PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Fraser*, 2019 NSPC 63

Date: 20190911
Docket: 8282139,8313018, 8282131, 8182132, 82812134, 8289833,8328413
Registry: Truro

Between:

Her Majesty The Queen

v.

Anthony Fraser

Judge:	The Honourable Judge Bégin,
Heard:	September 11, 2019, in Truro, Nova Scotia
Charge:	5(2) Controlled Drugs and Substances Act X2 91(3), Criminal Code X2 86(2) Criminal Code 334(b) Criminal Code 354(1)(a) Criminal Code
Counsel:	Jan Murray, for the Federal Crown Laura Barrett, for the Provincial Crown Bradford Yuill, for the Defendant

By the Court:

Guilty Pleas – Withdrawal Anthony Fraser Sept. 11, 2019

[1] Mr. Fraser came to Court this morning to be sentenced on a number of charges. Guilty pleas were entered into various federal offences on July 17, 2019. At that time of Mr. Fraser entering his guilty pleas I had Mr. Fraser confirm his guilty pleas on the record. Mr. Fraser confirmed his guilty pleas. Mr. Yuill, who represents Mr. Fraser, confirmed in Court that the provisions of s. 606 (1.1) had been discussed with Mr. Fraser prior to his entering of his pleas on July 17, 2019. A Pre-Sentence report was ordered and a sentencing date of September 11, 2019, today, was set.

[2] Mr. Yuill also noted on the record that the guilty pleas by Mr. Fraser arose as a result of discussions, meaning more than one conversation, between himself and the Crown Attorney. It is important to note that Mr. Yuill has represented Mr. Fraser on the record since November 28, 2018, and that Mr. Yuill appeared in Court five times before the July 17, 2019 date when the guilty pleas were entered. Mr. Fraser appeared in Court with Mr. Yuill on two of those occasions prior to July 17, 2019.

[3] During the June 25, 2019 Court appearance, for which Mr. Fraser was present, Mr. Yuill advises the Court that these are complex matters and that there have been extensive discussions between Crown and Defence and that there was a resolution expected for the matters before us today the next appearance on July 17, 2019.

[4] Prior to Court this morning an Agreed Statement of Facts was provided to myself. I must assume that Mr. Yuill reviewed these Agreed Statements of Facts with Mr. Fraser prior to them being filed with the Court. For future cases, counsel should ensure that their clients sign the Agreed Statement of Facts to fully ensure that their client is in agreement with the facts as stated.

[5] The Agreed Statement of Facts contain all of the essential elements to support the guilty pleas by Mr. Fraser.

[6] Upon Mr. Fraser entering Court this morning I learn that Mr. Fraser wants to withdraw his guilty pleas. No formal application has been made by Mr. Fraser that

would comply with the requirements under the *Code*, that would include the preparation of an affidavit by Mr. Fraser.

[7] I refused that request by Mr. Fraser, and I refused the application by Mr. Yuill to withdraw as counsel for Mr. Fraser until I had the opportunity to listen to the Court proceedings from July 17, 2019.

[8] Prior to today's court appearance I read the Presentence Report prepared on August 20, 2019. I note that at page 3 of the Presentence Report that Mr. Fraser confirms his guilt for selling drugs when he refers to a time around May 2018, "…that's when everything started to fall apart. I started to sell drugs."

[9] There is another acknowledgement by Mr. Fraser of his guilt for dealing drugs at page 6 of the Presentence Report where he states, "…it was good, it was good, I had toys and everything, I had women, I had my own place, into it for the money."

[10] The guilty pleas were entered on July 17, 2019. No motion to withdraw the guilty pleas was made before today even though Mr. Fraser had ample time to do so. Mr. Fraser also had the opportunity to profess his innocence at the time of his interview with the probation office, as we do see on occasion. Mr. Fraser did not do so, but rather, confirmed his guilt when speaking with the probation office.

[11] It is also important to note that Mr. Fraser has prior involvement with the criminal justice system. While he does not technically have a criminal record as he received a conditional discharge in February 2012 for an offence of Assault Causing Bodily Harm. He would have been 22 years of age at that time. He would have been an adult, and not a youth.

[12] I will take a minute to review the law governing the withdrawal of guilty pleas.

[13] In **R. v. Wong,** 2018 SCC 25 (S.C.C.), the majority held that the following criteria can allow the withdrawal of a guilty plea by an accused:

1. he or she was not aware of a legally relevant collateral consequence, and
2. there is a reasonable possibility he or she would have proceeded differently if properly informed of that consequence.

