NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Murphy*, 2015 NSCA 102

Date: 20151112
Docket: CAC 443455
Registry: Halifax

Between:

Tyson Lee Murphy

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	Justice Cindy A. Bourgeois
Motion Heard:	November 5, 2015, in Halifax, Nova Scotia in Chambers
Held:	Motion dismissed
Counsel:	Tyson Lee Murphy on his own behalf, Monica G. McQueen, for the respondent

Decision:

[1] On May 25, 2015, Mr. Murphy was found guilty following trial of trafficking in cocaine, contrary to s. 5(1) of the *Controlled Drugs and Substances Act*. On June 3, 2015 Mr. Murphy plead guilty to obstructing justice contrary to s. 139(2) of the *Criminal Code*, in that he attempted to dissuade a witness from providing evidence against him.

[2] Mr. Murphy was sentenced to two years imprisonment for the trafficking offence, and an additional 200 days for the obstruction offence. He also received additional time for other charges, which are not relevant to this motion.

[3] Mr. Murphy did not file his Notice of Appeal within the required time frame. He has brought a motion to extend the time for filing an appeal. In support of his motion, Mr. Murphy provided affidavit evidence and a proposed Notice of Appeal, in which he challenges both of the above convictions. The Crown chose to cross-examine Mr. Murphy at the hearing, and vigorously opposed the motion.

The Law

[4] Section 678 of the *Criminal Code* gives me authority to extend the time for filing a Notice of Appeal.

> Notice of appeal
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> **678.** (1) An appellant who proposes to appeal to the court of appeal or to obtain the leave of that court to appeal shall give notice of appeal or notice of his application for leave to appeal in such manner and within such period as may be directed by rules of court.
>
> Extension of time
>
> (2) The court of appeal or a judge thereof may at any time extend the time within which notice of appeal or notice of an application for leave to appeal may be given.

[5] The same authority is reflected in *Civil Procedure Rule* 91.04.

[6] The factors I should consider in exercising the discretion to extend have been described by Beveridge, J.A. 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.)

[7] His Lordship further explains that the merits assessment will involve inquiring whether the applicant can demonstrate an arguable ground of appeal. In terms of what constitutes an "arguable issue", Beveridge, J.A. endorses the approach taken in civil matters:

> [50] ...For example, in *MacCulloch v. McInnes, Cooper & Robertson* (2000), 186 N.S.R. (2d) 398, Cromwell J.A., as he then was, wrote:
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> > [4] The appellants must show that there is an arguable issue raised on appeal. This is not a difficult threshold to meet. What is required is a notice of appeal which contains realistic grounds which, if established, appear of sufficient substance to be capable of convincing a panel of the court to allow the appeal: see Freeman J.A., in **Coughlan et al v. Westminer Canada Ltd. et al.** (1993), 125 N.S.R. (2d) 171; 349 A.P.R. 171 (C.A.). It is not my role as a Chambers judge hearing a stay application to enter into a searching examination of the merits of the appeal or to speculate about its probable outcome but simply to determine whether the arguable issue threshold has been reached.

These are the principles I will apply to this motion.

Application of the Principles

[8] In my view, whether Mr. Murphy possessed a *bona fide* intention to appeal, and the existence of arguable grounds, are the most salient considerations on this motion.

a) *Bona fide intention to appeal*

[9] Mr. Murphy's affidavit does not state when he first formed the intention to appeal his convictions. He did advise in his oral submissions that he wanted to appeal immediately following being convicted of the trafficking offence on May 25th. He asserts that staff at the Central Nova Scotia Correctional Facility, and later in the "Reception" unit of the Springhill Institution did not provide him "with the resources; forms to file an appeal". His affidavit asserts that he was transferred

from the Reception unit, to a general housing unit on August 3, 2015 and "in late August" applied to Nova Scotia Legal Aid for assistance in filing an appeal.

[10] In his *viva voce* evidence, Mr. Murphy testified it was very difficult while housed in "Reception" to garner any assistance in terms of obtaining appeal forms or legal advice. In response to my inquiries as to when he requested forms or to be able to contact a lawyer, Mr. Murphy advised it would have been "sometime between June 11 and August 3rd". He could not be more specific. The deadlines for appealing his convictions expired in July.

