Date: 20120613
Docket: 11/84
Citation: *R. v. Sutton*, 2012 NLCA 35

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

BETWEEN:

CHRISTOPHER WADE SUTTON — APPELLANT

AND:

HER MAJESTY THE QUEEN — RESPONDENT

Coram: Welsh, Rowe, and White JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador, Clarenville, NL

Appeal Heard: May 10, 2012
Judgment Rendered: June 13, 2012

Reasons for Judgment by Rowe J.A.
Concurred in by Welsh and White JJ.A.

Counsel for the Appellant: Derek Hogan
Counsel for the Respondent: Robin Fowler

Rowe J.A.:

INTRODUCTION

[1] This case deals with circumstances in which an accused can withdraw a guilty plea on the basis that it was not made voluntarily.

FACTS

[2] In 2011, Christopher Sutton faced 35 charges under six informations:

(1) Offences on May 18, 2010

- break and enter
- theft under $5000
- theft over $5000

(2) Offences on January 13, 2011

- theft under $5000
- breach of recognizance

(3) Offences in February-March, 2011

- breaches of recognizance

(4) Offences in March 2011

- assault
- breaches of recognizance

(5) Offence on March 27, 2011

- mischief

(6) Offences on April 5, 2011

- escape from lawful custody
- theft under $5000

- being unlawfully in a dwelling house

- mischief

- possession of a prohibited weapon

- breaches of recognizance

[3] On August 22, 2011, Mr. Sutton through his counsel pleaded guilty to nine of the foregoing charges; the Crown withdrew 26 others. One of the offences to which Mr. Sutton pleaded guilty was a break and entry on May 18, 2010, at Greenwood Building Supplies.

[4] At a sentencing hearing on August 23, the Crown prosecutor read in facts relating, *inter alia*, to the Greenwood break and entry. Mr. Sutton's counsel, Averill Baker, said there was "no dispute" as to the facts.

[5] While the Crown and Defence had made a deal involving guilty pleas to certain offences in return for other charges being withdrawn, there was no joint submission on sentence. Ms. Baker sought time served or a conditional sentence. The Crown sought four years.

[6] The Provincial Court judge, among other factors, noted Mr. Sutton's extensive criminal record. The judge fixed a sentence of 16 months for the Greenwood break and entry; he also fixed sentences for the other eight offences, such that the total for all nine offences was 38 months. Applying totality, he reduced this to 30 months. He gave Mr. Sutton credit for time served (5.6 months) on a "one for one" basis. The resulting period of incarceration was 24 months and 12 days.

[7] Mr. Sutton appeals his conviction for the Greenwood break and enter on the basis that he should be permitted to withdraw his guilty plea. He says the plea was involuntary, having regard to the common law (see *R. v. Lyons*, [1987] 2 S.C.R. 309 at 371) and s. 606(1.1) of the *Criminal Code* which reads, in part:

> A court may accept a plea of guilty only if it is satisfied that the accused
>
> (a) is making the plea voluntarily …

[8] I reproduce Mr. Sutton's affidavit in support of his appeal:

1. I am appealing a conviction for a break, entry and theft, contrary to s. 348(1)(b) of the Criminal Code, at Greenwood Building Supplies, Lethbridge, Newfoundland on May 18th, 2010. I pleaded guilty to this offense through my counsel, Averill Baker, before His Honour Judge Kennedy in Provincial Court in Clarenville on August 22nd, 2011. However, I never admitted this offense to Ms. Baker, in fact, I denied it, and I never asked her to negotiate a plea agreement concerning this and the other outstanding charges against me. I only pleaded guilty to the break and entry because she said that I would receive a conditional sentence for this and the other charges and that a trial for the break and entry would be postponed to the new year while I stayed on remand.

