Citation: *R. v. Janz*, 2020 YKTC 25

Date: 20200828
Docket: 19-00131
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Chief Judge Chisholm

REGINA

v.

BRANDON VERNER GEORGE JANZ

Appearances:
Noel Sinclair — Counsel for the Crown
Baird Makinson — Counsel for the Defence

RULING ON APPLICATION

Introduction

[1] Brandon Janz faces a charge that while his ability to operate a motor vehicle was impaired by a drug, he had care or control of a vehicle, contrary to section 253(1)(a) of the *Criminal Code*.

[2] Although the alleged offence dates back to November 19, 2018, the police did not lay a charge until May 6, 2019. Mr. Janz entered a guilty plea on June 26, 2019.

[3] Mr. Janz subsequently retained counsel and applies to the Court to withdraw the guilty plea.

Background

[4] Mr. Janz was scheduled to make his first appearance in court on this charge on May 29, 2019. He allegedly failed to appear on that date. On June 12, he appeared with Ms. Josie O'Brien, Indigenous Court Worker. Both the care and control charge and the May 29 failure to attend charge were before the Court. The record of proceedings indicates that the Court read the charges to Mr. Janz, after which the Crown elected to proceed summarily. When Mr. Janz next appeared on June 26, he was again assisted by Ms. O'Brien. She asked that both charges be read again to Mr. Janz.

[5] The judge read both charges to Mr. Janz and inquired into his language preference. Mr. Janz chose to proceed in English.

[6] Ms. O'Brien indicated to the judge that Mr. Janz would like to enter a guilty plea to the care and control charge. The judge reviewed the provisions of s. 606(1.1) of the *Criminal Code* with Mr. Janz, including that the plea was voluntary; that by pleading guilty, he was giving up his right to a trial; and by doing so was relieving the Crown of their obligation to prove its case beyond a reasonable doubt.

[7] The judge confirmed that Mr. Janz understood the charge, and that he did not want to speak with a lawyer. The judge requested that the Crown provide him with a summary of the facts to confirm that the facts supported the charge, and to determine whether Mr. Janz agreed with those facts, despite the fact that this was not a requirement of s. 606(1.1) at that time.

[8] Mr. Janz filed two Affidavits in this application. In the first Affidavit, he deposes that he entered his guilty plea, after having taken several medications, which impeded his ability to think clearly. He believed that entering an early guilty plea would be to his benefit, and did not realize that it would have been beneficial to speak to a lawyer. Having subsequently spoken to a lawyer, although he does not take issue with the facts presented by the Crown, he now understands that there may be a defence to the charge. He had intended to raise this issue (i.e. what he now understands to be a defence) at the time of sentencing.

[9] Ms. O'Brien, who assisted Mr. Janz in court, also prepared an Affidavit that was filed with the Court. She recalls assisting Mr. Janz at two court appearances in June 2019, including the appearance at which he pleaded guilty. At that second appearance, she received a sentencing position from the Crown that she communicated to Mr. Janz. She noted that Mr. Janz appeared exhausted, however he was coherent and seemed to understand what was occurring.

[10] Although she suggested to him that he wait to enter his plea, he was intent on doing so at the second appearance. She informed Mr. Janz of the fact that pleading guilty would result in him having a criminal record. She also explained to him that there were mandatory minimum sentences for the impaired care and control charge, and she advised him that he could apply for legal aid. Ms. O'Brien deposed that her role as a court worker does not include providing legal advice.

[11] When Ms. O'Brien next saw Mr. Janz on July 10, 2019, he indicated to her that he should not have entered the guilty plea based on his state of mind, and that he wanted to obtain legal assistance.

[12] Mr. Janz's second Affidavit concerns the circumstances leading to his arrest for the impaired care and control charge. Mr. Janz explains that on the day in question, he visited a residence to pick up a friend. He had not consumed any drugs or alcohol. While at the residence, a person unknown to him offered him a "monster energy drink" and stated something to the effect of there being "some interesting stuff in there".

[13] After consuming the drink, Mr. Janz became panicked about what it contained, even though he did not feel impaired. At that point, he borrowed a car and left the residence with the friend he had come to get. He intended to drive his friend to her house, and then return to his house.

[14] Although not specifically stated in this Affidavit, I understand that the police subsequently located Mr. Janz and ultimately charged him with the matter before the Court.

