IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Dodge, 2005NSPC24

Date: 2005 June 7
Docket: 1493318-20
Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Jason John Dodge

Judge:	The Honourable Associate Chief Judge R. Brian Gibson, J.P.C.
Heard:	April 20, 22 & 29, 2005, in Dartmouth,Nova Scotia
Written decision:	June 7, 2005
Charges:	That he, on or about the 23rd day of November, 2004 at or near Dartmouth, Halifax Regional Municipality, in the County of Halifax, Province of Nova Scotia did unlawfully have in his possession, Cocaine, a substance included in Schedule 1 of the **Controlled Drugs and Substances Act**, S.C. 1996, c.19, and did thereby commit an offence contrary to Section 4(1) of the said Act. AND FURTHER at the same time and place aforesaid, did without lawful excuse store a firearm, to wit., a 30/30 rifle, in a careless manner, contrary to Section 86(2) of the **Criminal Code**. AND FURTHER at the same time and place aforesaid, did unlawfully possess a loaded prohibited weapon, to wit., a 9mm handgun, with ammunition, for which he

was not the holder of an authorization or license under which he may possess it, contrary to Section 95(2)(a) of the **Criminal Code**.

Counsel: James Whiting, for the Crown
David Perlmutter, for the Defence

By the Court:

[1] On December 22, 2004, Jason John Dodge, the Accused herein, was charged with three offences, contrary to S.86(2) of the **Criminal Code** involving careless storage of a 9 mm handgun, a .38 calibre handgun and a 30/30 rifle. He was also charged on the same Information at the same time with unlawful possession of a loaded prohibited weapon, to wit: a 9 mm handgun with ammunition, contrary to S.95(2)(a) of the **Criminal Code**. On the same date, but on a separate Information, Jason John Dodge was charged with the offence of possessing cocaine, contrary to S.4(1) of the **Controlled Drugs and Substances Act**.

[2] The Accused was arrested on December 22nd and made his first appearance in the Provincial Court on December 23rd arriving thereat through the cell area at the Provincial Court in Dartmouth. The Crown elected to proceed by indictment with respect to the aforesaid **Criminal Code** charges and proceeded summarily with respect to the **Controlled Drugs and Substances Act** charge. The Accused elected to be tried in the Provincial Court and tendered guilty pleas to the S.86(2) **Criminal Code** charge regarding the 30/30 rifle and a guilty plea with respect to the S.95(2)(a) **Criminal Code**

charge regarding the 9 mm handgun with ammunition. The Accused also tendered a guilty plea with respect to the S.4(1) **Controlled Drugs and Substances Act** charge.

[3] After tendering the aforesaid guilty pleas, a Presentence Report was ordered and sentencing was scheduled to take place on February 24, 2005 at 1:30 p.m. The Accused was subsequently released on a $5000 Recognizance with one surety and a number of listed conditions.

[4] On January 10, 2005, the Provincial Court was asked to schedule an application by the Accused's counsel of record to hear an application to withdraw as counsel. On January 11, 2005 that application to withdraw was heard and the Accused's counsel of record withdrew with leave of the Court. Further proceedings on the Informations were adjourned until February 2, 2005 at 9:30 to permit the Court to confirm the status of the Accused's new counsel.

[5] On February 2, 2005 the Accused appeared in Court giving notice of his application to withdraw his guilty pleas. On or about February 8, 2005 the

Court received correspondence from Dana Bowden, Assistant Probation Officer, advising that Mr. Dodge had contacted Mr. Bowden to advise that he would be changing his plea and was directed by his lawyer not to report for the scheduled appointment in relation to the Presentence Report. On February 24th, the date originally scheduled for sentencing, the matter was further adjourned to March 24, 2005 to hear the plea withdrawal application. The full plea withdrawal application was heard over three dates, being April 20, April 22 and April 29. The Accused was represented during the plea withdrawal application by legal counsel.

[6] To assist with the plea withdrawal application, the Court ordered a transcript of the December 23, 2004 proceedings at which time the Accused tendered his aforementioned guilty pleas. At the time that he tendered his guilty pleas, the S.86(2) **Criminal Code** charges with respect to careless storage of the 9 mm handgun and the .38 calibre handgun were withdrawn by the Crown.

[7] In the course of considering this application I have relied upon the following cases: Adgey v. the Queen (1975), 2 S.C.R. 426, R. v. Hirtle, 104 N.S.R.

