

Citation: *R. v. Reid*, 2003 YKTC 64

Date: 20030805
Docket: T.C. 02-00355
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Chief Judge Lilles

R e g i n a

v.

Wendy Reid

David McWhinnie
Malcolm Campbell

Counsel for Crown
Counsel for Defence

DECISION

[1] Ms. Wendy Reid applies to set aside her plea of guilt entered on May 14, 2003 and confirmed on June 20, 2003, to the count alleging that she:

On or between the 01st day of January 1999 and the 09th day of July 2002, at or near Whitehorse, Yukon Territory, did unlawfully commit an offence in that she did steal monies, the property of Pelly Banks Holding Co. Ltd., of a value exceeding five thousand dollars, contrary to Section 334(a) of the Criminal Code.

[2] During the time period cited in the allegation, Ms. Reid was a clerical employee at the Porter Creek Super A where she held responsibilities for reconciling the money from the cash tills with the bank deposits. It is alleged by Crown that on over 100 different occasions, over a period of three years, Ms. Reid took money of various amounts. The total amount taken is alleged to be \$212,679.10.

[3] September 9, 2002, was Ms. Reid's first appearance before the Court. She appeared with her counsel, Mr. Robert Dick, and was released on her undertaking. In the four subsequent appearances, Ms. Reid being present at two, Ms. Reid pleaded not guilty and elected to have a preliminary hearing.

[4] On January 24, 2003, five days prior to the scheduled preliminary hearing, Mr. Dick, appearing as agent for Ms. Reid, re-elected to be tried before a Territorial Court Judge.

[5] On May 14, 2003, Mr. Dick appeared before JP Cameron as agent for Ms. Reid and entered a guilty plea. The facts of the offence were not read by Crown, however, Mr. Dick did admit to the amount of money Crown alleged Ms. Reid had taken.

[6] Ms. Reid appeared with Mr. Dick on June 20, 2003, before myself, for disposition. The detailed facts of the offence, which involved numerous transactions over the course of three years, were read by Crown and admitted by Ms. Reid. As part of the sentencing hearing, I heard submissions from Crown and Mr. Dick and heard from Ms. Reid and Ms. Reid's mother. The Crown recommended incarceration in a penitentiary while Mr. Dick recommended a conditional sentence. In the result, I did not sentence Ms. Reid but, rather, ordered a pre-sentence report and directed that she be remanded into custody while the report was being completed.

[7] Ms. Reid now seeks to withdraw her guilty plea and election. The burden falls on Ms. Reid to demonstrate that it would be unjust for the Court to maintain her guilty plea.

[8] The British Columbia Court of Appeal summarized the applicable test in *R. v. Read* (1994), 47 B.C.A.C 28 at para. 43:

... A guilty plea entered in open court is presumed to be voluntary unless the contrary is proven (*R. v. R.T.* (1992), 58 O.A.C. 81 (C.A.), at 84). Further, the appellant must establish that his plea was wrong and that it would be unjust to uphold the plea (*R. v. Hughes* (1987), 76 A.R. 294 (C.A.), at 296). Finally, the court must be satisfied on the evidence before it that the appellant has a defence which if proven could constitute a valid defence (*R. v. Adgey*, [1975] 2 S.C.R. 426; 13 C.C.C. (2d) 177, at 191 (C.C.C.)).

[9] A review of some of the applicable case law gives an indication of the evidence required to satisfy this burden.

[10] In *R. v. Hughes*, [1987] A.J. No. 204 (C.A.), the accused pleaded guilty to charges of robbery and using a firearm during the commission of an indictable offence. After he was sentenced he brought an application to set aside both guilty pleas on the grounds that he was unaware a robbery was to be undertaken by others until after it was complete. Secondly, he said that his plea of guilty was prompted by police assurances that his girlfriend would not be charged if he promptly pleaded guilty.

[11] Prior to the accused's plea, duty counsel advised the accused to remand the case and obtain his own counsel and also advised him of the seriousness of the charge and the range of sentence he could expect. The accused, however, insisted that his pleas of guilty be entered forthwith and they were.

[12] The guilty plea to the robbery was maintained. The fact that the accused was motivated to plead guilty in exchange for his girlfriend not being charged was not sufficient in satisfying the Court that his plea was involuntary or based on a misapprehension.

[13] In *R. v. Burden*, [1996] O.J. No. 1221 (C.A.), the accused applied to set aside his guilty plea on the grounds that he pleaded guilty because Crown counsel had indicated to the accused's counsel that if he pleaded guilty she

would seek a sentence of 15 to 18 years. Alternatively, if he pleaded not guilty and was convicted, Crown counsel would bring on a dangerous offender application. The fact that the accused's primary motivation for entering the guilty plea was his desire for a reduced sentence was not in itself sufficient to challenge the presumption that his plea was made voluntarily.

