IN THE COURT OF APPEAL OF THE YUKON TERRITORY

Citation: *R.* v. *Jordan,* 2004 YKCA 12

Date: 20040908
C.A. No. 03-YU513
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

Respondent

And

DANNY JOSEPH JORDAN

Appellant

Before: Mr. Justice L.F. Gower

Appearances:
Kevin M. Drolet — For the Respondent
Danny J. Jordan — Appearing on his own behalf

REASONS FOR JUDGMENT

INTRODUCTION

[1] Mr. Jordan applies for a lawyer to represent him in his appeal from a conviction for the offence of breaking and entering and committing an aggravated assault. The aggravated assault primarily consisted of wounding one Frederick Martin by chopping off his small finger with a meat cleaver. Mr. Jordan says that his guilty plea was not voluntary. He has been denied a lawyer through legal aid and has made an application under s. 684 of the *Criminal Code*. That section authorizes a judge of this Court to assign counsel for an appellant if "it appears desirable in the interests of justice" and the appellant does not have sufficient means to do so on his own. It is undisputed that

Mr. Jordan does not have sufficient means to retain counsel. Therefore, the issue is whether it is in the interests of justice to grant his application.

CIRCUMSTANCES

[2] Mr. Jordan argues that he did not voluntarily plead guilty to the charges for which he was sentenced. In considering that argument, I not only heard his submissions at the hearing before me on June 21, 2004, but I have also had the uncommon benefit of reviewing virtually the entire record relating to this application, including:

- Mr. Jordan's affidavit filed June 1, 2004, which included an opinion on the merits of Mr. Jordan's appeal by J. Van Wart, then an independent lawyer retained by the Yukon Legal Services Society (Legal Aid);
- the transcripts of the appearances by Mr. Jordan when his guilty pleas were entered at the sentencing hearing;
- the pre-sentence report; and
- the reasons for sentencing of the Territorial Court Judge.

[3] Mr. Jordan submits that he did not realize what guilty pleas had been entered until he heard the reasons for sentence of the Territorial Court Judge. After credit for time served, Mr. Jordan received a global sentence of five years. In particular, five years for breaking and entering and committing an aggravated assault and one year concurrent for committing an assault. He says he thought he was pleading guilty to aggravated assault and common assault. He claims he was expecting a sentence in the range of two to three years. He denied agreeing to plead guilty to the break and enter offence, because he did not feel the facts justified this as a "home invasion" type of

offence. He expects that this break and enter aspect will cause him difficulties when he applies for parole. Had he known he would be convicted and sentenced as he was, he says he would “have fought it, drawn it out and took my chances”. He submitted to me, with reference to the evidence of the victim, Mr. Martin, that he was a “retard” and a “creep”, and that he “could have fought a lot of what he was saying”.

[4] His oral submissions fit closely with what he reported to Mr. Van Wart in the preparation of the independent opinion for Legal Aid. He feels he was wronged and misled by his lawyer at the sentencing hearing because the break and enter count carries a stigma beyond that of mere aggravated assault. He says he was not informed by his lawyer at the sentencing hearing that he was pleading guilty to break and enter and committing an aggravated assault. He claimed that when he became aware of the pleas actually entered at the sentencing hearing on December 18, 2003, he passed a note to his lawyer explaining that he did not plead guilty to the break and enter count.

[5] Mr. Jordan’s lawyer explained to Mr. Van Wart that plea bargaining was conducted on October 20, 2003, the day of the preliminary inquiry. He said that after some initial negotiations he advised Mr. Jordan to plead guilty to the break and enter and common assault counts based upon a concession from the Crown on the range of sentence. He said he likely explained to Mr. Jordan the charges he was pleading to, but candidly acknowledges that Mr. Jordan’s version of events may be accurate. Mr. Jordan’s lawyer recalled that the plea bargaining occurred within a short period of time and he confirmed that Mr. Jordan passed him a note as the reasons for sentence were being read. However, at the time of the interview by Mr. Van Wart, he did not have access to the transcripts of the related appearances.