(2d) 56 (N.S.C.A.), R. v. Porter [1994] N.S.J. No. 304 (N.S.C.A.), and R. v. Murphy [1995] N.S.J. No. 481 (N.S.C.A.). In addition to the aforementioned cases I have had the benefit of the testimony of Jason John Dodge and two copies of the Informations to Obtain a Search Warrant sworn the 23rd day of November, 2004 pursuant to which Search Warrant authorizations were issued relative to premises situate at 16 Crawford Street, Dartmouth, Halifax Regional Municipality, Nova Scotia. It was the execution of the two aforementioned search warrant authorizations that triggered the subsequent events that ultimately led to the Accused being charged and appearing before the Court.

[8] The transcript of the proceedings which took place on December 23rd when the Accused tendered his guilty pleas together with his *viva voce* testimony given in the course of this plea withdrawal application confirms the following: (1) that the Accused was represented by counsel when he tendered his pleas. His counsel at that time was the duty counsel assigned to give advice to and assist individuals appearing in Court through the cell area. In other words individuals, who like the Accused, are detained and have had, in addition to facing the charges before them, issues pertaining to the

question of their release or detention. (2) Each charge was read to the Accused. (3) The Accused understood the charges and said so at the time the charges were read to him. (4) The Accused was advised of the maximum punishment for each of the S.86(2) and the S.95(2)(a) charges as well as the minimum sentence of one year imprisonment in relation to the S.95(2)(a) offence. On the 23rd day of December, the Accused responded indicating that he understood these consequences. (5) The essence of S.86(2) and the S.95(2)(a) charges were explained to him. (6) The Accused was advised by the Court that it was not bound by any agreements made between he and the Crown, either directly or through his counsel, regarding the sentence to be imposed should he plead guilty. (7) After all of the foregoing was canvassed with Mr. Dodge he tendered his guilty pleas directly to the Court and a Presentence Report was ordered. (8) The evidence is clear that the Accused tendered his pleas voluntarily. (9) There is no evidence that the Accused did not understand the consequences of pleading guilty nor the nature of the charges. (10) There is no evidence to indicate that the Accused had a problem with his mental state when he tendered his guilty pleas. (11) The evidence is clear that the Accused did what he intended to do on December

23rd which was to plead guilty to the charges in relation to which he now seeks to withdraw those pleas.

[9] The essence of the Accused's application is that he was solely motivated to plead guilty and accept the consequences of so doing with the hope or objective that Michelle Myra would be released and that the Crown would not proceed with the **Criminal Code** and **Controlled Drugs and Substances Act** charges against her.

[10] The evidence revealed that Michelle Myra, Katherine Chaisson, Michael Lyle, Greg Cameron and Donald Naugle were all jointly charged with the same aforesaid **Criminal Code** charges that were subsequently brought against the Accused, Mr. Dodge, as well as other **Criminal Code** charges and **Controlled Drugs and Substances Act** charges including possession of cannabis (marijuana) and cocaine both for the purposes of trafficking, contrary to S.5(2) of the **Controlled Drugs and Substances Act**. These five individuals were arrested after being found at the 16 Crawford Street premises on the date that the search warrant authorizations were executed. On December 3, 2004 all of the foregoing individuals elected trial in the

Provincial Court, pled not guilty and had their trial set for March 31, 2005 on all charges against them.

[11] The record reveals that on the 15th day of December, 2004 Greg Cameron tendered a guilty plea to the charge of possession of cannabis (marijuana) for the purpose of trafficking, contrary to S.5(2) of the **Controlled Drugs and Substances Act** and guilty pleas to careless storage of the same .38 calibre handgun with which Mr. Dodge was charged as well as a S.108(2)(a) **Criminal Code** charge relative to the same .38 calibre handgun. Mr. Cameron also pled guilty to a S.145(3)(a) **Criminal Code** charge on December 15, 2004. Sentencing in respect of his guilty pleas was adjourned until February 16, 2005. On February 16, 2005 Greg Cameron received a 15 month Conditional Sentence with respect to the aforementioned charges.

[12] The record also reveals that on December 22, 2004, Michelle Myra, who was represented by legal counsel, was before the Supreme Court of Nova Scotia for a bail review hearing. At that time she was still in custody as a result of bail having been denied pursuant to a bail hearing held before a Judge of the Provincial Court which took place on November 26, 2004.

With the exception of Michael Lyle and Michelle Myra, the other co-accused being Katherine Chaisson, Greg Cameron and Donald Naugle had been released from custody prior to December 22, 2004.

