in that regard. Mr. McNeil's intention to appeal only crystallized after learning of Mr. Barrett's sentence. I will review the evidence that leads me to that conclusion.

[15] Mr. McNeil says he never intended or wanted to plead guilty to anything. He wanted to proceed to trial. He says his guilty plea was a result of undue pressure placed on him by his lawyer. He further claims that Mr. MacEwen negotiated the plea deal and Agreed Statement of Facts without his instructions and then threatened to withdraw as counsel if he did not go along with the arrangement. Not seeing another realistic option, Mr. McNeil says he entered the guilty plea. He says that immediately after doing so, he formed the intention to appeal.

[16] Mr. MacEwen testified it was with Mr. McNeil's informed instructions that he commenced settlement discussions with the Crown. This was taking place in the days leading up to the commencement of trial. Mr. MacEwen acknowledged that Mr. McNeil had an important decision to make, but he had clearly explained the pros and cons of proceeding to trial and the consequences of pleading guilty to manslaughter. Mr. MacEwen testified he received instruction to negotiate the terms of a plea deal with the Crown. This included direction from Mr. McNeil to seek amendments to the facts as drafted by the Crown and to seek a written assurance that he would not be called to testify in the Barrett prosecution. As a result of following his client's instruction, the Statement was amended and a written assurance was received. The evidence of Ms. Pentz supports the nature of the plea negotiations as well as the requests brought by Mr. MacEwen on behalf of his client.

[17] Mr. MacEwen testified there was no indication from Mr. McNeil that he wanted to appeal his conviction. He did recall, however, that after the sentencing hearing, he and Mr. McNeil discussed concerns regarding the length of the sentence imposed. He acknowledged he may have advised Mr. McNeil to apply to Legal Aid to request counsel should he wish to appeal his sentence. Mr. MacEwen testified he had no further discussions with Mr. McNeil about appealing his sentence or conviction until after the Barrett matter was concluded.

[18] Mr. McNeil testified he wanted to appeal both conviction and sentence and that he had sent an application to Legal Aid within the appeal period. He testified he believed filing an application was all that he needed to do to start an appeal. He says he was under the belief that his appeal was being advanced and he did not follow up with either Legal Aid or the Court as he was aware that "these things take time". Mr. McNeil testified it was only after hearing of Mr. Barrett launching an appeal did he make inquiries as to the status of his own appeal. As a result, he discovered that he had not started an appeal.

[19] I do not accept Mr. McNeil's evidence on this point. As part of his evidence, Mr. McNeil introduced a copy of an application to Legal Aid dated November 15, 2016. This was the day following his sentencing hearing. On the application, he seeks legal help "to appeal sentence for manslaughter conviction". This document also contains a handwritten notation across the top reading "cancelled per client". In his affidavit in support of his motion, Mr. McNeil states "I am late filing this appeal because I was improperly informed by inmates that it would do more harm than good". Mr. McNeil further states he was "getting the run around" trying to find the necessary documents and he "got very frustrated and gave up". Nowhere in his affidavit does he explain that he was late filing his appeal because he thought he had done so by virtue of applying to Legal Aid on November 15, 2016.

[20] On cross-examination, Mr. McNeil was asked about his affidavit evidence relating to the advice from other inmates. He explained he was told by inmates that having an outstanding appeal may hurt his chances of obtaining parole, which he wanted to seek, so he decided not to proceed.

[21] Based on the evidence, I am satisfied that, although Mr. McNeil may have experienced anxiety surrounding his guilty plea, he entered the plea voluntarily and after participating in settlement negotiations with the Crown. I have carefully reviewed the transcript from the trial proceedings and it is clear Mr. McNeil not only entered his plea, he assured the trial judge it was being done voluntarily. He raised no issue with the agreed facts recited by the Crown. Further, at the sentencing hearing, there is no indication that Mr. McNeil had any lingering doubt about his admission of guilt. He apologized for his role in Ms. Jessome's death.

[22] I am further satisfied that although initially questioning his sentence, Mr. McNeil chose to forego pursing an appeal for fear it would impact his chances for parole. His initial plan to appeal, subsequently abandoned, does not give rise to a *bona fide* intention to appeal. Mr. McNeil's intent to appeal his conviction and sentence did not crystallize until the conclusion of the Barrett matter. Mr. Barrett was sentenced on October 31, 2017. It is significant that on the same day, Mr. McNeil filed a second application to Legal Aid seeking assistance to bring an appeal.

[23] Having found a lack of a *bona fide* intention to appeal, I am satisfied the motion should be dismissed. However, a consideration of the merits of the appeal are also in order given the proposed grounds raised.

Is there merit to the proposed appeal?

[24] With respect to the allegations relating to Mr. MacEwen's role as counsel, it should be apparent from the reasons above that I am of the view, based on Mr. McNeil's own evidence, he would have considerable difficulty advancing an argument that his plea was invalid. Further, Mr. McNeil has not advanced an adequate reason to question the appropriateness of his seven-year sentence. I agree with the Crown that it falls within an acceptable sentencing range. Given the deference afforded to the sentencing judge, without more, it is difficult to see how Mr. McNeil has raised an arguable issue.

[25] Finally, Mr. McNeil wants to argue on appeal that the Crown breached its plea bargain with him. This is not because of how his prosecution unfolded, but because of how the Barrett matter was subsequently handled. He says this justifies an acquittal and new trial. It became apparent during the course of hearing the motion that this is Mr. McNeil's real concern. He says he did not kill Ms. Jessome, but because of the Crown's dealings with Mr. Barrett, it looks like he did.

[26] I am unable to see how the Crown failed to live up to the agreement with Mr. McNeil. They introduced the agreed facts that Mr. McNeil negotiated, including an acknowledgement that he did not kill Ms. Jessome. The Crown, as agreed, withdrew the second degree murder charge against him in exchange for his guilty plea to the included offence to manslaughter. There was no agreement to advance a joint recommendation with respect to sentence. Based on the evidence before me, Mr. McNeil got what he bargained for.

[27] Ms. Pentz gave evidence as to why the Crown did not proceed with the intended second degree murder charge against Mr. Barrett. She explained that evidentiary concerns, including having an important statement ruled inadmissible, negatively impacted the prospect of obtaining a murder conviction. Further, Mr. McNeil, an eye-witness, had obtained the Crown's assurance that he would not be called to testify. These factors led to the Crown's willingness to withdraw the murder charge against Mr. Barrett in exchange for a guilty plea to accessory after the fact.

[28] Although one can understand why Mr. McNeil may not be pleased with how his co-accused's matter was resolved, it does not serve to invalidate his plea. The Agreed Statement of Facts, which Mr. McNeil does not challenge, established the required elements of being a party to manslaughter. His role as a party, not a principle, was specifically noted by the trial judge. As noted earlier, there is

nothing before me on this motion to give rise to an arguable ground with respect to the sentence.

[29] Considering the entirety of the material before me, I am satisfied that it is not in the interests of justice to extend the time to permit Mr. McNeil to pursue his proposed appeal.

Conclusion

[30] For the reasons above, I dismiss the motion.

Bourgeois, J.A.