[11] I am unable to conclude on a balance of probabilities that Mr. Murphy had a *bona fide* intention to appeal within the required time frame. I will explain.

[12] In my view, the evidence is not supportive of a finding that Mr. Murphy was keen, as he asserts, on appealing from the moment of his conviction on May 25th. As noted earlier, he was represented by counsel during this time, with whom he met on June 3rd. On that day, he plead guilty to yet another charge, which he is now also attempting to appeal. Mr. Murphy confirmed that he did not raise his wish to appeal the first conviction with his lawyer, prior to entering a guilty plea on June 3rd.

[13] Mr. Murphy's evidence as to when and how he tried to pursue an appeal once he was incarcerated was vague. What is most telling in terms of his intent to appeal, is his evidence that despite being release from "Reception" on August 3rd, he made no attempt to contact legal counsel or advance the appeal in any other way, until "late August".

b) Arguable Issue for Appeal

[14] The Crown submitted that Mr. Murphy raised no arguable grounds in his proposed Notice of Appeal. Upon reviewing the proposed Notice, and questioning Mr. Murphy carefully as to why he asserts the two convictions ought to be set aside, I agree with the Crown.

[15] Mr. Murphy set out the following grounds in his proposed Notice:

1. Unreasonable verdict not supported by the trial evidence.
2. Although I pled guilty to obstruction, I did so based upon circumstances beyond my control.
3. Any other grounds that the trial transcripts may present.

[16] In his *viva voce* evidence, Mr. Murphy acknowledged the following:

- He was convicted following trial of trafficking in cocaine based upon the court finding the Crown's key witness to be credible, and accepting their evidence;
- The same witness was key to the Crown's case on the obstruction of justice charge;
- Mr. Murphy understood that the witness would likely be again believed, should the obstruction trial proceed;
- Based on that likelihood, he instructed his counsel to enter a guilty plea to the charge on June 3, 2015;
- Through his counsel, Mr. Murphy was able to negotiate the withdrawal of a second charge also scheduled for trial on June 3rd, and a joint recommendation on sentencing for both offences;
- A guilty plea was entered on June 3rd by counsel, in the presence of Mr. Murphy. When asked by the court, Mr. Murphy acknowledged it was his intent to plead guilty, was aware the joint recommendation did not bind the court, and that by admitting guilt, he was giving up his right to trial;
- The judge accepted the joint recommendation on sentencing that had been negotiated by his counsel and the Crown.

[17] I questioned Mr. Murphy carefully as to his proposed grounds of appeal. The first ground relates to the outcome of the May 25th trial. I asked him to explain what he meant by "unreasonable verdict not supported by the trial evidence". He explained that the judge accepted the testimony of the Crown witness, and she should not have. When asked why accepting that evidence was problematic, Mr. Murphy's only explanation was that he was "innocent".

[18] When asked about the second ground relating to the guilty pleas on June 3rd, Mr. Murphy explained that he was uncomfortable with pleading guilty, but felt that given the key witness had been found to be credible previously, his chances of being successful at trial were not good.

[19] Significantly, Mr. Murphy does not allege that he was pressured or coerced to entered the guilty plea, or that his legal counsel was ineffective in their representation of him. He could point to no other alleged errors made by the court below.

[20] Although I am mindful that raising an arguable ground of appeal is a low threshold, Mr. Murphy has not met that bar. Complaining that a judge erred in accepting certain evidence because the appellant asserts he is innocent, is not, without articulating an error in the court's use of that evidence, an arguable ground of appeal. Further, there is nothing raised by the evidence or submissions, which give rise to an arguable ground relating to Mr. Murphy's guilty plea. From his own evidence, I am satisfied it was made knowledgably and voluntarily. Being uncomfortable with the reality that admitting guilt may be the best option in the circumstances, does not give rise to an arguable ground of appeal.

Disposition

[21] Being satisfied it is not in the interests of justice to permit Mr. Murphy's appeal to proceed, I dismiss the motion.

Bourgeois, J.A.