2. I consented to remand before Provincial Court in Clarenville on March 16th, 2011. By the time I first spoke to Ms. Baker in person at Her Majesty's Penitentiary (HMP), St. John's in late May or June, 2011, I was facing 35 charges – see IPCIS attached as Schedule "A" for a list of these. Ms. Baker said that she would represent me and that I should maintain not guilty pleas to all charges.

3. Although I never saw Ms. Baker again in person until the first day of trial on August 22nd, 2011, I spoke to her several times by telephone from HMP. She told me each time that she had not had time to review my case and that she would send me a copy of the crown disclosure. I wrote Ms. Baker asking for crown disclosure and she said again in mid July that she would send me a copy. I never did receive a copy.

4. In early August, I again spoke to Ms. Baker by telephone. However, I had difficulty getting her to discuss my case because she was distracted by her personal problems… . She told me that … no matter what, she would handle my case. I never asked her in this or any of our conversations to negotiate a plea agreement with the Crown.

5. After this telephone conversation until the first day of trial on Monday, August 22nd, 2011, I was unable to reach Ms. Baker. I called her by telephone approximately ten times, including on Thursday, Friday, Saturday, and Sunday, August 18-21 while I was in custody at the RCMP detachment in Clarenville. I received no response.

6. I saw Ms. Baker at approximately 10:30 a.m. on Monday, August 22nd, 2011 at the RCMP detachment in Clareville. She told me that she had a good deal for me and that I should take it. We spent the next half hour to 45 minutes discussing the Crown offer.

7. I told Ms. Baker that I was willing to plead guilty to some of the offences but not to the break in at Greenwood Building Supplies because I had an alibi and because the main witness, Cody Gough, was in Alberta and

refused to testify. Ms. Baker said: "Chris, I mean if I go bugging the Crown, this deal she's offering will not be offered! Your best bet is to take the deal."

8. Ms. Baker said that the Crown was seeking a total sentence of 4 years imprisonment. She said: "That's absolutely ridiculous". She added: "I can work wonders with Judge Kennedy. You're lucky you don't have Judge Porter".

9. Ms. Baker said: "I can get you time served and a conditional sentence". She said: "I think you'll get house arrest, because you're going to school." She said that if I stuck with the not guilty plea to the break and entry at Greenwood Building Supplies, it would be November and then well into the new year before the trial could be heard due to her schedule. She said: "Let's plead guilty and go for house arrest and get this over with." I said I was not happy about pleading guilty to break and enter. But, I understood that this charge was going to be reduced to a lesser charge; and Ms. Baker convinced me that I was going to get house arrest, in addition to time served, as a sentence for all the offences to which I was pleading guilty. We spoke about the information she would need for a sentence hearing.

10. When I appeared before His Honour Judge Kennedy later that morning, I was confused about what I was pleading guilty to and which charges were being withdrawn. Although I have a lengthy criminal record and have been in court many times (see criminal record, transcript p. 89, 1.17-p. 93,1.1), I found the procedure on August 22nd, 2011 before Judge Kennedy difficult to follow because of the number of charges being called. I first understood that I was pleading guilty to the break in at Greenwood Building Supplies the next day when the Crown prosecutor read in the facts supporting the charge (ibid p. 17.1.4-p.p. 20,1.15); and that another break and enter into a home in Clarenville on April 5, 2011 was the break and enter that was being reduced to another charge – unlawfully in a dwelling house (ibid p. 29,1.16-p. 32,1.1). However, I said nothing in court because I was still convinced that I would receive house arrest.

11. When Ms. Baker examined me in court during the sentence hearing on August 23rd, 2011, she asked me how I felt about the breaches of court orders, the theft of a jar of money, and the break and entry at Greenwood Building Supplies (ibid p. 481.13-16). I replied that I was "absolutely sorry." (ibid 1.17-21). However, in my mind, I was not apologizing for the break and enter but for the theft of the jar of money collected for a church mission to Africa (ibid p. 21 1.19-20). As a spiritual person with faith in God, I felt horrible about taking this money.