[14] In *R. v. Campbell*, [2003] B.C.J. No. 31, the Supreme Court addressed the issue of a viable defence. In this case, the accused applied for an extension of time to appeal his conviction for driving while disqualified. The accused had pleaded guilty, but he argued that duty counsel had not properly informed him of the sentencing consequences of his plea. He argued that, as a result, his plea was uninformed and invalid. As a viable defence, the accused submitted that there may be statutory and constitutional defences available to him, without being any more specific. The Court concluded at paras. 32 and 33:

The onus is on Mr. Campbell to establish that he has a reasonably arguable defence and I do not consider it sufficient in satisfying that onus to rely on vague defences only that may be available without specifics.

I conclude on this factor that the accused has not satisfied his onus of demonstrating that he has a reasonably arguable defence.

[15] In *Campbell, supra*, the accused's failure to outline a specific defence was the determining factor in the Court dismissing his application.

[16] In the case at bar, Ms. Reid has filed an affidavit in support of her application. Ms. Reid's evidence is that Mr. Dick entered a guilty plea without her instructions. Prior to May 14, 2003, they had discussed the possibility of pleading guilty. Ms. Reid states that while she was innocent of the allegation, she considered this option due to the volume of evidence against her and the beneficial mitigating effects of a guilty plea. Nevertheless, she was surprised to learn that Mr. Dick had entered the guilty plea on May 14, 2003. Ms. Reid

learned of the guilty plea from reports in the media and phone calls from friends. Her immediate concern was that there might be a warrant for her arrest. Ms. Reid made calls to the RCMP detachment and the court registry and learned that no warrant had been issued.

[17] On May 15, 2003, Ms. Reid states that she met with Mr. Dick. Ms. Reid states that Mr. Dick explained that he had entered the guilty plea because he had made arrangements with Crown for a joint submission on sentence for a conditional sentence. Ms. Reid does not dispute that she understood she would be convicted and sentenced on the basis of her plea. Ms. Reid was also aware that a joint submission would not bind the judge.

[18] On June 20, 2003, Ms. Reid was present when Mr. Dick admitted the facts alleged by Crown. In her affidavit, Ms. Reid states that she believed that she had to admit the facts as part of her compromise to obtain the joint submission. Ms. Reid said she was shocked to hear Crown recommend a sentence for incarceration in a federal penitentiary. She also said she would never had acquiesced to the guilty plea had she known this was going to be the position of Crown.

[19] Ms. Reid further states that if given the chance she can mount a viable defence. She relies on a statement of an unnamed “expert” in the field of corporate crime. This “expert” suggested to Ms. Reid’s mother-in-law that the disclosed documents relied on by Crown could have been manipulated by someone else. On cross-examination, Ms. Reid stated that she never had any personal discussions with the alleged “expert” and had no personal knowledge of his expertise. She was not aware of what information, if any, was provided to the “expert” by her mother-in-law. The mother-in-law did not testify. Ms. Reid further suggests that there is undisclosed documentation that confirms the accuracy of her cash deposits, which she would rely on to mount a defence. Finally, Ms. Reid suggests she would also rely on the credibility of her declared innocence.

[20] On cross-examination, Ms. Reid did not contest the theory of the Crown's case that she was spending more than she was earning. Ms. Reid confirmed Visa statements, mortgage, rent and RRSP payments made by Ms. Reid's household in 2001. In total, Ms. Reid confirmed an expenditure of nearly \$97,000 in 2001. This is compared with her estimated net income of \$30,000 for herself and \$40,000 for her husband.

[21] In response to Ms. Reid's allegations that her counsel, Mr. Dick, had acted without her instructions, Crown tendered Mr. Dick as a witness. Ms. Reid waived her solicitor/client privilege by making the allegations critical of her counsel: *R. v. Read, supra*. Mr. Dick testified that he acted upon Ms. Reid's instructions when he entered a guilty plea of May 14, 2003, and admitted the alleged facts on June 20, 2003. For several months prior to the plea, Mr. Dick and Ms. Reid had discussed the possibility of entering a guilty plea. They agreed to initially elect to proceed by way of preliminary hearing in order to delay the proceedings. Consistent with discussions Mr. Dick had with Ms. Reid, he re-elected to proceed in Territorial Court two weeks prior to the preliminary hearing. Mr. Dick informed Ms. Reid that to maximize the mitigating effect of a guilty plea, it should be entered prior to trial. As the trial date was approaching, Mr. Dick entered a guilty plea. Although not reduced to writing, Mr. Dick felt clear about his instructions.

[22] Mr. Dick testified that he never reached a firm deal with Crown for a joint submission for a conditional sentence. Nor, had he said to Ms. Reid, that he had reached a deal with Crown. What he told Ms. Reid was that he would be seeking a conditional sentence, and if she could provide restitution, Crown would consider a joint submission for a conditional sentence. Mr. Dick testified that Ms. Reid was well aware of the range of sentencing possibilities. Mr. Dick also discussed the possibility of a penitentiary term with Ms. Reid, including the advantage of being eligible for parole after serving one third of the sentence.

