

COURT OF APPEAL OF YUKON

Citation: *R. v. Penner*,
2023 YKCA 3

Date: 20230525
Docket: 19-YU852

Between:

Rex

Respondent

And

Edward James Penner

Appellant

Before: The Honourable Chief Justice Bauman
The Honourable Mr. Justice Frankel
The Honourable Madam Justice Charlesworth

On appeal from: An order of the Supreme Court of Yukon, dated
September 19, 2019 (*R. v. Penner*, Whitehorse Docket 18-01502).

Counsel for the Respondent: N. Sinclair

Appearing as *Amicus Curiae*: D.A. McWhinnie

Place and Date of Hearing: Whitehorse, Yukon
May 10, 2023

Place and Date of Judgment
with Reasons to Follow: Whitehorse, Yukon
May 10, 2023

Date and Place of Written Reasons: Vancouver, British Columbia
May 25, 2023

Written Reasons of the Court:

Summary:

The appellant was convicted of first-degree murder in September 2019 and filed a notice of appeal. In April 2022, the Deputy Registrar referred the matter of the appellant's failure to diligently pursue his appeal to the Court. The Court ordered the appointment of amicus curiae to review the merits of the appeal. The appellant refused to attend a subsequent hearing held to consider amicus's report and next steps in the appeal. The Crown sought an order dismissing the appeal for want of prosecution. Held: Application granted. Since filing his notice of appeal, the appellant has discharged counsel appointed by the Yukon Legal Services Society, failed to retain new counsel, refused to attend all but one case-management hearing, and twice refused to appear before the Court. He bears responsibility for advancing his appeal and his persistent refusal to accept assistance has brought the matter to a standstill. As there is no realistic possibility he will take steps to prosecute his appeal, it is dismissed for want of prosecution.

Reasons for Judgment of the Court:**Introduction**

[1] Edward Richard Penner was convicted of first-degree murder. He filed a notice of appeal and obtained counsel through the Yukon Legal Services Society ("LSS"). However, he discharged that counsel before they could file a factum. Since then, there have been a number of case-management hearings before this Court's Deputy Registrar. With one exception, Mr. Penner refused to appear at those hearings. Because Mr. Penner failed to diligently pursue his appeal, the matter was referred to the Court. When Mr. Penner refused to appear before the Court it appointed *amicus curiae* to review the merits of the appeal. Following the receipt of *amicus's* report, another hearing before the Court was scheduled. When Mr. Penner again refused to appear the Crown sought an order dismissing the appeal for want of prosecution. We granted that application with reasons to follow. These are those reasons.

Background

[2] Mr. Penner was charged with having committed first-degree murder in June 2017. His trial took place during the late summer of 2019. He was represented by counsel. On September 19, 2019, a jury found Mr. Penner guilty; he was sentenced

that day to life imprisonment with no parole eligibility for 25 years. On October 17, 2019, Mr. Penner, acting on his own behalf, filed a notice of appeal.

[3] The LSS agreed to fund Mr. Penner's appeal and appointed Vincent Larochelle to act for him. Mr. Larochelle obtained appeal books and transcripts. However, Mr. Penner discharged Mr. Larochelle before Mr. Larochelle was able to file the factum he had written.

[4] Because nothing had been done to advance the appeal following the filing of the appeal books and transcripts, this Court's Deputy Registrar convened a case-management hearing on March 8, 2022. Mr. Larochelle appeared, along with Noel Sinclair (Crown counsel), and Lynn MacDiarmid (Executive Director of the LSS). Arrangements were made for Mr. Penner to attend by videoconference, but he refused to participate.

[5] Mr. Larochelle indicated he had prepared a factum subject to Mr. Penner's approval. It had not been filed because Mr. Penner had discharged him. Mr. Larochelle further indicated he had offered to assist Mr. Penner in transitioning to other counsel. Ms. MacDiarmid stated the LSS was open to appointing new counsel for Mr. Penner, but he had indicated in January 2022 that he did not want legal aid counsel and wished to retain counsel on his own.

