

Date: 20110127
Docket: 09/121
Citation: *R. v. White*, 2011 NLCA 14

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN: RICHARD WHITE

APPLICANT

AND: HER MAJESTY THE QUEEN

RESPONDENT

Coram: Green, C.J.N.L.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division 2009 01T 3814

Application Heard: January 25, 2011
Judgment Rendered: January 25, 2011
Memorandum of Disposition Filed: January 27, 2011

The Applicant appearing on his own behalf
Counsel for the Respondent: Stephen R. Dawson

MEMORANDUM OF DISPOSITION

Green, C.J.N.L.:

[1] The applicant (appellant) applied under s. 684 of the *Criminal Code* for the appointment of counsel to assist him in the conduct of his appeal

relating to his conviction and sentence for an offence involving care and control of a motor vehicle. I granted the application at the conclusion of the hearing.

[2] The central issues at trial were whether the applicant had care or control of the vehicle and whether the presumption in s. 258(1)(a) of the *Criminal Code* applied. Evidence was presented at trial to the effect that the vehicle had been driven by a friend of the applicant immediately prior to its drawing to a stop in a parking lot, whereupon the friend exited the car and left to obtain mechanical assistance. Two police officers testified that they found the applicant behind the wheel of the car, alone, with the engine off but the key in the ignition.

[3] The applicant, who is incarcerated in relation to other offences, filed a notice of appeal and factum which are very difficult to decipher. The Crown has not yet filed its factum.

[4] To justify the appointment of counsel under s. 684 the Court should generally be satisfied that: (i) the applicant does not have the financial resources to engage private counsel; (ii) the applicant has been denied, or would not qualify for, legal aid; (iii) there are serious (i.e. not frivolous) issues to be dealt with on the appeal; and (iv) the applicant will not be able adequately to present his own case on the appeal or the Court will not be able properly to decide the case without the assistance of counsel: *R. v. Ryan*, 2008 NLCA 42.

[5] I am satisfied that the applicant does not have the financial resources to engage his own counsel and the Crown does not dispute that fact that the applicant is not entitled to legal aid.

[6] I am also satisfied that the applicant will not be able adequately to present his own case without the assistance of counsel. The applicant has limited education, is dyslexic and cannot read. He has had to obtain the assistance of other inmates to prepare any written material for submission to the Court. The material that has been submitted is disjointed, disorganized and hard to understand. In oral submissions, the applicant has difficulty focusing and articulating the key points he is trying to make. While the issues are not necessarily complex, the Court will nevertheless have difficulty understanding and addressing the appeal without the assistance of counsel.

[7] The issue that remains for consideration is the potential for appellate merit. The bar to be cleared in this regard is not a high one. Nevertheless, as noted by Goodridge, C.J. in *R. v. Rideout* (1990), 84 Nfld. & P.E.I.R. 54 (Nfld.C.A.) at paragraph 8, to have merit there must be, “some point of law being raised which warrants consideration by the Court of Appeal and which, if it had been differently decided in the trial court, might have resulted in a different verdict.”

[8] As already noted, the notice of appeal and factum filed by the applicant are not very helpful in understanding the points which the applicant is attempting to raise. To gain a better understanding of the matter I have read the trial transcript, considered the written material submitted by the applicant in the light of that evidence, and also given consideration to what the applicant has said during his telephone appearances before me.

[9] From that review, it appears that the applicant is asserting, at least, that: he received ineffective assistance of counsel at trial; there was evidence available that contradicted the police officers’ description at trial of what they observed that was not put before the court or that, if used in cross-examination, could have undermined the officers’ credibility; the judge failed to address the submission of the applicant’s trial counsel in summation respecting evidence relating to footprints in the snow which, if considered, might have confirmed the evidence of the applicant’s friend that he left the area to obtain mechanical assistance, thereby bolstering his credibility; and the judge failed to consider trial counsel’s submission respecting evidence that could have supported the applicant’s position that he did not occupy the driver’s seat for the purpose of setting the vehicle in motion.

[10] While recognizing that the trial judge’s assessment of the evidence is entitled to deference on appeal and that an appellate court might, even after identifying error, apply the curative provision under s. 686(1)(b) of the *Criminal Code*, it cannot be said that the points that could be raised on this appeal are devoid of merit and could not lead to a different result.

[11] Accordingly, I concluded that I should exercise my discretion to appoint counsel on the appellant’s behalf.

[12] An order was made as follows:

1. Pursuant to s. 684 of the *Criminal Code*, counsel shall be appointed to represent Richard White on his appeal in this matter;
2. Within seven (7) days of this order, the appellant shall notify the Registrar of the name of a member of the Bar who is willing to act on his behalf;
3. If the appellant fails to so notify the Registrar or if the counsel designated by the appellant does not confirm to the Registrar that he or she is willing and able to act, the Registrar shall nominate a member of the private Bar, knowledgeable in criminal law, to act as counsel for the appellant; and
4. The fees and expenses of the counsel so designated or nominated shall be agreed between counsel and the Attorney General and, failing agreement, shall be taxed by the Registrar on the basis of the standard fee schedule for outside counsel retained by the Government of Newfoundland and Labrador and shall be paid by the Attorney General.

J. D. Green, C. J.N.L.