[14] To be allowed to withdraw a plea on the basis that the accused was unaware of legally relevant collateral consequences, the accused must file an affidavit which shows a reasonable possibility that subjectively he or she would have either opted for a trial or only pleaded guilty with different conditions. Because the decision whether to plead guilty is a deeply personal one, the proper question is not what a reasonable person would have done, but what the accused would have done. Any kind of objective test would sometimes have the result that an accused who would not have pled guilty will be unable to withdraw the plea based on what some other person would have done, or alternatively that an accused who would have pled guilty even if fully informed would nonetheless be allowed to withdraw the plea.

[15] The Court noted that an accused might be able to show that he or she would have proceeded to trial even though there was little to no chance of success, and the accused need not show that there was a viable defence.

[16] Similarly, an accused might show that he or she would only have pleaded guilty on different conditions which would have alleviated in whole or in part the adverse effects of the legally relevant collateral consequence. The mere existence of such conditions is not sufficient: the accused must satisfy the court that there is a reasonable possibility he or she would have taken that course. However, the accused need *not* show that any other party, such as the Crown, would have been willing to accept such conditions: only that he or she would have insisted on them. In assessing any of these claims, a court is not obliged to automatically accept an accused's claim, and should look to objective circumstantial evidence to test their veracity against a standard of reasonable possibility.

Burden of Proof

[17] In **R. v. Desrochers,** 2018 MBCA 55 (M.C.A.), Hamilton J. A. set out a helpful framework to guide consideration of a motion to strike a guilty plea. She stated that the plea of guilty is a conscious volitional decision. There are no closed lists of factors to consider.

> [29] A guilty plea in open court is presumed to be voluntary. Therefore, on an appeal seeking to set aside a guilty plea, the onus is on the accused to demonstrate that there is a valid reason to set aside the guilty plea in the interests of justice. The enquiry is fact-based.

At paragraph 32:

Factors that the courts consider in such an appeal include:

- whether the accused had a prior record that demonstrates that he had participated in plea proceedings before.
- whether the accused was represented by counsel and whether there is a challenge to the adequacy of that representation.
- any medical issues of the accused at the time of the guilty plea.
- any pressure from the accused's own counsel, the prosecution or anyone else.
- the viability of any defence.

[18] Before sentence is passed, a trial judge has a discretion to permit an accused to withdraw a guilty plea **(Thibodeau v. The Queen,** [1955] S.C.R. 646**)**. The court has the power to permit an appellant to withdraw a guilty plea provided there are "valid grounds". There is no closed list of what might qualify, but it includes situations where the appellant did not fully appreciate the nature of the charge or the effect of the plea or never intended to admit facts essential to guilt, or on the accepted facts, a conviction is not legally available (see **Adgey v. The Queen,** [1975] 2 S.C.R. 426; **Brosseau v. The Queen,** [1969] S.C.R. 181; **R. v. Bamsey,** [1960] S.C.R. 294.)

[19] History has borne out the wisdom of this broad approach. Relief has been granted because of:

- inappropriate inducements or threats (***R. v. Hirtle*** (1991), 104 N.S.R. (2d) 56 (C.A.);
- improper pressure by counsel (***R. v. Lamoureux*** (1984), 13 C.C.C. (3d) 101 (Que. C.A.); ***R. v. Laperrière***, [1996] 2 S.C.R. 284);
- police threats, (***R. v. Nevin***, 2006 NSCA 72);
- violation of the accused's right to full disclosure (***R. v. Duguay***, 2003 SCC 70);
- a powerful inducement by the Crown with reliance on flawed or tainted opinion evidence which, when discredited, undercuts the existence of an informed plea (***R. v. Kumar***, 2011 ONCA 120; ***R. v. Shepherd***, 2016 ONCA 188).

[20] In ***R. v. Henneberry,*** 2017 NSCA 71 (N.S.C.A.), the court held at paragraph 19:

[19] The onus is on an appellant to demonstrate on a balance of probabilities that his or her plea was invalid. What factors inform the validity of a guilty plea? ***R. v. T.(R.),*** 10 O.R. (3d) 514, [1992] O.J. No. 1914 is one of the leading cases that discuss this issue. **To be valid, a plea must be voluntary, informed, and unequivocal.** Justice Doherty, for the Court wrote of these requirements:

> [14] To constitute a valid guilty plea, the plea must be voluntary and unequivocal. The plea must also be informed, that is the accused must be aware of the nature of the allegations made against him, the effect of his plea, and the consequence of his plea: ***R. v. Lyons***, [1987] 2 S.C.R. 309 at p. 371, 37 C.C.C. (3d) 1 at p. 52
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> …
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> [16] I will first address the voluntariness of the appellant's guilty pleas. A voluntary plea refers to the conscious volitional decision of the accused to plead guilty for reasons which he or she regards as appropriate: ***R. v. Rosen***, [1980] 1 S.C.R. 961 at p. 974, 51 C.C.C. (2d) 65 at p. 75. A guilty plea entered in open court will be presumed to be voluntary unless the contrary is shown: Fitzgerald, The Guilty Plea and Summary Justice, supra, at p. 71.
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> [17] Several factors may affect the voluntariness of a guilty plea. None are present in this case. The appellant was not pressured in any way to enter guilty pleas. Quite the contrary, he was urged by duty counsel not to plead but to accept an adjournment. No person in authority coerced or oppressed the appellant. He was not offered a "plea bargain" or any other inducement. He was not under the effect of any drug. There is no evidence of any mental disorder which could have impaired his decision-making processes. He is not a person of limited intelligence.
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> [18] In his affidavit the appellant asserts that he was anxious and felt himself under pressure when he entered his pleas. No doubt most accused faced with serious charges and the prospect of a substantial jail term have those same feelings. Absent credible and competent testimony that those emotions reached a level where they impaired the appellant's ability to make a conscious volitional choice, the mere presence of these emotions does not render the pleas involuntary.

[20] To this we would add, voluntary means the accused has not been coerced into pleading guilty. It is the free choice of an accused, untainted by improper threats, bullying or any improper inducement to plead guilty.

[21] In ***R. v. MacFarlane,*** 2014 NBCA 35 (N.B.C.A.), Richard J.A. restated the court's position on this issue beginning at paragraph 17:

> There are numerous decisions of this Court on the test to be applied in deciding whether an accused should be allowed to withdraw a guilty plea, one of the most recent of which is ***R. v. McLaughlin,*** 2013 NBCA 28, 403 N.B.R. (2d) 358, where it is stated as follows:
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> > **There is a strong presumption a guilty plea, particularly one made with the assistance of counsel, is valid** (***R. v. Laffin***, 2009 NSCA 19, [2009] N.S.J. No. 66 (QL) at 44; ***R. v. Eizenga***, 2011 ONCA 113, [2011] O.J. No. 524 (QL) at para. 4). Furthermore, because the withdrawal of a guilty plea raises a question of mixed law and fact, leave is required pursuant to s. 675(1)(*a*)(ii) of the *Code*.
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> > This Court recently canvassed the jurisprudence with respect to the withdrawal of a guilty plea in such cases as ***R. v. Miller***, 2011 NBCA 52, 374 N.B.R. (2d) 302; ***R. v. Tower***, 2010 NBCA 27, 358 N.B.R. (2d) 190; ***R. v. Monteith***, 2010 NBCA 77, [2010] N.B.J. No. 346 (QL), leave to appeal refused [2010] S.C.C.A. No. 439 (QL), and ***R. v. Edgett***, 2008 NBCA 65, 336 N.B.R. (2d) 321. Essentially, Mr. McLaughlin must be able to demonstrate that:
> >
> > 1. **He was unaware of the allegations made against him in the charge;**
> > 2. **He was unaware of the effect and potential consequences of his plea;**
> > 3. **The plea was not made voluntarily;**
> > 4. **The plea was equivocal in nature.**

[22] A good review of the whole issue of withdrawing of guilty pleas can be found at paras. 85-90 of the Supreme Court's decision in **R. v. Taillefer** and **Duguay,** [2003] S.C.J. No. 75 (S.C.C.). In New Brunswick the Court of Appeal dealt with the issue of **the heavy onus upon the accused to show the plea was not valid** in **R. v. Gautreau,** [1991] N.B.J. No. 832 (NBCA), as well as in **R. v. Claveau,** (2003), 260 N.B.R. (2d) 192 (NBCA), the former quoted with approval in **R. v. Arsneault,** 2005 NBQB No. 196 (QB)

[23] Where a person makes an informed plea to criminal charges and does not recant or deny the facts and where the judge warns as required by s. 606 (1.1) as to

consequences and does not specifically include the possibility of immigration consequences he commits no error and the plea is not entitled to be withdrawn. **R. v. Hunt,** [2004] A.J. No. 196 (ACA)

[24] A short annotation after **R. v. Taillefer,** (2004), 17 C.R. (6th), at p. 149 @ p.152 sets out the basic requirements of a valid guilty plea to be that the plea must be:

1. voluntary;
2. unequivocal;
3. informed – that is based on sufficient information concerning the nature of the charges against the accused and the consequences of the plea. If the judge hearing the application to withdraw the plea of guilty is of the view that the accused has raised a "real doubt" that the plea was validly made it may be struck. ***R. v. Moser,*** [2002] O.J. No. 552 (O.S.C.J.), per Hill J.***; R. v. Vrban,*** [2003] O.J. No. 4402 (S.C.J.), at para. 7.