[6] In response to a question from Mr. Sinclair, the Deputy Registrar stated he was not yet prepared to refer the appeal to the Court for possible dismissal under Rule 13(3) of the *Yukon Territory Court of Appeal Criminal Appeal Rules, 1993*, which states:

Where the registrar considers that the appellant has failed to diligently pursue the appeal or has failed to comply with the Rules, he may refer the matter to the court or a justice.

[7] The hearing ended with the Deputy Registrar stating he would arrange for a letter to be sent to Mr. Penner. The next case-management hearing was set for March 31, 2022.

[8] Later that day, the Deputy Registrar sent a letter to Mr. Penner in which he indicated that:

- a case-management hearing had been held;
- Mr. Larochelle had indicated he was no longer able to act for Mr. Penner;
- the LSS might be willing to appoint new counsel;
- Mr. Penner had the option of hiring his own lawyer or representing himself;
- the Court needed to know how (or whether) Mr. Penner wanted to continue with his appeal;
- if Mr. Penner wished to continue with this appeal, then either he or his lawyer must come to the next case-management hearing;
- Mr. Penner should contact the Court and/or LSS and tell them what he would like to do (contact information was provided); and
- if Mr. Penner or a lawyer acting on his behalf did not attend and indicate how Mr. Penner wished to proceed, the appeal might eventually be dismissed.

[9] Mr. Penner appeared at the March 31, 2022 case-management hearing by videoconference. Mr. Sinclair and Ms. MacDiarmid also appeared. Mr. Penner advised the Deputy Registrar he did not wish to use legal aid counsel and was in the process of retaining counsel himself. The Deputy Registrar told Mr. Penner that if, for whatever reason, he did not retain counsel, then he should contact the LSS. To give Mr. Penner time to retain counsel, the next case-management hearing was set for April 28, 2022.

[10] Mr. Penner refused to appear at the April 28, 2022 case-management hearing; Mr. Sinclair and Ms. MacDiarmid did appear. The Deputy Registrar stated that given the history of the matter he would be making a referral under Rule 13(3).

[11] On May 2, 2022, this Court's Registrar sent a letter to Mr. Penner advising him his appeal had been referred to the Court under Rule 13(3) and that he was required to appear, by videoconference, on May 16, 2022. Mr. Penner was told the Court would be considering whether to dismiss his appeal.

[12] Mr. Penner refused to appear on May 16, 2022. Mr. Sinclair applied to have the appeal dismissed for want of prosecution. The Court put the matter over to the following morning to consider what the next steps should be.

[13] On May 17, 2022, in reasons indexed as 2022 YTCA 4, the Court determined that it was not yet appropriate to dismiss Mr. Penner's appeal and ordered the appointment of an *amicus curiae* for the purpose of providing submissions on the merits of the appeal. The Rule 13(3) reference was adjourned to await *amicus*'s report. The formal order entered with respect to the appointment of *amicus* assigned its management to the LSS.

[14] The LSS appointed David A. McWhinnie to serve as *amicus*. He provided his report on March 3, 2023. In it, he identified three potential grounds of appeal:

1. Whether the trial judge erred in admitting as evidence a recorded police statement of a deceased witness.
2. Whether the trial judge erred in concluding the probative value of otherwise inadmissible 'discreditable conduct' evidence outweighed its prejudice in admitting it.
3. Whether the trial judge's failure to relate the pertinent evidence to his charge on the element of 'planning and deliberation' in non-direction amounting to misdirection.

Mr. McWhinnie considers the third ground to be the strongest.

[15] On March 23, 2023, legal counsel, acting on behalf of the Deputy Registrar, wrote to Mr. Penner enclosing Mr. McWhinnie's report. The letter advised Mr. Penner that the Court would be holding a hearing to consider next steps in his appeal and that it was in his interest to attend. The letter referred to the possibility that the appeal could be dismissed. The letter and Mr. McWhinnie's report were emailed to the federal penitentiary in which Mr. Penner was then incarcerated. The

following day, a Correctional Service of Canada officer advised the registry that Mr. Penner had refused to view the documents.

