SUPREME COURT OF NOVA SCOTIA

Citation: *W.F. v. R.*, 2022 NSSC 378

Date: 20221222
Docket: Hfx No. 500754
Registry: Halifax

Between:

W.F.

Appellant

v.

His Majesty the King

Respondent

Restriction on Publication: ss. 486.4 and 517

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	November 14, 2022, in Halifax, Nova Scotia
Counsel:	Patrick Eagan, for the Appellant Tim Leatch, for the Respondent Shane McCracken, for Laura McCarthy

The original text of this decision has been corrected according to the erratum dated January 10, 2023

By the Court:

[1] The appellant, W.F., contends that a miscarriage of justice occurred at her trial. In referring to the appellant as "she/her" I note that the pronouns which she now prefers differ from those used at trial. I heard this matter in the capacity of a Summary Conviction Appeal Court Judge.

[2] W.F. asserts that the miscarriage resulted from ineffective representation provided by her trial counsel, Laura McCarthy. In the Notice of Appeal, such ineffective representation is alleged to have occurred because trial counsel:

(a) failed to advise the appellant as to the merits of testifying in her own defence;

(b) failed to consult with the appellant before advising the court that the appellant would be calling no evidence at trial;

(c) failed to adequately prepare the case for the defence, including the failure to meet with and prepare the appellant; and

(d) failed to subpoena a witness in the appellant's defence.

[3] W.F.'s appeal is dismissed. My reasons follow.

Background

[4] W.F.'s trial took place over the course of two days, June 10, 2019 and July 29, 2019, in the Nova Scotia Provincial Court, before the Honourable Judge Jean Whalen. On October 10, 2019, Her Honour rendered a decision, convicting W.F. of two offences involving a breach of the publication ban that had been imposed in a sexual assault case in which W.F. had been involved, and a breach of probation arising from those breaches.

[5] The sexual assault charges remain outstanding. Within the context of those charges, Judge Whalen had imposed a mandatory publication ban pursuant to section 486.4 of the *Criminal Code*. It prohibited the publication, broadcast, or transmission in any way of "any information that could identify the victim." The alleged victim of these offences was N.S., the appellant's step-granddaughter.

[6] At trial, N.S.'s mother gave evidence that the appellant had made Facebook posts identifying her daughter (albeit, not naming her), which included pictures of her, notwithstanding the ban. A social worker with Nova Scotia Department of

Community Services also testified that she had confronted W.F. about these posts, and that she had admitted to making them. After a voluntariness *voir dire* had been conducted, the trial judge admitted their verbal exchange into evidence. Screenshots of the Facebook posts were admitted as well. M.S. (the mother of N.S.), Victoria Cicchino (the social worker), and Constable Jerell Smith all testified for the Crown.

[7] Constable Smith testified that the appellant, upon her arrest for the offences, also admitted (to him) to having made the Facebook posts. Following a voluntariness *voir dire* with respect to that alleged admission, the trial judge excluded this evidence from the trial proper.

[8] In rendering her decision on October 10, 2019, the trial judge convicted the appellant of the offences, finding (1) that W.F. was the author of the posts, and further, (2) that the Facebook posts themselves constituted the publication of "information that could identify the victim", and thus contravened the publication ban that had been imposed.

[9] The appellant has filed an affidavit dated June 21, 2021 in support of her Amended Notice of Appeal, and her application to introduce fresh evidence within the context thereof. In response, the Crown has filed an affidavit of trial counsel, Ms. Laura McCarthy.

A. Fresh Evidence

[10] It is common ground between the parties that the rules enunciated by the Supreme Court of Canada in *R. v. Palmer*, [1980] 1 S.C.R. 759, insofar as they relate to the calling of fresh evidence on appeal, are relaxed in this case. This is because the evidence is directed toward the process itself, rather than an issue already decided at trial. In its essence, it relates to the question of whether the appellant received a fair trial at first instance.

[11] The right to effective representation of counsel is part of the right to make full answer and defence under s. 7 of the *Canadian Charter of Rights and Freedoms*, and also to the right to a fair trial pursuant to section 11(d) thereof.

