



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

Citation: *R. v. Noray*, 2021 NLCA 22

Date: April 12, 2021

Docket Number: 201601H0117

BETWEEN:

BRADLEY NORAY

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

Coram: Fry C.J.N.L, Hoegg and Goodridge JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador,
General Division 201401G7905

Application Heard: April 12, 2021

Judgment Rendered Orally: April 12, 2021

Reasons for Judgment Filed: April 15, 2021

Reasons for Judgment by: Fry C.J.N.L.

Concurred in by: Hoegg and Goodridge JJ.A.

Counsel for the Appellant: Self-Represented (Not Present)

Counsel for the Respondent: David Schermbrucker

Authorities Cited:

RULES CONSIDERED: *Court of Appeal Criminal Appeal Rules (2002)*,
SI/2002-96, rules 10 and 14.

Fry C.J.N.L.:

[1] The Crown applied to strike the appeal of Bradley Noray pursuant to rule 10(2)(a) of the *Court of Appeal Criminal Appeal Rules (2002)*, SI/2002-96. The application was granted and the appeal struck for the following reasons.

BACKGROUND

[2] Mr. Noray was convicted of trafficking and conspiracy to traffic in Sch. I substances under the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, and was sentenced on November 30, 2016 to 3½ years in prison.

[3] Mr. Noray appealed his conviction on December 7, 2016 and applied for bail pending appeal which was denied. The appeal was ordered to be expedited with Mr. Noray ordered to file his factum by March 17, 2017; the Crown to file its factum by March 31, 2017; and with the date for the appeal set for June 14, 2017. Mr. Noray was at this time represented by counsel.

[4] The appeal did not proceed on June 14, 2017 as counsel for Mr. Noray made an application for, and was granted, leave to withdraw as solicitor of record. Mr. Noray has been self-represented since that time.

[5] The matter was enlarged to July 31, 2017 to permit Mr. Noray time to seek new counsel and to set a new date for the appeal. Mr. Noray appeared by video conference from Dorchester Penitentiary and advised he would be released in the next 10-15 days. He advised the Court of his intention to engage counsel and a hearing date was set for September 11, 2017.

[6] By September 11, 2017 the Court determined that the appeal could not proceed as Mr. Noray had not engaged counsel or filed any documents. The Court referred to rule 10 of the *Criminal Appeal Rules*, encouraged Mr. Noray to take steps to perfect the appeal, and adjourned the appeal indefinitely.

[7] The Court notified the parties of a status update set for September 26, 2018. On that date, Mr. Noray advised the Court that he was still seeking legal counsel and wanted to continue with the appeal. He was not eligible for legal aid and planned to engage private counsel. He was advised to contact the Court when he was ready to proceed. No further date was set.

[8] Following two years of inactivity, the Court notified the parties of a status update set for September 29, 2020. Although served with notice of this date, Mr. Noray did not appear. The Crown requested that a date be set for either an

application to strike or for the appeal to be heard. The Court set December 7, 2020 for the hearing of either the appeal or application to strike with personal service to be effected on Mr. Noray.

[9] On October 1, 2020, a registered mail notice of hearing was sent to Mr. Noray; the tracking receipt confirms delivery.

[10] Mr. Noray was also personally served with the notice of hearing and the application to strike set for December 7, 2020 by Constable Cody Field of the Royal Newfoundland Constabulary, who filed an affidavit of service with the Court.

[11] On December 7, 2020, Mr. Noray appeared before the Court and denied receiving any notice or documents. He further advised that he had engaged legal counsel. The matter was adjourned until 12:30 p.m. when the counsel he had apparently engaged was able to appear.

[12] Counsel for Mr. Noray advised that she had been engaged by Mr. Noray for another matter unrelated to his appeal. She requested time to meet with him to discuss the matter under appeal. The matter was enlarged until December 15, 2020. The Crown indicated that should counsel be engaged it would assist with the appeal proceeding and the application to strike may not be necessary.

[13] On December 15, 2020, counsel appeared and indicated that she was retained to review the issues on appeal and advise Mr. Noray and sought a postponement until January 12, 2021.

[14] On January 12, 2021, counsel advised that she was prepared to represent Mr. Noray once an appropriate retainer agreement was in place. The date for filing of Mr. Noray's factum was set for April 12, 2021. As well, a status update was scheduled for February 9, 2021 to ascertain whether the agreement was in place.

[15] Counsel appeared on February 9, 2021 and advised that she had not been retained. Accordingly, the hearing date for the application to strike was set for April 12, 2021. Mr. Noray was not present in court on February 9, arriving after court had adjourned. He was provided with notice of the hearing date by registry staff. The notice of hearing was also sent by registered mail to Mr. Noray and was confirmed delivered on February 11, 2021 by tracking receipt.

[16] The Registry sent reminders by telephone and email prior to the hearing. The Crown's application to strike was heard on April 12, 2021. Mr. Noray did not appear.

ANALYSIS

[17] The Crown applied to strike Mr. Noray's appeal pursuant to rule 10(2) of the *Criminal Appeal Rules* more than four years after the notice of appeal was filed. Rule 10(2) of the *Criminal Appeal Rules* states:

10 (2) Where a party to an appeal or counsel fails to perfect the appeal within a period of 6 months after the filing of the transcript or, where no transcript is filed, within a period of 12 months after the filing of the notice of appeal, or a party or their counsel otherwise fails to comply with these Rules, the Court, on application of any other party to the appeal or of its own motion, on giving to the parties such notice, if any, as the Registrar is able to effect, or without notice if reasonable notice cannot be effected, may :

- (a) strike out the appeal;
- (b) direct the appellant to perfect the appeal within a specified time;
- (c) fix a date for hearing of the appeal; or
- (d) make any other order as may be just.

[18] Rule 10(2)(b) provides that the Court may provide direction to perfect an appeal. This has occurred in this case several times over the past four years. The Court has also set three different dates under rule 10(2)(c) to provide Mr. Noray with time he requested to engage counsel for the appeal. The appeal is no closer to being heard today.

[19] The Court also notes rule 14(1)(a) of the *Criminal Appeal Rules* which permits an appellant not represented by counsel to present oral argument if they provide notice to the Court.

14(1) An appellant shall prepare an appellant's factum unless

- (a) the appellant is not represented by counsel and has stated in the notice of appeal that he or she desires to present oral argument only;

[20] Mr. Noray was advised at prior court appearances that his appeal could be heard without his filing a factum and that he could make oral argument. However, he consistently maintained that he did not want to proceed with the appeal without counsel and accordingly postponements were granted to obtain

the services of legal counsel. He did not do so. Of interest, he advised the Court that he has obtained counsel to represent him on unrelated criminal charges that are ongoing.

[21] The consequences of striking Mr. Noray's appeal were explained to him at a status hearing as well as on another occasion in court in the presence of his proposed counsel. Rule 10(6) of the *Criminal Appeal Rules* states as follows:

No proceeding shall thereafter be taken in any appeal deemed abandoned or struck out under this Rule unless the appeal is reinstated by the Court, which the Court may do on such terms as the Court deems just.

[22] I am satisfied that Mr. Noray has had ample opportunity to address the issues necessary to proceed with his appeal. I am not satisfied that setting a further date for an appearance would achieve progress in the perfection of his appeal. Moreover, Mr. Noray has not requested a further adjournment. In the circumstances presented here, I would allow the application and strike the appeal.

D.E. Fry C.J.N.L.

I Concur: _____

L.R. Hoegg J.A.

I Concur: _____

W.H. Goodridge J.A.