Date: 2015 03 12
File: T1-2014-000591

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

ELVIS JAMES RABESCA

REASONS FOR DECISION
of the
HONOURABLE JUDGE GARTH MALAKOE

Heard at:	Yellowknife, Northwest Territories
Date of Decision:	March 12, 2015
Date of Application:	February 23, 2015
Counsel for the Crown:	Brendan Green, Jacqueline Porter
Counsel for the Accused:	Paul Falvo

[Application to Withdraw Guilty Plea]
[Sections 253(1)(a) and 253(1)(b) of the *Criminal Code*]

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A. INTRODUCTION

A.1 Issue and Background

[1] Elvis Rabesca is applying to withdraw his guilty plea to operating a vehicle when the alcohol level in his blood was over the legal limit. He asserts that at the time of entering his guilty plea, he was doing so with the hope of negotiating a better sentence with the Crown and showing the Court that he deserved a more lenient sentence than what was being proposed by the Crown. With the passage of time and a new lawyer, he no longer has that hope.

[2] In the decision that follows, a reference to a section number without specifying the legislation is a reference to the *Criminal Code of Canada*.

[3] Mr. Rabesca was charged on April 7, 2014 for an event that happened the day before, on April 6, 2014.

[4] He appeared for the first time in court on May 13, 2014. On his fourth appearance in Court, he entered not guilty pleas to both of the drinking and driving charges: operating a motor vehicle when his ability to do so was impaired by alcohol (the "impaired driving charge") and operating a motor vehicle when his blood alcohol level was over 80 mg. of alcohol per 100 ml. of blood (the "over 80 charge"). The trial was set for September 26, 2014 for a half day.

[5] It was brought forward on September 12th; and then adjourned to September 22, 2014. It was struck from the docket on September 22nd.

[6] On the day of trial, September 26, 2014, Mr. Rabesca changed his plea on the over 80 charge from "not guilty" to "guilty". Mr. Rabesca was asked directly

by the Court if his plea was guilty. He responded, "Yes". His lawyer at the time stated, "And that is voluntary and fully informed, Your Honour."

[7] It was put over to October 28th to be spoken to; then to November 18th. On November 25, 2014, Mr. Rabesca was present and the sentencing on the over 80 charge and another matter were put over to December 4, 2014. On December 4, 2014, there was a further adjournment to January 8, 2015 for facts and sentencing.

[8] On January 8, 2015, Mr. Rabesca's lawyer indicated that Mr. Rabesca was intending to retain new counsel. Mr. Rabesca appeared with his new counsel on January 20, 2015 and again on February 6, 2015. As of February 6, 2015, the matter had been on the Territorial Court docket 15 times.

[9] On February 17, 2015, Mr. Rabesca's new counsel filed a Notice of Application to Strike Guilty Plea along with the affidavit of Elvis Rabesca. Copies of the transcripts from his court appearances were filed with the Court. The application was heard on February 23, 2015. Prior to the oral submissions of counsel, Elvis Rabesca was cross-examined on his affidavit by the Crown.

B. WHY DOES THE ACCUSED WANT TO CHANGE HIS GUILTY PLEA?

[10] The grounds for Mr. Rabesca's application as stated on the Notice are as follows:

> (a) That the Applicant did not freely and voluntarily enter his plea of guilty; because he did not fully comprehend what he was doing and its effect;
>
> (b) That the plea of guilty was only entered by the Applicant with the hope of negotiating a better sentence with the Crown, and showing the Court that he was deserving of a lesser sentence;
>
> (c) That the applicant does not admit the allegations against him and wishes the matters to go to trial.

[11] In his affidavit, Mr. Rabesca says that when he came to Court on the day of trial, he was tired from work and not thinking clearly. He was aware that the Crown was asking for a sentence of 120 days in jail. Mr. Rabesca had been convicted in the past of driving with a blood alcohol level over 80 and of driving while disqualified. In 2010, when he was sentenced for driving over 80, the Crown was asking for more jail time than the one day that he actually received. With respect to the current charge, the prosecutor had originally said that the Crown was

going to ask for 30 days, but had changed that submission to 120 days on June 3, 2014.

[12] Mr. Rabesca felt that if he pleaded guilty on September 26, 2014 and delayed sentencing, he could get support letters and provide them to the Crown and then to the Court. The Crown might change its mind with respect to its recommendation and the Court might not put him in jail.

[13] Mr. Rabesca is satisfied with the help and advice that his first lawyer provided him. In his affidavit, Mr. Rabesca states that he does not "want to admit what the police say" and wants his case to go to trial. I take this to mean that he seeks to require the Crown to prove the charges against him.

