

Date: 20150306
Docket: 14/59
Citation: *R. v. Payne*, 2015 NLCA 11

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

BETWEEN:

TERRANCE WILLIAM PAYNE

APPLICANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

Coram: Welsh J.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (G) Gander 201405G0074

Application Heard: March 5, 2015

Decision Rendered: March 6, 2015

Counsel for the Applicant: Self Represented

Counsel for the Respondent: Lisa Stead

Counsel for the Attorney General

of Newfoundland and Labrador: Peter Ralph Q.C.

Welsh J.A.:

[1] This is an application for the assignment of legal counsel pursuant to section 684(1) of the *Criminal Code*. Mr. Payne is appealing his convictions for possession of instruments for breaking into a place (section 351 of the *Criminal Code*) and possession of property knowing it was obtained by an offence (section 354 of the *Criminal Code*). It is unclear whether he is also appealing his conviction for breaking and entering (section 348 of the *Criminal Code*).

[2] Section 684(1) states:

A court of appeal or a judge of that court may, at any time, assign counsel to act on behalf of an accused who is a party to an appeal or to proceedings preliminary or incidental to an appeal where, in the opinion of the court or judge, it appears desirable in the interests of justice that the accused should have legal assistance and where it appears that the accused has not sufficient means to obtain that assistance.

[3] Relevant factors to be considered are set out in *R. v. Ryan*, 2008 NLCA 42, 277 Nfld. & P.E.I.R. 167:

[9] From the foregoing decisions, there are four key issues to be considered in the exercise of the discretion conferred under s. 684:

- (a) does the applicant have the means to engage legal counsel for his appeal;
- (b) if not, will Legal Aid provide counsel for the appeal;
- (c) are there serious (i.e. not frivolous) issues to be dealt with in the appeal;
- (d) will the appellant adequately be able to present his case and will the court be able properly to decide the case without the assistance of counsel?

[4] In this case, counsel for the Attorney General concedes that Mr. Payne does not have the means to engage counsel and that he has been refused assistance from legal aid. However, counsel submits that the appeal is frivolous.

[5] The difficulty faced by this Court is that the ground of appeal alleged by Mr. Payne is that his counsel entered a guilty plea when he had instructed her to plead not guilty. It is impossible to assess the validity of this claim and related issues without an affidavit from counsel who represented Mr.

Payne in the Court below. In the circumstances, I am satisfied that Mr. Payne will require the assistance and advice of counsel to proceed with the appeal.

[6] Accordingly, the application for the assignment of counsel is granted.

[7] Relevant procedural aspects are referenced in *Ryan*:

[15] Crown counsel urged on the Court that Mr. Ryan's counsel should be compensated on the Legal Aid tariff. I agree, subject to two points. First, the Attorney General has the option of agreeing to a higher rate. Second, as s. 684(3) provides, in the absence of agreement between the Attorney General and counsel, either of them may have fees and disbursements taxed by the Registrar of the Court.

[16] Mr. Ryan has two weeks to provide the Court with a name or list of names of counsel that he would agree to represent him. Then, counsel will be assigned to act on his behalf. ...

[8] In this case, Mr. Payne should provide the Court registry with a name or list of names of counsel as soon as possible.

B. G. Welsh J.A.