[12] Indeed, in *R. v. Wolkins*, 2005 NSCA 2 the court noted:

> 61. The other category of fresh evidence concerns evidence directed to the validity of the trial process itself or to obtaining an original remedy in the appellate court. In these sorts of cases, the *Palmer* test cannot be applied and the admissibility of the evidence depends on the nature of the issue raised. For example, where it is

> alleged on appeal that there has been a failure of disclosure by the Crown, the focus is on whether the new evidence shows that the failure may have compromised trial fairness: see *R. v. Taillefer*; *R. v. Duguay*, [2003] 3 S.C.R. 307 at paras. 73-77. Where the appellant seeks an original remedy on appeal, such as a stay based on abuse of process, the evidence must be credible and sufficient, if uncontradicted, to justify the appellate court making the order sought: see e.g. *United States of America v. Shulman*, [2001] 1 S.C.R. 616 at paras. 43-46. Where the appellant alleges that his trial counsel was incompetent, the fresh evidence will be received where it shows that counsel's conduct fell below the standard of reasonable professional judgment and a miscarriage of justice resulted: see *R. v. G.D.B.*, supra.

[13] As a consequence, I admit both the affidavit filed by the appellant, and that filed by counsel for Ms. McCarthy, both of whom were subjected to cross-examination on the contents thereof.

B. Law and Analysis.

[14] Once again, there is not much dispute as to the applicable law. In *R. v. Joanisse,* (1995) 102 CCC (3d) 35 (ONCA), the court noted, in effect, that where ineffective assistance of counsel is alleged, evidence will be received by the appellate court pursuant to s. 683(1). It may be used as a tool to determine whether trial counsel's representation was indeed ineffective, and also whether it resulted in a miscarriage of justice.

[15] As that same court pointed out in *R. v. Archer*, (2005) 202 CCC (3d) 60 (ONCA):

> 119. ...where the claim [of ineffective assistance] is based on contested facts, the appellant must establish the material facts on the balance of probabilities.

[16] Our Court of Appeal has had opportunity to weigh in on this topic on many occasions. For example, in *R. v. Fraser*, 2011 NSCA 70:

> 35. I am satisfied that every factor is clearly established in this case. The second, third and fourth may be dispensed with quickly. There can be no doubt that the evidence and *viva voce* testimony is relevant. It strikes at the heart of the appellant's complaint that he suffered a miscarriage of justice at the hands of his trial counsel. The evidence relates to the acts or omissions which are said to have seriously prejudiced the appellant's ability to defend himself. The evidence is reasonably capable of belief and when considered along with the other evidence adduced at trial, it could reasonably be expected to have affected the result.

[17] Earlier, in *R. v. Weagle*, 2008 NSCA 122, the following guidance was provided:

> 23. ... it is not the function of this court to second-guess or perform a retrospective analysis of trial tactics, strategy or the judgement exercised by trial counsel. Considerable deference is owed to counsel's decisions made during the trial.

[18] It is a fair observation that courts generally approach allegations of ineffective assistance of counsel with caution. Counsel are presumed to be competent, and an appellant must demonstrate not only counsel's incompetence, but also that it led to a miscarriage of justice. This has been interpreted to constitute a heavy burden on the appellant to show that counsel's acts or omissions did not meet a reasonable professional standard, and that this incompetence resulted in a miscarriage of justice.

[19] What is a miscarriage of justice? In *Wolkins*, Cromwell J.A., as he then was observed:

> 89. The clearest example is the conviction of an innocent person. There can be no greater miscarriage of justice. Beyond that, it is much easier to give examples than a definition; there can be no "strict formula ... to determine whether a miscarriage of justice has occurred": *R. v. Khan*, [2001] 3 S.C.R. 823 per LeBel, J. at para. 74. However, the courts have generally grouped miscarriages of justice under two headings. The first is concerned with whether the trial was fair in fact. A conviction entered after an unfair trial is in general a miscarriage of justice: *Fanjoy,* supra; *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.) at 220-221. The second is concerned with the integrity of the administration of justice. A miscarriage of justice may be found where anything happens in the course of a trial, including the appearance of unfairness, which is so serious that it shakes public confidence in the administration of justice: *R. v. Cameron* (1991), 64 C.C.C. (3d) 96 (Ont. C.A.) at 102; leave to appeal ref'd [1991] 3 S.C.R. x.

[20] In *R. v G.K.N.,* 2016 NSCA 29, Bryson J.A. explained:

> 57. While counsel must take instructions regarding election and plea and whether or not to testify, the conduct of the case generally does not require client instructions. Indeed, it may well be the obligation of counsel to resist client instructions where these conflict with counsel's judgment about the client's best interests, (*Joanisse*, paras 109-111, 118-120; *R. v. B.(G.D.)*, 2000 SCC 22, para 34).

[21] With respect to the performance and prejudice components of a claim of ineffective representation by counsel, the authorities appear to be clear that the court must assess the latter first. If the appellant cannot establish prejudice, then there is

no need to consider the performance component. If the appellant can establish prejudice, he must then demonstrate that he sustained that prejudice because of the inadequate representation.