[14] In cross-examination, Mr. Rabesca confirmed that he understood that by changing his plea to guilty to the over 80 charge, he was admitting the allegations against him. He also understood that there would be no trial and the Court would proceed directly to sentencing. By pleading guilty, he was hoping to buy time and hoping that the Crown would take a different position. The motivation for this was that he did not want to go to jail.

C. ANALYSIS

[15] A guilty plea entered in open court, particularly by an accused represented by counsel, is presumed to be a valid plea; an accused seeking to set aside that plea bears the onus of demonstrating that the plea was not valid. And, where the accused is represented by counsel, the court should be entitled to assume that the charge has been fully explained to him and that he fully understands the charge, the facts to which he was admitting his guilt, and the effect of his plea. This was accepted in the Supreme Court of the Northwest Territories in *R. v. Bilodeau*, [1993] N.W.T.J. No. 22 at paragraph 12.

[16] The Territorial Court dealt with the criteria for changing a guilty plea in *R. v. Lennie*, [1986] N.W.T.J. No. 90 (NWT TC):

> It is settled that the Trial Judge has a discretion to allow a change of plea at any time before sentence is imposed, (*Thibodeau* vs The Queen [1955], S.C.R. 646, 21 C.R. 265, and *R vs Bamsey* [1960] S.C.R. 294, 125 C.C.C. 329, 32 C.R. 218) but not after. That being in the discretion of an Appellate Court only (*R vs Roop* [1958], O.W.N. 394, (C.A.)).
>
> Any consideration of the law in this field must commence with *Adgey vs The Queen* (1973), 13 C.C.C. 177, 23 C.R.N.S. 298, wherein the Supreme Court of Canada dealing with this issue set out three types of situations where a change of plea may be accepted by a presiding Judge.

1. Where the accused did not appreciate the nature of the charge or where it did not appear that the accused intended to admit his guilt;

2. Where on the facts before the court the accused could not in law be convicted;

3. Any other valid ground.

[17] The Court in *Lennie* surveyed the case law with respect to "other valid grounds" and recognized the following:

(a) fairness based on exceptional circumstances;

(b) denial of legal advice and civil rights during a police investigation;

(c) misunderstandings as to the effect of guilty pleas or corruption or misleading by a person in authority;

(d) unexpected consequences, error in fact going to the *actus reus*;

(e) guilty plea on misunderstanding and in order to "get rid of" an offence;

(f) procedural error;

(g) misunderstanding based on language; and

(h) essential factual ingredient lacking.

[18] This assessment of the law was confirmed by the Supreme Court of Canada in *R. v. Taillefer; R. v. Duguay*, 2003 SCC 70 where the Court once against stated at paragraph 85 that an accused may only be allowed to change his plea if he can satisfy the appeal court "that there are valid grounds for his being permitted to do so." The Supreme Court further stated that it did "not think it appropriate to exhaustively define the grounds that could justify withdrawing a guilty plea."

[19] In the Manitoba Court of Appeal case of *R. v. Jawbone*, [1998] M.J. No. 235, the Court approved the following test for the withdrawal of a guilty plea:

> 6. . . . The circumstances justifying the exercise of such a discretion are not confined to circumstances where there is a suggestion of impropriety or error in the formal plea itself, rather "valid grounds" (see *R. v. Bamsey*, [1960] S.C.R. 294, at 298; 32 C.R. 218; 30 W.W.R. 552; 125 C.C.C. 329) for the accused being permitted to withdraw his plea should not be too narrowly defined or rigidly applied. The essential question to be determined in each case is <u>whether it is justified in the interests of justice</u>. [emphasis added]

[20] As a starting point in the analysis of whether valid grounds exist in Mr. Rabesca's case, it is significant that on September 26, 2014, after Mr. Rabesca confirmed with the Court that he was pleading guilty, his lawyer stated, "And that is voluntary and fully informed, your Honour." The Court responded, "Thank you. Then I feel no further inquiry is necessary."

[21] Section 606 (1.1) of the *Criminal Code*, which came into force on September 23, 2002, states:

> 606. (1.1) A court may accept a plea of guilty only if it is satisfied that the accused
>
> (a) is making the plea voluntarily; and
>
> (b) understands
>
> (i) that the plea is an admission of the essential elements of the offence,
>
> (ii) the nature and consequences of the plea, and
>
> (iii) that the court is not bound by any agreement made between the accused and the prosecutor.

[22] It is a common practice in the Territorial Court for the Judge to inquire of counsel if "Section 606 (1.1) of the *Criminal Code* has been complied with." In this case, the lawyer pre-empted that inquiry by volunteering that the plea was "voluntary and fully-informed." In my view, based on the statement of Mr. Rabesca's lawyer, the Court could be satisfied that the accused entered a guilty plea with the voluntariness and understanding required in section 606 (1.1).