[13] On December 22, 2004 the Accused approached Michelle Myra's counsel at the Law Courts indicating his desire to claim responsibility for at least some of the **Criminal Code** and **Controlled Drugs and Substances Act** charges brought against her. From what I determined from the evidence, this led to the Accused's contact with Constable Carlisle of the Halifax Regional Police Department and his arrest. The Accused apparently provided an inculpatory statement to the police, neither the particulars of which, nor the statement itself, were put before me.

[14] On December 23, 2004 the Crown directed a stay of proceedings of all **Criminal Code** and **Controlled Drugs and Substances Act** charges against Michelle Myra, Michael Lyle and Katherine Chaisson and the remands of Ms. Myra and Mr. Lyle were terminated. I am satisfied from the submissions that the aforesaid action by the Crown was taken as a direct result of the actions of the Accused.

[15] After carefully reviewing all the evidence, including the testimony of the Accused, I am not satisfied that when he tendered his guilty pleas he intended to admit his guilt. In essence I found the Accused's testimony to be credible when considered in the context of the other evidence, the record of these proceedings and facts which had been admitted during this application, both with respect to these and the criminal proceedings brought against the other individuals, including Michelle Myra, arising from the search and seizure at the premises identified as 16 Crawford Street, Dartmouth, Nova Scotia on November 23rd.

[16] This is one of those rare circumstances where the motivation for pleading guilty appears to have had nothing to do with admitting guilt. The absence of an admission of guilt, despite a voluntarily tendered guilty plea, renders the guilty plea unsustainable as a basis for a conviction and sentence. In this case that sentence would be a minimum of one year of incarceration for the S.95(2)(a) offence above. There is a real possibility in this case that if the Accused was convicted based upon his guilty pleas, that it would be a

wrongful conviction and thereby a miscarriage of justice. In R. v. Porter [1994] N.S.J. No.304, Pugsley, J.A. stated at paragraph 25:

> "In Adgey v. The Queen (1975), 2 S.C.R. 426, Dickson, J. on behalf of the majority, stated at page 431:
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> This Court in Queen v. Bamsey (1960), S.C.R. 294 at p.298, held that an accused may change his plea if he can satisfy the Appeal Court "that there are valid grounds for his being permitted to do so." It would be unwise to attempt to define all that which may be embraced with the phrase "valid grounds".
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> Without intending to be exhaustive, Dickson, J. listed some of the grounds that he considered would meet the test. They include the situation where the accused never intended to admit to a fact, which is an essential ingredient of the offence, or a situation where the accused may have misapprehended the effect of a guilty plea, or never intended to plead guilty at all."

[17] In R. v. Hirtle (1991) 104 N.S.R. (2d) 56, Hallet, J.A. stated at page 60:

> "In circumstances such as this, to prove error that would warrant granting the application to change the plea to not guilty, the accused must show that when he pleaded guilty he did not appreciate the nature of the charge or prove he did not intend to admit that he was guilty. This would appear to be the law, both with respect to the exercise of the discretion by the trial judge and an exercise of such a discretion by an Appeal Court on an application to withdraw a plea of guilty. R. v. Savory (1965-69), 5 N.S.R. 626. A miscarriage of justice would, of course, also be a ground to allow such an application, either at the trial or Appeal Court level. What we have before us is an appeal from the exercise of the trial judge's discretion and not an application to withdraw the guilty plea.

[18] In R. v. Murphy [1995] N.S.J. No.41, Chipman, J.A. stated at paragraph 10:

> "This Court will permit the withdrawal of a guilty plea only in exceptional circumstances. Such circumstances include, but are not limited to, a basic misunderstanding by the accused of the nature of the charge or the effect of his plea, that he never intended to admit guilt or that there was a serious question as to his mental state at the time of entering the plea. Such grounds are difficult to substantiate if at the time of entering the guilty plea, the accused was represented by counsel and the plea made in open court in the presence of the accused."

[19] In reaching the conclusion that this Court should permit the Accused to withdraw his guilty pleas, I recognize that he will not be placed beyond prosecution on these charges nor the prospect of a finding of guilt on one or more of these charges to which he pled guilty. I also recognize that there is some prejudice to the Crown, but it is a less significant prejudice than that which could flow from what may have been a wrongful conviction arising from the Accused's guilty pleas if he was not permitted to withdraw them.