[25] Such things as prior involvement in the judicial system by the accused may be relevant to the determination. ***R. v. Vrban*** at para. 10.

[26] In ***Vrban,*** Durno J. adopts the test set out in ***Moser*** by Hill J. that the accused carries the burden that the plea was not voluntary unequivocal and informed to the extent that **he must satisfy the Court that there exists, on the whole of the evidence led "real doubt" that the plea of guilty meets the criteria**. (***Vrban*** para. 10)

[27] An *equivocal* plea occurs in circumstances where the plea was unintended, confusing, qualified, modified, or uncertain in terms of the accused's admission of the elements of the offence. (***Moser*** at para. 32)

[28] **A *voluntary* guilty plea is a conscious, volitional decision of the accused to plead guilty.** Everyone appearing in the criminal justice system accused of crimes, when entering a guilty plea experiences inherent and external pressures… An involuntary guilty plea occurs as a result of coercive or oppressive conduct by others, or any circumstances personal to the individual which unfairly deprives them of their free choice to have a trial.

[29] A valid guilty plea must be *informed*, with the accused understanding the nature of the charges faced, as well as the legal effect and consequences of the

guilty plea including the range of dispositions that could reasonably be imposed. ***Vrban*** (para. 10) See, also, ***R. v. Brun,*** [2006] N.B.J. No. 51 (NBCA)

[30] In ***R. v. M.A.W,.*** (2009) 237 C.C.C. (3d) 560 (OCA), the Court of Appeal was faced with an accused who pleaded guilty and was sentenced and then treated for mental illness after which he claimed his pleas were not informed and voluntary. The Court of Appeal held that the proper test in these circumstances was to use the same test as for fitness to stand trial or exercising his right to silence or to counsel, that is, the "limited cognitive capacity" test. Courts have applied the standard to fitness to stand trial, as well as in assessing voluntariness of an accused's decision whether to exercise the right to silence and the right to counsel. Applying the same test to voluntariness of a guilty plea achieves a consistent and uniform mental competency standard for all decisions that an accused makes before and during a trial. It would be incongruous to find an accused mentally competent to stand trial, yet unfit to enter a guilty plea.

[31] See, also, ***R. v. Carty,*** (2010), 253 C.C.C. (3d) 469 (O.C.A.), where the Court of Appeal refused to vacate the plea based on the pressures of the court environment.

[32] In ***R. v. Raymond,*** (2011), 262 C.C.C. (3d) 344 (Q.C.A.), the accused's attempt to vacate the plea was rejected. The accused's own mistaken understanding of her parole eligibility would not be sufficient to justify the withdrawal of her guilty plea. See, also, ***R. v. J.L.,*** 2014 NBCA 66 (N.B.C.A.) at paragraph 5.

[33] **Based on my review of the timeline for this case, and the extensive involvement by counsel for Mr. Fraser, the confirmation by myself with Mr. Fraser of his guilty pleas on July 17, 2019, and the confirmation by Mr. Yuill, experienced counsel, that he had reviewed the sections of s. 606 (1.1) with Mr. Fraser prior to his entering his guilty pleas on July 17, 2019,and the consideration of the admissions in the Pre-Sentence Report, and the prior involvement by Mr. Fraser with the criminal justice system, and the admissions contained in the Agreed Statements of Fact, I find that the guilty pleas by Mr. Fraser entered on July 17, 2019 were 1) voluntary; 2) unequivocal; and 3) informed .**

[34] One can only speculate that Mr. Fraser has what can best be described as "buyer's remorse" as it relates to the jail time he was expecting to receive today. That, however, is **not** a basis for withdrawing guilty pleas.

[35] I have also reviewed the case of ***R. v. Buchanan,*** 2016 NSPC 45, where Judge Derrick found that there would be no miscarriage of justice to maintain the guilty pleas. I accept that that is the test before me today – would there be a miscarriage of justice considering the timeline that I have just reviewed? I do not believe so.

[36] The guilty pleas by Mr. Fraser stand.

[37] Mr. Fraser has the option to proceed with the sentencing today continuing with Mr. Yuill as his counsel and presumably relying on a joint recommendation, or Mr. Fraser can indicate that he wishes to have new counsel and a new sentencing date will be set in the very near future.

Alain J. Bégin, JPC