[6] In assessing the events and circumstances, I give particular weight to the following points:

1. Mr. Jordan was present in Court on October 20, 2003 for the preliminary inquiry. He was jointly charged with three other co-accused. Crown Counsel made an application to amend the charge against Mr. Jordan of breaking and entering contrary to s. 348 of the *Criminal Code*. The proposed amendment was accepted by the Court and was read aloud by Crown Counsel as follows:

> The Information would then read:
> … did unlawfully commit an offence in that he did **break and enter** a certain place to wit: **a dwelling house** situated at 710 Jarvis Street, Whitehorse, Yukon Territory, **and** did **commit** therein the indictable offence of **aggravated assault** by wounding Frederick Martin.[1]
> (emphasis added)

2. Moments later, Mr. Jordan's lawyer indicated that he had had discussions with Crown Counsel, had made a "thorough review of the substantial disclosure", and had instructions from Mr. Jordan to withdraw the not guilty plea to the amended (break and enter) count and to enter guilty pleas to that count and also to count 4 (the common assault against Desiree Wagerer contrary to s. 266 of the *Criminal Code*).[2] Mr. Jordan's lawyer then requested the preparation of a pre-sentence report and asked for an adjournment for approximately five to six weeks for sentencing.

[1] Transcript, October 20, 2003, p. 1
[2] Transcript, October 20, 2003, p. 2

3. Stays of proceedings had been directed for two of the three co-accused. The preliminary inquiry proceeded against the remaining co-accused, Mr. Nehass. Mr. Jordan and his counsel were present for the direct examination and cross-examination of the Crown's first witness. Court was adjourned over the lunch break and resumed at 1:30 p.m. At that time, Mr. Jordan's lawyer indicated that he had had an opportunity to speak with Mr. Jordan and suggested December 8, 2003 as the sentencing date. After that he asked that Mr. Jordan be excused from the proceedings, which was allowed by the Court.

4. On December 8, 2003, Mr. Jordan again appeared with his lawyer for the sentencing hearing. Crown Counsel made detailed submissions about the circumstances of the offences, which went on for over seven pages of the transcript. At the conclusion of those submissions, Mr. Jordan's lawyer indicated that the facts were "substantially correct".[3]

5. The Territorial Court Judge then asked Mr. Jordan's lawyer whether he had discussed with his client the provisions of s. 606(1.1) of the *Criminal Code,* to which Mr. Jordan's lawyer replied "Yes".[4] Accordingly, the Territorial Court Judge made findings of guilt on the two charges against Mr. Jordan.

6. There was a break in the proceedings for approximately 10 or 15 minutes so that the defence lawyers could consult with Crown Counsel and their

[3] Transcript, October 8, 2003, p. 16
[4] Transcript, October 8, 2003, p. 19

respective clients. Upon resuming those proceedings, Crown Counsel began his sentencing submissions by stating:

> Your Honour, Mr. Jordan appears before the Court for sentencing in relation to his pleas of guilty to an offence contrary to s. 348 of the *Criminal Code*, **break, enter and commit aggravated assault**, in relation to which the maximum penalty is one of life imprisonment. Mr. Jordan has also entered a plea of guilty to an offence of common assault, which carries a maximum penalty of five years imprisonment.[5] (emphasis added)

7. The matter was then adjourned over the lunch break, following which Mr. Jordan's counsel made his submissions on sentence.