Positions of the Parties

[15] Counsel for Mr. Janz submits that his client's plea was uninformed, in that he did not intend to admit an essential element of the offence. The defence contends that although Mr. Janz accepts the facts as presented to the plea inquiry judge, he did not realize that there was a possible defence to the charge, namely involuntary intoxication. In other words, he did not have a complete understanding of the criminal

process and believed that he could raise the issue of involuntary intoxication at the time of the sentencing hearing.

[16] The defence points to Mr. Janz's first Affidavit in which he states that he was taking a combination of medication that diminished his ability to think clearly at the time of pleading guilty. He also has outlined in short order in his second Affidavit his potential defence to the charge.

[17] The Crown contends that Mr. Janz's plea was clearly unequivocal. The judge who conducted the plea inquiry did so in a comprehensive manner. In light of the Affidavit evidence that Mr. Janz had taken a combination of drugs on the morning of his guilty plea, and even though Mr. Janz is not specifically questioning the voluntariness of his plea, the Crown submits that the Court should consider the issue of voluntariness. The Crown asserts that the Court should be satisfied upon review of the proceedings that the plea was voluntary.

[18] The Crown maintains that the plea inquiry judge informed Mr. Janz of the immediate consequences of the plea, and that he made his decision to plead guilty after an extensive inquiry by the judge. According to the Crown, Mr. Janz's guilty plea was clearly informed.

[19] The Crown argues that the involuntary intoxication defence referred to by the defence is not a viable defence, and that at the end of the day there is no evidentiary foundation that would tend to demonstrate that a miscarriage of justice would occur if this application were dismissed.

[20] Further, the Crown submits that allowing Mr. Janz to withdraw his guilty plea in these circumstances risks opening the floodgates.

Analysis

[21] A guilty plea is a formal admission of guilt (*R. v. T. (R.),* [1992] 10 O.R. (3d) 514 (C.A.) at para. 13).

[22] An accused seeking to withdraw a guilty plea bears the onus of demonstrating that the plea was invalid. A valid guilty plea must be voluntary, unequivocal, and fully informed (*T. (R.) at para. 14*; *R. v. Wiebe*, 2012 BCCA 519; *R. v. Krzehlik*, 2015 ONCA 168; and *R. v. Moser* (2002), 163 C.C.C. (3d) 286 (ONCA)).

[23] In *R. v. Eizenga*, 2011 ONCA 113, the Court stated at para. 44:

> …Up until the time of sentencing, a trial judge also has the discretion to permit an accused person to withdraw a guilty plea and to enter a new one. Provided the trial judge has exercised his or her discretion judicially, an appellate court will not lightly interfere: *R. v. Adgey*, [1975] 2 S.C.R. 426.

[24] In *R. v. Wong*, 2018 SCC 25 at para. 3, the Court summarized the competing elements of the plea resolution process:

> The plea resolution process is also central to the criminal justice system as a whole. The vast majority of criminal prosecutions are resolved through guilty pleas and society has a strong interest in their finality. Maintaining their finality is therefore important to ensuring the stability, integrity, and efficiency of the administration of justice. Conversely, the finality of a guilty plea also requires that such a plea be voluntary, unequivocal and informed. And to be informed, the accused "must be aware of the nature of the allegations made against him, the effect of his plea, and the consequence of his plea" [citation omitted].

[25] A court has the discretion to allow an accused to withdraw his guilty plea if there are valid grounds to do so (*R. v. Bamsey*, [1960] S.C.R. 294 at p. 298; and *R. v. Adgey*, [1975] 2 S.C.R. 426 at pp. 428-431). As indicated in *Adgey*, there may be circumstances, for example, where "the accused never intended to admit to a fact which is an essential ingredient of the offence with which he is charged" (p. 430). In *R. v. Alec,* 2016 BCCA 282, the Court considered the test for withdrawing a guilty plea. At paragraph 76 and 77, the Court stated:

> 76 There is no complete catalogue of the circumstances that may be found to constitute "valid grounds" for permitting an accused to withdraw a plea of guilty. The circumstances in which an appellate court will be justified in allowing an appeal from conviction where an accused has pleaded guilty are varied. The inquiry is case-specific and sufficiently flexible to take account of the almost infinite range of circumstances that might be said to have contributed to a miscarriage of justice: *R. v. Meers* (1991), 64 C.C.C. (3d) 221 (B.C.C.A.).
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> 77 From the authorities referred to herein, it is clear that certain inquiries will feature prominently in cases of this kind. For example:
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> - Was the accused represented at the time of the plea?
> - Does the accused have a meritorious claim that he was incompetently represented during the trial or at the time of the plea, and has such a claim been advanced in connection with the appeal?
> - Was an inquiry of the sort contemplated by s. 606(1.1) of the *Code* undertaken at the time of the plea?
> - Was the plea entered by the accused personally?
> - Is there any evidence that the accused's plea was involuntary?
> - Does the record reflect equivocation about the plea? For example, did the accused seek to qualify the guilty plea in some way?
> - Does the record, or any additional evidence sought to be tendered on appeal, establish that the accused did not fully

appreciate the nature of the charge in respect of which the plea was entered?