[23] However, counsel for Mr. Rabesca at the hearing of this application argues that despite the assurance on September 26, 2014, Mr. Rabesca did not fully understand the consequences of the guilty plea. As I understand the argument, Mr. Rabesca felt that he could avoid the mandatory minimum jail sentence of 120 days if he entered a guilty plea and then took advantage of the time between the guilty plea and sentencing to try and convince the Crown to change its position. In addition, letters of support would be obtained to seek the leniency of the Court.

[24] The "misunderstanding" then that Mr. Rabesca had was his failure to understand the concept of "mandatory minimum sentence". He knew that he was likely to get jail. He just thought that he could get less than 120 days. In other words, he believed he could avoid that mandatory minimum sentence. Counsel for Mr. Rabesca argues that failure to understand the concept of "mandatory minimum sentence" is a failure to understand the "nature and consequences of the plea."

[25] I am unable to accept this argument for two reasons. Firstly, it puts too specific a level of understanding on the phrase "nature and consequences of the plea." In my view, knowing that imprisonment and a driving prohibition are the

consequences of pleading guilty is sufficient understanding. It is not necessary to know the duration of the imprisonment or the driving prohibition.

[26] Secondly, Mr. Rabesca's belief that the Crown has the power to ask for a sentence of imprisonment that is less than 120 days is not without foundation. If, for some reason, the Crown could be convinced not to tender a Notice of Intention to Seek Greater Punishment, the mandatory minimum sentence set out in the *Criminal Code* would not be engaged.

[27] It may very well be that Mr. Rabesca's understanding now is that the Crown will not budge from its position to file the Notice of Intention and therefor engage the mandatory minimum sentence of 120 days imprisonment. His belief on September 26, 2014 may have been that he or his lawyer could convince them not to file the Notice. This change in thinking cannot be attributed to a failure to understand the consequences of entering a guilty plea.

[28] Mr. Rabesca adopted a certain strategy when he entered the guilty plea to the over 80 charge on September 26, 2014. It involved further negotiation with the Crown before sentencing and providing letters of support to the Court during sentencing. Mr. Rabesca appears to have come to the realization that his strategy was not the best one he could have chosen and wishes to resile from it. Mr. Rabesca's situation is similar to the situation reviewed by the BC Court of Appeal in *R. v. Staples*, 2007 BCCA 616 at paragraph 45, where the Court stated:

> Simply put, the guilty plea was a "conscious volitional decision made for reasons the accused regards as appropriate" (*R. v. T.(R.)* (1993), 10 O.R. (3d) 514 at p.520). The applicant has essentially acknowledged as much in his January 2007 affidavit, where he characterizes his guilty plea as "a serious error in judgment on my part" (emphasis added). With the benefit of hindsight, the applicant may now be of that view. More importantly, however, the statement in his affidavit provides recognition of what the record demonstrates: that the applicant was involved in his guilty plea and sentencing, engaged in weighing alternatives, and exercised his judgment albeit in a way he now regrets. An error in judgment is not the equivalent of a failure to appreciate or understand the nature and consequences of a guilty plea.

[29] Mr. Rabesca was aware of the effects of pleading guilty. Mr. Rabesca had seen the letter of the Crown dated May 13, 2014 in which jail time and the driving prohibition was mentioned. He was aware that the Crown's proposal of 30 days jail in the May 13, 2014 letter was made in error and he was aware that the Crown was asking for 120 days jail before he entered his not guilty plea on June 10, 2014 and definitely, before he changed his plea to guilty on September 26, 2014.

[30] Let me deal with some other points raised by Mr. Rabesca in his affidavit.

[31] Mr. Rabesca says that on the date of trial, when he changed his plea to guilty, he was not thinking clearly; and that he was really scared about going to jail. Although I accept that the day of trial might have focussed certain pressures on Mr. Rabesca, he had seven court dates prior to the trial date and over five months to consider his options. I do not see how his ability to make voluntary and informed choices with the assistance of legal counsel would be affected.

[32] In *R. v. T.(R.)* (1992) 17 C.R. (4th) 247 (Ont. C.A.) at paragraph 18, Justice Doherty had this to say about the effects of pressure on a guilty plea:

> 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.

[33] There is no evidence that he received bad advice from his lawyer. To the contrary, Mr. Rabesca states that "I am satisfied with the help and advice that she gave me."

[34] In his affidavit, Mr. Rabesca states, "I graduated from grade 12 but had difficulty with English. I had to take remedial English class. I speak Tli Cho language at home, at work and with friends and family. I speak English when I go to the store. I watch English language TV and movies. I can talk and understand English, but I have trouble sometimes with some of the legal words."