C. Did the appellant sustain prejudice by the manner in which her trial was conducted?

[22] W.F. says that she always intended to argue that she was not the author of the posts. However, having heard both Ms. F. and Ms. McCarthy on the point, I accepted Ms. McCarthy's evidence which was to the effect that W.F. had told her that she had authored those Facebook posts. The social worker told the court that W.F. had told her the same thing. The police officer said the same thing as well, but his evidence did not make it past the voluntariness *voir dire*, so it was not considered by the trial judge, and I do not do so either.

[23] W.F. further says that Ms. McCarthy failed to advise her (or did so inadequately) as to the implications which would accompany a failure to testify on her part.

[24] However, it is trite to observe that Ms. McCarthy could not have proceeded in the manner in which W.F. (now) claims that that she would have wished her to have done. Defence counsel can certainly put the burden on the Crown to prove its case, but she cannot allow her client to take the stand and give evidence that is known to be false.

[25] Indeed, trial counsel did put the Crown to the proof of the authorship of the Facebook posts. In contrast, if W.F. had testified, that aspect of the case would have had to have been abandoned. Moreover, in the event that W.F., on the stand, under oath, were to say that she was not the author of those posts, Ms. McCarthy would have had to withdraw as her lawyer.

[26] Ms. McCarthy had a clear recollection that she spoke with W.F. on more than one occasion about whether or not she would testify. She confirmed those instructions, and made a written note to that effect on June 7, 2019, three days before the trial began. Once again, she confirmed these instructions verbally on June 10, 2019, before the trial had begun that day.

[27] The trial strategy, which involved putting the Crown strictly to the proof of both authorship and illegality of the content of the posts, would have been significantly undermined had W.F. testified, as she now claims to have desired. The

authorship of the posts would have to have been conceded, with no corresponding gain on the other issue, that of the legality of the posts themselves.

[28] W.F. says that her counsel was not prepared for the trial. The basis for this contention is said, in part, to arise from the fact that Ms. McCarthy decided not to call a particular witness. Ms. McCarthy's evidence, which I accepted, was that she was originally instructed to call that evidence, but that the potential witness was elusive, Ms. McCarthy was unable to contact and meet with her, and as a consequence, neither counsel or W.F. had any inkling of what she would be prepared to say if she took the stand. As a consequence, Ms. McCarthy indicated that W.F. had instructed her not to call that witness.

[29] Moreover, the court has been provided with absolutely no evidence as to what this witness could or would have said had she been called to the stand during the trial. Given that the appellant carries the onus of demonstrating that she has sustained prejudice by virtue of a decision made by her counsel, this, in and of itself, fatally undermines her position on this point.

[30] Next, W.F. has contended that Ms. McCarthy should have hired a forensic specialist. Similarly, there has been nothing presented as to what might have resulted had this step been taken. Realistically, the most that such a person could say would be that the images in question could have been posted by someone else. It is difficult to see, in the circumstances of this case, how such a specialist could have said much that would have affected the result of the trial.

[31] Ms. McCarthy did prepare for trial. This was a summary conviction matter, she was also representing W.F. on the much more serious sexual assault charges as well. She had numerous telephone calls with W.F., a lengthy meeting several months before the trial in which both the subject charges, and the sexual assault charges, were discussed, private meetings at the courthouse before and after court appearances, a meeting a few days before the trial, and other correspondence. She was successful in having Cst. Smith’s evidence (of what W.F. said to him about the authorship of the posts) excluded after a *voir dire*.

[32] In this case, I have not been satisfied that is reasonably probable that the appellant was prejudiced by any acts or omissions on Ms. McCarthy's part. The appellant has not demonstrated that a miscarriage of justice has taken place.

Conclusion

[33] Faced with a client who had admitted authorship of the Facebook posts, trial counsel could only have asked W.F. to testify if she was prepared to make that admission when she was asked under oath. To do so would have effectively conceded one of two potential arguments, which is to say, the authorship of the posts. The other argument about whether or not the content of the posts actually breached the publication ban was a legal argument based upon an objective assessment of the content. Ms. McCarthy made that argument.

[34] The appeal is dismissed.

Gabriel, J.

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ERRATUM

Judge: The Honourable Justice D. Timothy Gabriel

Heard: November 14, 2022, in Halifax, Nova Scotia

Counsel: Patrick Eagan, for the Appellant
Tim Leatch, for the Respondent
Shane McCracken, for Laura McCarthy

Erratum Date: January 10, 2023

Counsel of record to include Shane McCracken on behalf of Laura McCarthy
Para. 5 – the word "defences" should be "offences"