[16] On April 5, 2023, the registry sent a letter to Mr. Penner to advise him a hearing would be held on May 10, 2023, and that arrangements would be made for him to appear by videoconference.

[17] Mr. Penner refused to appear on May 10, 2023; Mr. Sinclair and Mr. McWhinnie did appear. Mr. Sinclair asked that the appeal be dismissed for want of prosecution on the basis that Mr. Penner had shown a total lack of interest in moving it forward. Mr. Sinclair described the grounds of appeal Mr. McWhinnie had identified as not particularly strong and the Crown's case with respect to first-degree murder as "overwhelming". He noted there was no evidence Mr. Penner was unfit to make decisions with respect to the appeal. Last, referring to the time that had passed and the reliability and availability of witnesses, he submitted the Crown would be prejudiced if the appeal were allowed to proceed and a new trial ordered years after the events in issue.

Analysis

[18] As a starting point, and without assessing the merits, we accept that "arguable" grounds of appeal exist. Indeed, this would have been our view even in the absence of Mr. McWhinnie's report, in light of the fact the LSS agreed to fund the appeal and Mr. Larochelle had prepared a factum. It may be that the grounds Mr. Larochelle intended to advance are different from those identified by Mr. McWhinnie, but that does not matter. What does matter is that Mr. Penner has refused to advance his appeal and to participate in the significant efforts that have been made to assist him in that regard.

[19] This is Mr. Penner's appeal. He bears responsibility for advancing it, and he alone controls aspects of the process. It was his decision to discharge Mr. Larochelle, not to reengage with the LSS, and not to appear before the Deputy Registrar and the Court.

[20] As Mr. Sinclair pointed out, we know nothing about why Mr. Penner is refusing to participate. More particularly, there is nothing to indicate he is unable to understand the nature of these proceedings nor the consequences of his decisions, even if the ones he does make appear not to be in his best interest.

[21] The purpose of case-management is to assist in moving an appeal forward. However, when it becomes apparent that an appellant is either unable or unwilling to bring their appeal on for hearing, the usual result is an order dismissing the appeal for want of prosecution: see e.g., *R. v. McDiarmid*, 2017 YKCA 2; *R. v. James*, 2022 YKCA 5. This is so, even when what is sought to be appealed is a conviction for murder: *R. v. Boyd*, 2004 BCCA 646.

[22] Approximately three and one-half years have now passed since Mr. Penner filed his notice of appeal. His persistent refusal to accept the assistance that has been made available to him has brought the matter to a standstill. In light of what has transpired, we are satisfied there is no realistic possibility he will take steps in the future to prosecute his appeal. Accordingly, it is time to bring that appeal to an end, by dismissing it for want of prosecution.

Concluding Comment

[23] For Mr. Penner's benefit, we wish to mention that an order dismissing an appeal for want of prosecution is not an absolute bar to the appeal being heard. As such a dismissal does not engage the merits of the appeal, it is open to an appellant to apply to reopen/reinstate the appeal. This occurred in *R. v. T.L.C.*, 2012 BCCA 131, 285 C.C.C. (3d) 486, a case in which a conviction appeal that had been dismissed for want of prosecution was reinstated and allowed. As discussed in *T.L.C.*, the overarching factor on an application to reinstate is the interests of justice. Making that determination requires consideration of such matters as:

- (a) the length of delay between the dismissal and the application for reinstatement, and the adequacy of the explanation offered for that delay;
- (b) whether the appellant contributed to the delay;

- (c) whether the appellant had a *bona fide* intention to pursue the appeal throughout the proceedings;
- (d) whether the initial order was made in error, or the court was operating under some misunderstanding of the material facts;
- (e) the effect reinstatement would have on public confidence in the administration of justice;
- (f) the seriousness of the charges; and
- (g) the merit of the appeal.

“The Honourable Chief Justice Bauman”

“The Honourable Mr. Justice Frankel”

“The Honourable Madam Justice Charlesworth”