[35] Mr. Rabesca's lawyer told the Court on May 13, 2014 that she had canvassed language rights with Mr. Rabesca and that he was requesting a Tli Cho language interpreter for his father. On May 20, 2014, she once again confirmed that the interpreter was "for the benefit of his father." On September 26, 2015, when Mr. Rabesca entered the guilty plea, the Court spoke directly to him in English and he responded to the Court in English.

[36] I am satisfied that Mr. Rabesca is sufficiently competent in the English language that language difficulties did not interfere with his ability to understand his lawyer or the nature and consequences of the guilty plea on September 26, 2014.

[37] In the absence of the Court accepting the previous arguments, counsel for Mr. Rabesca simply asks the Court to use the inherent discretion it has as described by the Supreme Court of Canada in *R. v. Adgey*, [1975] 2 S.C.R. 426 and allow Mr. Rabesca to withdraw his guilty plea. Mr. Rabesca is not putting forth a defence to the over 80 charge (to which he has entered a guilty plea) or to the impaired

driving charge (to which he has entered a not guilty plea), but he simply wants to exercise his right to have a trial. According to the defence, there is no prejudice to the Crown. Mr. Rabesca was wrong in his understanding that the Crown could be convinced to change its position and he should now have the benefit of a trial.

[38] As stated earlier, the basis for Mr. Rabesca's request does not fall under the criteria stated in *Adgey* unless it is a new "valid ground." I do not accept that there is a valid ground. On pleading guilty, Mr. Rabesca accepted that he was guilty of the essential elements of the offence of operating a motor vehicle when his blood alcohol level was over 80 mg. of alcohol per 100 ml. of blood. No evidence has been presented to indicate that the Court should doubt this acceptance. Therefore, he no longer enjoys the benefit of the presumption of innocence with respect to the elements of offence.

[39] I accept that having found that Mr. Rabesca understood the nature and consequences of the guilty plea and that he had no issue with respect to his previous legal representation, the Court could still allow a trial if there was a possibility of a valid defence and some explanation as to why he was not previously aware of that defence. No defence has been proposed. Instead, Mr. Rabesca's application is based on his hope for an acquittal after a trial. This "hope" is not based on the existence of a positive defence, but on the conclusion that an acquittal is the only way that he is going to avoid jail. In my view, this cannot be the basis upon which the Court should exercise its discretion to allow the withdrawal of the guilty plea.

[40] The withdrawal of a guilty plea should only be allowed in exceptional cases. The possibility of an acquittal at trial after the accused has previously admitted the essential elements of the offence is not an exceptional case. The rationale behind the exceptional case approach was stated by the Alberta Court of Appeal in *R. v. Hoang*, 2003 ABCA 251 at paragraphs 25 and 26:

> [25] There are practical and valid policy considerations why a court should not allow a guilty plea to be withdrawn except in exceptional circumstances. Both the accused and the state benefit when an accused pleads guilty. For the accused, additional charges may be withdrawn or a reduced sentence recommended. A guilty plea is treated as a mitigating factor in sentencing. Because no trial is required, judicial resources and resources in the Crown prosecutor's office are saved. Appeals are limited and duplication of proceedings is avoided. Those values were recognized in *Housen v. Nikolaisen*, 2002 SCC 30, although in the context of a civil case. These benefits are lost and delay results if an appeal from a guilty plea is allowed.
>
> [26] The importance of a conviction on the basis of a guilty plea is more than an administrative convenience. It also promoted the values inherent in the criminal trial process. As the American Bar Association stated in *Standards for Criminal Justice*, 2d ed. Vol. 3 (Boston: Little Brown and Company, 1980) 1982 Supp. At 14.5:

> Even if more prosecutors, judges and defence counsel were available and trial of all cases possible, conviction without trial would continue to be a necessary and proper part of the administration of criminal justice. Indeed, the limited use of the trial process for those cases in which the defence has grounds for contesting the matter of guilt aids in preserving the meaningfulness of the presumption of innocence. The frequency of conviction without trial, therefore, not only permits the achievement of legitimate objectives in cases where pleas of guilty are entered, but also enhances the quality of justice in other cases as well.

[41] Although the guilty plea is an important mechanism within the criminal justice system and the finality associated with an informed and voluntary guilty plea is presumed, there are situations where a guilty plea can be withdrawn. In my view, however, Mr. Rabesca has not established that the withdrawal of his guilty plea to the driving over 80 charge is justified in the interests of justice.

D. CONCLUSION

[42] The application of the accused to withdraw his guilty plea is denied and the over 80 charge will proceed to sentencing.

Garth Malakoe
T.C.J.

Dated at Yellowknife, Northwest Territories, this 12th day of March, 2015.

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