NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Publicover*, 2020 NSCA 67

Date: 20201027
Docket: CAC 491489
Registry: Halifax

Between:

Wendell Corey Publicover

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	Van den Eynden, J.A.
Motion Heard:	October 7, 2020, in Halifax, Nova Scotia in Chambers
Held:	Motion dismissed
Counsel:	Wendell Publicover, appellant in person Erica Koresawa, for the respondent Drew Hampden, for the Attorney General (Nova Scotia)

Decision:

[1] Mr. Publicover pled guilty to a number of criminal charges: break and enter (s. 348(1)(b)); theft (s. 334(b)); assault (s. 266); mischief (s. 430(4)); unlawful possession of a weapon (s. 91(2)); and six counts of breach of probation under s. 733.1(1)(a) of the *Criminal Code*. The Honourable Judge G. Lenehan imposed a total custodial period of five years and various ancillary orders. With remand credit, Mr. Publicover had 45 months to serve in custody.

[2] Mr. Publicover appeals against conviction—he wishes to withdraw his guilty pleas. He also appeals against sentence. He claims he pled guilty because he thought the Crown was going to seek a two-year custodial period, and he was under the impression the sentencing judge would be supportive of a lenient sentence—one that involved a suspended sentence on the condition Mr. Publicover attend a residential treatment program to help him combat his long-standing addiction and mental health issues.

[3] These were not Mr. Publicover's first encounters with the criminal justice system. He committed these offences while being bound to keep the peace and be of good behavior under a number of probation orders. Mr. Publicover is in his early 40s and has a lengthy criminal record. By his own words, he has spent almost half of his life in prison. Given the seriousness of the charges Mr. Publicover was facing, he had good reason to be concerned with yet another, potentially lengthy, period of incarceration—something he wished to avoid.

[4] Mr. Publicover was represented by counsel in the court below. The entering of guilty pleas and sentencing was adjourned several times at Mr. Publicover's request. He was trying to source a long-term treatment program and viewed this an essential component to his request for a suspended sentence. There were at least eight adjournments requested—primarily to permit his counsel to continue to procure treatment options for Mr. Publicover. Eventually counsel reported that a bed had been secured. Mr. Publicover entered guilty pleas on July 11, 2019, and the matter was set over for sentencing. I note the record does not indicate that a full inquiry of the conditions for accepting a guilty plea was conducted under s. 606(1) of the *Criminal Code*. However, if so and whether it had any effect is something for the panel to decide.

[5] The record contains no reference by the Crown that it was seeking a two-year custodial sentence. Any such reference was made by defence counsel after

guilty pleas were entered on July 11, 2019. Near the end of this appearance, in an exchange with the judge about setting the matter down for sentencing, defence counsel said, "*I know my friend is looking for a deuce*". The Crown said nothing about sentence range during this appearance.

[6] The sentencing hearing took place on July 19, 2019. Although the Appeal Book does not contain the written sentencing submissions (as it should), it is apparent from the record that the judge received written submissions. The Crown was seeking a total of five years' incarceration for the multitude of offences Mr. Publicover pled guilty to plus several ancillary orders.

[7] Although Mr. Publicover and his counsel put effort into presenting a long-term treatment plan which they hoped would persuade the judge to impose a suspended sentence, there is no suggestion in the record by defence counsel that the Crown misrepresented or changed its position on sentence at anytime. In fact, during sentence submissions, defence counsel acknowledged the appropriateness of the requested range; however, defence counsel also emphasized the case authorities which supported other sentencing options. Mr. Publicover suggested to the judge that given his circumstances, coupled with his proposed treatment plan, a three-year period of probation with terms and conditions was a proper sentence.

[8] After hearing submissions from Crown and defence counsel, the judge asked Mr. Publicover if he would like to say anything before being sentenced. Mr. Publicover took the opportunity and explained his circumstances to the judge. During his remarks he said, "*The most I ever heard of was, I think a deuce, I think*". After a recess, court reconvened and the judge delivered his sentence decision.

[9] It is obvious from the record that as the judge was delivering his oral decision Mr. Publicover became upset a few times. At one point he said:

> […] I even pled guilty to the assault, dropped down to normal assault and you still called it causing bodily harm and everything. Oh my God! I can't believe it.
>
> […] It did not happen that way. You know why I pled guilty because you said two years down there in that courtroom, concurrent. The Crown ... he said my friend is looking for two years, right in front of you last week. I said, Guilty. That's why I ... I mean I sit here and you say five years. I'm like, I get downstairs I said I never heard of railroading, you know, I don't believe in that. […]

[10] Mr. Publicover filed his Notice of Appeal several weeks after being sentenced. His grounds of appeal meander over some ten pages; however, his main complaints are:

- He pled guilty while under the wrong impression the Crown was seeking two years' incarceration;

- He pled guilty to offences he did not commit because he hoped to get into a treatment program available at sentencing. He relied on what he describes as the judge's hopeful comments as assurances of a lenient sentence;

- The Crown twisted the facts read into the record in support of his guilty pleas;

- Ineffective assistance of counsel, including failing to provide disclosure and failing to submit relevant information to the court; and,

- Consideration should be given to the absence of mental health services and access to his therapeutic methadone while incarcerated for previous offences which he says contributed to this recent brush with the criminal justice system.