[20] The Accused may have been "playing fast and loose with the administration of justice", a phrase found in R. v. Saunders (1953), 106 C.C.C. 76, cited with approval in R. v. Bamsey (1960), S.C.R. 294 at p.300 and quoted at para. 29 in R. v. Porter (supra). Such "playing fast and loose with the administration of justice" occurred when the Accused tendered his guilty plea in light of his apparent motivation at that time. For that he could face

criminal sanction. However, it does not appear that his application to withdraw his guilty pleas falls into that category of playing fast and loose with the administration of justice as recognized in R v. Porter, but rather is based upon a recognition by the Accused that his reason for pleading guilty was not a proper basis for such a plea. This case before me is therefore unlike the circumstances in R. v. Porter.

[21] In this case before me it appears that the Accused was not under suspicion at the time the search warrant was issued nor, absent his stepping forward and claiming responsibility for some of the offences, does it appear that the police, after executing the search warrant at the 16 Crawford Street premises and completing their investigation, had any intention of charging him. Thus, the Accused, by his actions, caused these charges to be brought against him. This is not a matter where in the face of charges arising from police investigation, guilty pleas were tendered and then sought to be withdrawn upon the Accused concluding that the charges were based upon weak or suspect evidence.

[22] The Accused is a 27 year old individual. By his testimony and his demeanor, I characterized him as rather naive and immature. He testified to having known Michelle Myra and Donald Naugle for ten years, who at one time lived together as a couple. He described his relationship with them as being like a family. Michelle Myra and Donald Naugle have a nine year old daughter who resides with Michelle Myra. At the time of these charges, Ms. Myra and Mr. Naugle were separated although the building in which Ms. Myra and the Accused resided was owned by Mr. Naugle. The Accused was Ms. Myra's border and occupied a room in the basement. He used her bathroom and kitchen which were located in her main floor apartment. The Accused testified that he treated Ms. Myra's child, Justice, like his own. He testified to having a great concern about Ms. Myra being charged and the prospect of her spending Christmas in custody and thereby being separated from her daughter. His evidence strongly suggests that absent any actual responsibility for the charged offences he could have been willing, on December 23, 2004, to claim responsibility and sacrifice his own freedom solely to secure the freedom of Michelle Myra and absolve her from any responsibility for these charges. That apparent willingness at that time to make such a sacrifice may well have rendered any legal advice through duty

counsel or comments by myself as the presiding judge who took his guilty pleas ineffective. It appears that after pleading guilty, the Accused soon realized that his guilty pleas, apparently not based upon an admission of guilt, were going to give rise to a significant cost to him but with little apparent appreciation, in his mind, from those who had benefited from his actions.

[23] Approximately two weeks prior to December 22nd, after Michelle Myra had been denied bail, the Accused testified that he provided a written statement to Donald Naugle in which, according to the Accused's testimony, he claimed responsibility for some of the offences. The Accused testified that after Katherine Chaisson was released from custody, he had a conversation with her in which he learned of the items seized by the police on the 23rd day of November, 2004. The Accused had not been present at the 16 Crawford Street, Dartmouth premises when the search and seizure by the police occurred. The Accused's testimony appears to indicate that he was aware that Mr. Cameron was intending to plead guilty to some of the offences prior to giving the aforementioned statement to Mr. Naugle. By the time the Accused stepped forward on December 22, 2004 and tendered his guilty

pleas on December 23, 2004, it is clear that he was aware of the guilty pleas that had been tendered by Greg Cameron.

[24] Notwithstanding the provision of the statement to Donald Naugle, no adverse consequences seemed to have arisen for the Accused prior to December 22, 2004, prior to stepping forward and approaching Michelle Myra's counsel. Why that was so is unclear from the evidence. However, the evidence would suggest that there were discussions between the Accused and some of the individuals who were charged with the offences arising from the aforesaid November 23rd search and seizure involving how the Accused's motor vehicle was to be looked after in the event that he was incarcerated. After pleading guilty, the Accused became aware that those proposed arrangements were not about to be honoured. That and other apparent discussions about which he testified caused him to conclude that his sacrifice was not appreciated to the extent that it should have been in his mind.

[25] Ultimately, if this matter proceeds to trial, the evidence may be sufficient to prove the Accused guilty of some or all of the offences before the Court

despite any defence evidence before the Court at that time. However, when a guilty plea is tendered it must be based upon an admission of guilt even though there may be other practical reasons or motivations for so doing in addition to the requisite admission of guilt. In this case other motivations appear to have been present but not the admission of guilt. Leave to withdraw the guilty pleas is hereby granted.

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R. Brian Gibson, J.P.C.
Associate Chief Judge