- Does the record, or any additional evidence sought to be tendered on appeal, establish that the accused was uncertain about the consequences of the plea?
- Does the record, or any additional evidence sought to be tendered on appeal, establish that the accused did not intend to admit a fact which is an essential ingredient of the offence in respect of which the plea has been entered?
- Do the facts read into the record following the plea support a conviction?
- Has the accused tendered an affidavit on appeal explaining why the plea is invalid and why the underlying conviction should be set aside as a miscarriage of justice?
- How much time passed between the entry of the plea and the accused's first assertion that the plea is invalid? Has any explanation been given for delay in challenging the validity of the plea?

[26] In addition to the above noted factors, it has also been held that an accused's prior experience in the court system is one factor to be weighed with respect to the validity of the accused's plea (*T. (R.).* at paras. 36 and 54; and *Mosher* at para. 35).

[27] The Court in *Mosher* points out at para. 37 that "the presence of legal representation stands as a significant quality control mechanism to ensure a guilty plea is valid".

[28] I agree with the Crown that Mr. Janz' plea was both unequivocal and voluntary. In terms of voluntariness, although Mr. Janz had consumed medication before his court appearance, a review of the record reveals that he responded appropriately to questions posed by the plea inquiry judge.

[29] Turning to the issue of whether the plea was fully informed, I note that the judge accepting the plea conducted a comprehensive plea inquiry. At the same time, I accept that Mr. Janz did not believe that the circumstances in which he became intoxicated were relevant to the issue of plea, but instead believed that he could raise that issue at the time of sentencing.

[30] The factors that militate in favour of Mr. Janz's application are that:

- he was self-represented at the time of entering the guilty plea;
- he was a young adult of 21 years of age;
- he appears, based on the record, to be unfamiliar with the criminal justice system;
- he advised Ms. O'Brien two weeks after pleading guilty that he should not have done so; and
- he indicated his intention to start the process of retaining counsel on that day according to the record of proceedings.

[31] Additionally, and importantly, as noted above, I accept Mr. Janz's evidence that he did not mean to admit an essential element of the offence, specifically, that he consumed an intoxicating substance voluntarily.

[32] The Crown contends that the defence of involuntary intoxication has no merit. In *Alec*, the Court of Appeal noted that although the availability of a defence may be an important factor to be considered in an application to withdraw a guilty plea, the

essential question remains whether the plea was informed, voluntary, and unequivocal (see para. 83).

[33] As the Crown properly points out, Mr. Janz may have some challenges in mounting his defence, however, I am unable to determine with the information before me that it is without merit. Therefore, I find that the guilty plea is uninformed because there is a viable defence that Mr. Janz erroneously understood, when entering his guilty plea, to be a mitigating factor on sentencing.

[34] Additionally, the Crown asserts that Mr. Janz must establish that there has been a miscarriage of justice before the Court should permit his guilty plea to be set aside. In *R. v. Meers* (1991), 64 C.C.C. (3d) 221 (B.C.C.A.), the Court found that the "valid grounds" inquiry is "case-specific and sufficiently flexible to take account of the almost infinite range of circumstances that might be said to have contributed to a miscarriage of justice". The Supreme Court of Canada has stated that the essential question to ask when considering whether an irregularity rises to the level of a miscarriage of justice is whether the irregularity renders the trial unfair or creates an appearance of unfairness (*R. v. Khan*, 2001 SCC 86 at para. 69; and *R. v. Davey*, 2012 SCC 75 at para. 50).

[35] In the unusual circumstances of this matter, I find that Mr. Janz's guilty plea was not fully informed, as he did not understand that an essential element of the offence was the voluntary consumption of a drug. I am satisfied that had he known this, he would not have pleaded guilty. In all the circumstances, this situation creates an appearance of unfairness that should be remedied.

[36] In the result, I find that Mr. Janz has discharged his onus of establishing that the plea is invalid.

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CHISHOLM C.J.T.C.