12. I was not involved in the break and entry at Greenwood Building Supplies on May 18th, 2010 or present near the stolen property on May 22nd, 2010

> as the R.C.M.P. alleged (ibid p. 17,1.15-p. 18, 1.7). I was in my home at 194 Cabot Highway, Catalina the evening of May 17th, and the morning of May 18th, 2010. I understand that the break and enter occurred early on the morning of May 18th. My father, Neil Burry, was home all evening on May 17th and played poker on the computer until about 3:00 a.m. on May 18th. My mother, Carol Ann Sutton, was at work until about 11:00 p.m. that evening and came into my room about 12:30 a.m. on May 18th to say goodnight.

[9] In addition to the foregoing affidavit, Mr. Sutton seeks to have received in evidence affidavits by Carol Ann Sutton and Neil Burry, to the effect referred to in para. 12 of his affidavit. (As noted below, I place no reliance on these affidavits; thus, whether and on what basis they might be received in evidence need not be decided.)

[10] Ms. Baker was made aware of the contents of Mr. Sutton's affidavit and his pleadings in this appeal. She was provided an opportunity to seek intervenor status; she indicated that she did not wish to do so.

ISSUES

[11] Should Mr. Sutton's affidavit be received in evidence?

[12] Should Mr. Sutton be permitted to withdraw his guilty plea to the Greenwood break and entry?

ANALYSIS

(A) Admissibility of Affidavits

[13] In *R. v. Freake*, 2012 NLCA 10, this Court dealt with admissibility of an appellant's affidavit alleging incompetence of counsel:

> [10] Mr. Freake applied to adduce evidence (an affidavit) in support of his submission that he had been incompetently represented at trial. This Court recently addressed the test for when fresh evidence should be admitted on appeal in *R. v. R.W.*, 2011 NLCA 45, 308 Nfld. & P.E.I.R. 197. Chief Justice Green reviewed the law as set out by the Supreme Court of Canada in *R. v. Palmer*, [1998] 1 S.C.R. 759 and recently re-affirmed in *R. v. J.A.A.*, 2011 SCC 17, [2011] 1 S.C.R. 628.
>
> [11] The *Palmer* test works well for evidence that should have been led at trial, but for some reason was not, e.g. a weapon that was found at the crime scene only after the trial. The test does not fit with a situation, such as here, where an accused wants to place an affidavit in evidence to show that he was incompetently

> represented at trial. By its nature, such evidence could only come into existence after a trial and would only be relevant on appeal. (See: *R. v. Wolkins*, 2005 NSCA 2, 229 N.S.R. (2d) 222 at paras. 58-61.)
>
> [12] Thus, where an accused alleges incompetence of counsel such that he or she should have a new trial, an affidavit by the accused setting out the alleged facts should be received in evidence by the appellate court.
>
> [13] [Mr. Freake's counsel at trial] applied to become an intervenor with respect to the adequacy of her representation of Mr. Freake at trial. As well, she provided an affidavit in which she denied Mr. Freake's allegations. Where an accused alleges that his or her counsel was incompetent at trial, then that counsel should be granted intervenor status on the issue of competence and be accorded the opportunity to file an affidavit in reply to that of the accused. See Rule 5 of the *Supreme Court of Newfoundland and Labrador – Court of Appeal Criminal Appeal Rules (2002)*, SI/2002-96. See also *R. v. West*, 2009 NSCA 63, 279 N.S.R. (2d) 241 at para. 31.
>
> [14] The Court admitted the affidavits and granted Ms. Moss intervenor status. Counsel for Ms. Moss cross-examined Mr. Freake on his affidavit. Counsel for Mr. Freake cross-examined Ms. Moss on her affidavit. Crown counsel also cross-examined Mr. Freake and Ms. Moss on their affidavits.