[23] After Mr. Dick entered the guilty plea on May 14, 2003, Mr Dick testified that Ms. Reid contacted him. Ms. Reid did not express concern about the guilty plea, but expressed concern that she thought there would be a warrant for her arrest. Mr. Dick assured Ms. Reid that she need not worry about a warrant, as one had not been issued.

[24] With regard to the evidence of the guilty plea, I accept the testimony of Mr. Dick that he acted upon Ms. Reid's instructions and I reject Ms. Reid's evidence that he did not. I am satisfied that very early on in the proceedings, Ms. Reid had directed Mr. Dick to re-elect to Territorial Court, not for trial, but for sentencing. As part of this strategy, Ms. Reid needed the additional time to enable her to raise money for restitution. Mr. Dick's testimony is supported by the fact that when Ms. Reid learned of the guilty plea by Mr. Dick on her behalf, she was concerned about the possibility of a warrant and her arrest, not of the fact of the guilty plea. Furthermore, Ms. Reid had ample time between May 14, 2003 and her appearance before me on June 20, 2003 to raise with Mr. Dick her non-agreement to the plea he entered. Ms. Reid did not do so. Moreover, on June 20, 2003, Ms. Reid was in Court with her family for the purpose of sentencing. The detailed facts were read into the record. Ms. Reid accepted those facts. Ms. Reid's mother addressed the Court. At my own initiative, I raised the issue of ordering a pre-sentence report. I spoke directly to Ms. Reid and said that I would order one if she agreed to co-operate with the probation officer preparing the report. She said she would. Ms. Reid never raised any issue with respect to her plea having been entered by mistake or without her direction or consent.

[25] I also accept the evidence of Mr. Dick that he did not tell Ms. Reid that he had reached a deal with Crown for a conditional sentence. I think it much more likely that Mr. Dick informed Ms. Reid of the possibility of a conditional sentence and that he was trying to negotiate a deal with Crown. I am satisfied that Ms. Reid knew there was no deal, and that any potential deal was contingent on restitution being made. Ms. Reid attempted to gather funds for restitution and

advised the Court that she had only been able to raise \$20,000 from family members, but she said that together with her husband, she would pay \$1,000 a month during the period of her conditional sentence probation.

[26] I find that the reason Ms. Reid now seeks a withdrawal of her guilty plea is due to the position taken by Crown at the hearing for sentencing. This is perhaps surprising as incarceration in a penitentiary was not a novel concept for Ms. Reid. Mr. Dick testified that he had discussed the possibility of a penitentiary term with her. In any event, the fact that the Crown sought a harsher sentence than Ms. Reid may have anticipated does not, in itself, render her plea involuntary (*R. v. Burden, supra*, at para. 5; *R. v. Closs* (1998), 105 O.A.C. 392 (C.A.) at 394). I therefore reject Ms. Reid's application on this ground.

[27] In conclusion, I am satisfied that Ms. Reid's plea was voluntary and that, as a result, Ms. Reid has failed to establish that it would be unjust to uphold the plea. I am satisfied that Ms. Reid instructed her counsel to plead guilty. In doing so, Ms. Reid understood that she was admitting the essential elements of the offence alleged by Crown and would be convicted and sentenced as a result. While Ms. Reid may have hoped that she would receive a conditional sentence as a result of her plea, she knew the full range of sentencing options available to the Court and she understood that the Court was not bound by the submissions of counsel.

[28] Although not argued by counsel, I note that my findings are consistent with requirements of accepting a guilty plea set out in section 606(1.1) of the *Criminal Code*.

[29] Having found Ms. Reid's plea voluntary, it is not necessary to consider whether or not Ms. Reid presented a defence, which, if proven, could constitute a valid defence. Nevertheless, I shall indicate that I do not find Ms. Reid has provided sufficient evidence to support a viable defence. The hearsay evidence

of an alleged expert, whose name Ms. Reid does not know and to whom she has never spoken to personally, is not “evidence” that I can consider for the purpose of this application. Nor, am I compelled to consider Ms. Reid’s reference to untendered documentation purporting to verify the accuracy of her cash records, which was known to her at the time of plea. Finally, Ms. Reid’s submission that she would rely on the credibility of her assertion of innocence is not a viable defence in these circumstances, where the evidence against her consists largely, if not entirely, of documented evidence.

[30] Ms. Reid’s application to set aside her guilty plea is denied.

[31] In light of Ms. Reid’s allegations against Mr. Dick, her former counsel, I would add these further observations. The court record of defence elections, adjournments and pleas is totally consistent with Mr. Dick’s version of his dealings with Ms. Reid. I am satisfied that Mr. Dick provided Ms. Reid with good advice in what was for her, a bad situation. A strategy of delay, re-elections, and restitution followed by a guilty plea was developed with Ms. Reid’s approval and participation. The guilty plea was entered by him on her behalf, on her instructions and confirmed by her in person in open court. I am satisfied that, based on the evidence placed before me, Mr. Dick did not act unprofessionally in his dealings with Ms. Reid.

Lilles C.J.T.C.