8. Following another break, during which Mr. Jordan talked with his lawyer,[6] Mr. Jordan personally addressed the Court. His submissions were fairly extensive and went on for approximately a page and a half of the transcript.[7]

9. The pre-sentence report filed at the sentencing hearing also indicates at the outset that Mr. Jordan was charged with one count of break and enter and committing an indictable offence as well as one count of assault. The author, probation officer Shayne King, said he met with Mr. Jordan "on several occasions" in order to prepare the report. It is clear from the report that Mr. King discussed the circumstances of the offences with Mr. Jordan and that Mr. Jordan was questioned on his current attitude about having committed the offences. It is also evident that Mr. King consulted the

[5] Transcript, December 8, 2003, p. 28
[6] Transcript, December 8, 2003, p. 73
[7] Transcript, December 8, 2003, pp. 92 - 93

"Crown Information" in preparing the report. When interviewed by Mr. Van Wart, Mr. King confirmed that he discussed the charges with Mr. Jordan and that it was his routine practice to do so at the initial interview with the client. At one point during the sentencing hearing, Mr. Jordan's counsel referred to the preparation of the pre-sentence report where he said:

> Mr. Jordan, in my respectful submission, was, and as stated by Mr. King, was candid and frank with the probation officer.[8]

10. In delivering his reasons for sentence, the Territorial Court Judge referred to Mr. Jordan as "a career criminal" with a four-page criminal record containing some 54 convictions, many of them related to the present circumstances.

LAW

[7] Ryan J.A. of the British Columbia Court of Appeal in *R.* v. *Barton*, [2001] B.C.J. No. 1712 (C.A.) discussed the purpose of s. 684 and noted that a hearing will not be fair if either of the two sides cannot be properly heard.

[8] Levine J.A. said in *International Forest Products Ltd.* v. *Kern*, [2001] B.C.J. No. 2207 (C.A.) at paras. 6 and 13, that the factors to be considered on the "interests of justice" question include:

- the complexity of the case,
- any point of general importance,
- the appellant's competency,

[8] Transcript, December 8, 2003, p. 69

- the need for counsel to marshall facts, research law or make the argument,
- the nature and extent of the penalty imposed, and
- the merits of the appeal.

[9] Southin J.A. said in *R.* v. *Mills*, [1999] B.C.J. No. 970 (C.A.) at para. 13, that the "interests of justice" in s. 684 "is not a term which admits of closed categories".

[10] A legal aid opinion that an appeal has no prospect of success may be considered: *R.* v. *Chan*, [2001] B.C.J. No. 392 (C.A.) at para. 8; and *R.* v. *Edwards*, [2001] B.C.J. No. 2382 (C.A.) at paras. 4 and 6.

[11] Further, the *Canadian Charter of Rights and Freedoms* does not guarantee a right to be provided with legal counsel to argue an appeal: *R*. v. *Baig* (1990), 58 C.C.C. (3rd) 156 at 158 (B.C.C.A.), leave to appeal denied [1991] 1 S.C.R. vi.

[12] In *R.* v. *Bernardo* (1997), 121 C.C.C. (3d) 123 (Ont.C.A.), Doherty J.A. spoke for the Ontario Court of Appeal about s. 684. He recognized that the interests of justice involve more than the specific interests of a particular appellant and encompass broader societal concerns. The first step in the analysis is to recognize that in appeals of indictable matters, the *Criminal Code* provides liberal access to appellate review, as well as broad remedial appellate powers to the Court of Appeal. This not only protects the interests of the appellant, but also enhances the fairness and reliability of the entire criminal process. Therefore, an interpretation of the "interests of justice" in s. 684 must recognize that justice demands that an appellant be afforded a "meaningful opportunity" to establish the merits of his or her grounds of appeal.

[13] Commonly, impecunious appellants are provided with counsel funded by legal aid. However, in those cases where legal aid has been refused, s. 684 allows that there

may still be cases where the assistance of counsel is necessary to exercise a meaningful right of appeal. Two closely related principles guide this determination:

> … First, counsel must be appointed where an accused cannot effectively present his or her appeal without the help of a lawyer. Second, counsel must be appointed where the court cannot properly decide the appeal without the assistance of counsel".[9] …

[14] I accept Crown Counsel's submission that *Bernardo* essentially says these two principles may be reduced to three practical questions:

1. Is the appeal arguable?
2. Are the arguments complex?
3. Is the appellant capable of making those arguments?

[15] In asking whether the appeal was arguable, *Bernardo* cautions that any inquiry into the merits is limited for two reasons. First, it is often made on less than the entire record. Second, any requirement for an appellant to go beyond the arguable case standard would be unfair, because such an appellant would presumably have greater need for a lawyer than one who has a stronger appeal.[10]

[16] Turning to the issue of the plea on this conviction appeal, the Ontario Court of Appeal in *R.* v. *Newman* (1993), 79 C.C.C. (3d) 394 at p. 402, citing Doherty J.A. in *R.* v. *T.(R.)* (1992), 17 C.R. (4th) 247, said that for a guilty plea to be valid, it must be "voluntary and unequivocal":

> The plea must also be informed, that is the accused must be aware of the nature of the allegations made against him, the effect of his plea, and the consequences of his plea.

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[9] *Bernardo*, cited above, at para. 21
[10] *Bernardo,* cited above, at para. 22

[17] In his independent opinion, Mr. Van Wart correctly noted that the test for whether a plea was voluntary is set out in *R.* v. *Read (B.C.C.A.)*, 47 B.C.A.C. 28, at para. 43. There, the British Columbia Court of Appeal stated that a guilty plea entered in open court is presumed to be voluntary unless the appellant can establish that the plea was entered in error and that it would be unjust to uphold it. Also, the Court of Appeal must be satisfied, on the evidence before it, that the appellant has a defence which could be valid if proven. That test was adopted by the Yukon Territorial Court on *R.* v. *Reid,* [2003] YKTC 64. Mr. Van Wart concluded that, upon an objective assessment of the circumstances, Mr. Jordan is unable to satisfy this test.

[18] To the extent that Mr. Jordan's appeal implicitly involves an allegation of ineffective representation by his counsel, he must demonstrate that his lack of understanding flowed from the "flagrant incompetence" of his lawyer. The test for establishing a denial of the effective assistance of counsel was laid down by the Supreme Court of the United States in *Strickland* v*. Washington,* 104 S.Ct. 2052 (1984), which was quoted with approval by Martin, J.A. in *R.* v. *Garofoli* (1988), 41 C.C.C. (3d) 97, (Ont.C.A.) and cited again by that Court in *R.* v. *Newman*, cited above at 402:

> … First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defence. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable …

IS THE APPEAL ARGUABLE?

[19] It is clear that at the October 20th appearance, the charge of breaking and entering and committing an aggravated assault on Mr. Martin was read out, as amended, in Mr. Jordan's presence before his counsel entered a guilty plea to it. It is also clear that Mr. Jordan had opportunities to speak with his counsel throughout that day, if there was any confusion on his part.

[20] It is also clear that on December 8th, Crown Counsel once again specified on the record the nature of the charges to which Mr. Jordan had entered pleas of guilty. Further, his lawyer acknowledged having discussed with Mr. Jordan the provisions of s. 606(1.1) of the *Criminal Code*. That section requires the Court to be satisfied that the accused is making the plea *voluntarily*, and that the accused understands:

- the guilty plea is an admission of the essential elements of the offence ("breaking and entering" is, of course, an element of the s. 348 count);
- the nature and consequences of the plea (this would include the probable range of sentence); and
- the Court is not bound by any plea bargain.

[21] It would be highly unusual for senior counsel, such as the one representing Mr. Jordan, not to explain to the client the charges to which they were entering guilty pleas. Notwithstanding the forthright and candid concession by Mr. Jordan's lawyer on this point (prior to a review of the transcripts), a conversation explaining the charges would clearly be part of normal and expected defence counsel practice.

[22] The circumstances relating to the pre-sentence report strongly indicate that Mr. Jordan would have discussed with Mr. King the specific charges he pled guilty to. However, Mr. Jordan told Mr. Van Wart that the charges were not discussed with

Mr. King. At the hearing before me, Mr. Jordan could not recall seeing the pre-sentence report. While his memory on that point may be poor, it would also be highly unusual that a copy of a pre-sentence report would not be provided to an accused and discussed with counsel before the sentencing hearing.