[14] This is not a competence of counsel case; rather, it relates to whether a guilty plea was voluntary. That said, there are clear parallels between the two types of cases. Here, the appellant's affidavit could only come into existence after sentencing and would only be relevant on appeal. On a basis similar to that in *Freake*, it should be admitted. Also, the appellant's counsel at sentencing should be permitted to intervene (on the question of voluntariness) where, as here, the lack of voluntariness is alleged to have arisen as a result of the actions of that counsel. Finally, as in *Freake*, the parties and an intervenor should be permitted to cross-examine an affiant.

(B) Withdrawl of the Guilty Plea

[15] The appellant bears the burden of showing that a guilty plea was not voluntary. See *R. v. Giles*, 2010 NLCA 28, 297 Nfld. & P.E.I.R. 14 at para. 7; *R. v. Nevin* (2006), 210 C.C.C. (3d) 81 (NSCA) at para. 7; *R. v. T.(R.)* (1992), 10 O.R. (3d) 514 (Ont. C.A.) at para. 12.

[16] In *R. v. Stockley*, 2009 NLCA 38, 288 Nfld. & P.E.I.R. 56 at para. 7, this Court adopted five criteria for determining whether a guilty plea was voluntary:

(1) was the accused represented by experienced counsel;

(2) was the accused apprised of his position in law;

(3) did the accused have a defence;

(4) was the plea given in circumstances that amounted to pressure on him to do so; and

(5) what was the experience of the accused with the criminal justice system?

[17] I will deal with each in turn. First, Mr. Sutton was represented by experienced counsel. Second, in one sense, Mr. Sutton was apprised of his position at law, in that he understood what he was doing when he pleaded guilty. In another sense, he was not apprised of his position in law, in that his counsel had not reviewed with him the Crown's disclosure, nor had she in any meaningful way discussed the case with him before August 22, 2011.

[18] Third, Mr. Sutton denied committing the offence. I place no reliance on the affidavits by his mother and step-father. I would note what the Nova Scotia Court of Appeal wrote in *R. v. Nevin*, *supra*, at para. 18:

> Where a guilty plea is involuntary, however, the question is not whether an accused may ultimately be proved guilty at trial. An involuntary plea cannot stand.

I will deal with the fourth criterion presently. Fifth, Mr. Sutton concedes that he had extensive experience with the criminal justice system.

[19] The fourth criterion, whether the plea was given under pressure, is key. Three factors are relevant: first, he had, effectively, no discussion with his counsel before August 22; second, there was an imperative to make a decision rapidly on August 22 with, essentially, no time to reflect; and, third, his counsel made unrealistic statements to him concerning sentence, upon which Mr. Sutton appears to have relied.

[20] Overall, I am persuaded that Mr. Sutton was subject to undue pressure to plead guilty to the Greenwood break and enter and, thus, his plea was not voluntary. That being so, he is permitted to withdraw it. It follows that the conviction based on the guilty plea cannot stand. The appeal must be allowed and a new trial ordered.

OBITER

[21] In this case, two questions were not dealt with that should have been:

(1) Given the offender's withdrawal of a guilty plea to one offence, what effect (if any) would that have on the withdrawal of other charges by the Crown, given that there was a "package deal"?

(2) Given that the 16 month sentence for the Greenwood break and enter is set aside, should this Court have revisited the overall period of incarceration? I note that, having regard to totality, the Provincial Court judge reduced the overall sentence by eight months (from 38 to 30 months). Should such a reduction be made where the total period of incarceration before totality would be 22 months, rather than 38?

[22] In future cases, the parties should address questions of the foregoing nature.

CONCLUSION

[23] The conviction for the Greenwood break and enter is set aside, as is the 16 month sentence, and a new trial is ordered for that offence. Mr. Sutton's term of imprisonment of 30 months is reduced by 16 months.

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M. H. Rowe J.A.

I Concur: _____

B. G. Welsh J.A.

I Concur: _____

C. W. White J.A.