[11] Mr. Publicover tried to obtain counsel through Nova Scotia Legal Aid (NSLA) to represent him on appeal. After conducting a merit assessment of his grounds of appeal, NSLA declined to provide counsel. Mr. Publicover then unsuccessfully appealed that decision to the NSLA Appeal Committee.

[12] Mr. Publicover now asks me to appoint counsel to represent him on his appeal pursuant to s. 684(1) of the *Criminal Code*. This section provides:

> **684 (1)** A court of appeal or a judge of that court may, at any time, assign counsel to act on behalf of an accused who is a party to an appeal or to proceedings preliminary or incidental to an appeal where, in the opinion of the court or judge, it appears desirable in the interests of justice that the accused should have legal assistance and where it appears that the accused has not sufficient means to obtain that assistance.

[13] Mr. Publicover's motion was contested. The Attorney General of Nova Scotia responds to these s. 684 motions and in this case adopted the position that counsel should not be appointed as Mr. Publicover is capable of representing himself.

[14] As required under s. 684(1) of the *Criminal Code*, I consider: (1) whether it is desirable in the interests of justice that Mr. Publicover have legal assistance; and, (2) whether he has sufficient means to obtain counsel. The overall burden to establish these prerequisites is on Mr. Publicover (*R. v. Keats*, 2017 NSCA 7, para. 9).

[15] The first inquiry ("desirable in the interests of justice") involves consideration of various factors[1], including:

- Are the grounds of appeal arguable/have merit?

- Is the appeal complex? Complexity can be garnered from the grounds of appeal, the length and content of the record, the legal principles involved, and their application to the facts.

- Is Mr. Publicover able to effectively present his appeal without the assistance of counsel? The ability to do so can be gleaned from the ability to comprehend, communicate, and apply legal principles to the facts.

- The ability of the appeal panel to address the issues raised on appeal without the assistance of counsel.

- The Crown's duty to ensure the appellant is treated fairly and to bring important arguments to the attention of the panel, notwithstanding this might benefit Mr. Publicover.

Analysis of relevant factors

[16] There is no contest over whether Mr. Publicover has sufficient means to retain private counsel. I am satisfied he does not. My focus is on whether it is in the interests of justice to provide him with state funded counsel. I turn to analyze the factors which inform that determination.

Merits/arguable issue

[17] The Crown contends the grounds of appeal raise no arguable issue. It will be for a panel of this Court to ultimately determine if the grounds of appeal have

[1] See *R. v. Martin*, 2015 NSCA 82; *R. v. Miller*, 2015 NSCA 19 and cases cited therein.

merit. At this preliminary stage, it is not for me to conduct that searching examination. That said, I still consider whether the grounds are realistic or, put another way, at least have an opportunity to succeed (*R. v. MacLean*, 2017 NSCA 86).

[18] Although the grounds of appeal, or at least some, may be of questionable merit, for the purpose of this motion I am satisfied that Mr. Publicover's grounds meet the required threshold. I move on to consider the complexity of his appeal.

Complexity of the appeal

[19] As appeals go, this appeal is not complex. Although Mr. Publicover's grounds of appeal appear a bit unwieldly in his Notice of Appeal, they fall within several distinct complaints which he has been able to articulate. Also, the record is not large and, from his submissions on this motion, it is clear that Mr. Publicover has a good handle on the record and his alleged grounds of error.

Ability to meaningfully participate in and effectively present his own appeal

[20] On this motion, Mr. Publicover was able to articulate his position clearly, both in writing and during oral submissions. As noted, he has a good grasp of the record, what he sees as errors, and why he thinks this Court should intervene on appeal. Having had the benefit of reading and listening to his submissions, I am satisfied he has the comprehension and communication skills to adequately represent himself and meaningfully participate in his appeal.

[21] Although not related directly to Mr. Publicover's skill set, he reported encountering difficulties within the prison system in ensuring access to his court documents and getting his motion materials filed on time. As a prisoner, Mr. Publicover has little to no control over access to reasonable resources so he can advance his appeal as required and in the timeframes established by this Court. It appears he was finally able to get these issues resolved. However, had this been an unresolved and recurring problem, in my view, this may be an appropriate consideration in the appointment of counsel.

Final considerations: role of Court and duty of the Crown

[22] Even without counsel to assist Mr. Publicover in advancing his appeal, the Court of Appeal is well-positioned to recognize whether the appeal has merit. The panel will have reviewed the record and is well able to decide this appeal (see

Miller, supra and *Martin, supra*). There is also the important duty of the Crown to consider.

[23] The Crown has the duty of ensuring Mr. Publicover is treated fairly on appeal. It expressly acknowledged this important responsibility in its motion submissions. Should Mr. Publicover overlook an important argument the Crown is expected, and has acknowledged its obligation, to bring this to the Court's attention.

Conclusion

[24] For the foregoing reasons, it is not in the interests of justice to appoint state funded counsel. Motion dismissed.

Van den Eynden, J.A.