[23] Further, given Mr. Jordan's experience in the criminal justice system, one would expect him to have a better than average understanding of the process. In addition, he was described in the pre-sentence report as having "obvious intelligence".

[24] In the event that the appeal proceeds, I concur with Mr. Van Wart that Mr. Jordan would not succeed with his contention that he was unaware of the charges to which he entered guilty pleas, in the face of the evidence to the contrary. It is implausible that he would have been so ignorant given all of the circumstances described above. In particular, his statement that he did not understand what he had plead guilty to until he heard the reasons of the Territorial Court Judge is contrary to the Court record both from October 20th and December 8th; the charge of breaking and entering and committing an aggravated assault was specifically referred to on both occasions. In short, Mr. Jordan does not have an arguable case to make that his plea was not entered voluntarily.

[25] As for the implied argument of ineffective representation, even if Mr. Jordan could somehow demonstrate, in spite of the Court record, that his lawyer was flagrantly incompetent, he must also show that his lawyer's performance prejudiced his defence and deprived him of a fair trial. Given that Mr. Jordan was present during the admission of the facts in support of the Crown's case, and given that his lawyer indicated those facts were substantially correct, and given that Mr. Jordan had multiple opportunities to

speak to his lawyer, if there was any confusion on his part, I fail to see how Mr. Jordan was prejudiced or deprived of a fair trial.

[26] As an afterthought, at the hearing before me, Mr. Jordan candidly acknowledged that he recalled “some” of what the Crown prosecutor said regarding the amendment to the break and enter count on October 20, 2003. However, he also conceded that part of that day was “a bit of a blur” for him, as he had somehow managed to obtain and smoke a marijuana joint during the noon break before returning to Court for his brief appearance in the afternoon. On the other hand, the amendment was dealt with when Court commenced in the morning, when Mr. Jordan was presumably fresh, and his counsel entered the guilty pleas only moments later.

ARE THE ARGUMENTS COMPLEX?

[27] Even if I am in error in concluding that Mr. Jordan does not have an arguable case, the issues on this appeal are not complex. As for what did or did not occur at the various Court appearances, the record speaks for itself and Mr. Jordan himself is best acquainted with his version of the facts.

[28] Admittedly, there may be some lawyer-client privilege issues, but the privilege may be waived by Mr. Jordan. There is also a risk that Mr. Jordan’s former lawyer may be impugned by Mr. Jordan’s representations. However, that risk is present virtually every time an accused appeals on these types of grounds. Neither of these points make the arguments unmanageably complex. In the end, the issue in this appeal remains largely one of fact.

IS THE APPELLANT CAPABLE OF MAKING THOSE ARGUMENTS?

[29] There are several references in the pre-sentence report to Mr. Jordan's education and intelligence. He went as far as Grade 9 in school, but claims to have completed his General Education Diploma while in prison. I conclude from this, and from my assessment of Mr. Jordan in the hearing before me, that he is capable of putting together any necessary affidavit evidence and making the arguments on the merits.

[30] Mr. Jordan's application is dismissed.

POST-SCRIPT

[31] I note that Mr. Jordan has also appealed his sentence. However, he said in the hearing before me that he does not intend to pursue that aspect of the appeal, because he is apparently afraid that the Crown may cross-appeal and he could end up with a longer sentence. Although the Crown has not cross-appealed, it could give notice of intention to seek a longer sentence prior to the hearing of the appeal: *R.* v. *Hill*, [1977] 1 S.C.R. 827. However, even in that event, Mr. Jordan acknowledged to me that he received a letter from Legal Aid stating "the Board has decided to provide you withLegal Aid coverage for the appeal of sentence". Therefore, it is not necessary to consider s. 684 for this part of Mr. Jordan's appeal.

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GOWER J.A.