COURT OF APPEAL OF YUKON

Citation: *R. v. Reeves*,
2024 YKCA 3

Date: 20240216
Docket: 23-YU908

Between:

Rex

Respondent

And

John Michael Joseph Reeves

Applicant

Before: The Honourable Mr. Justice Willcock
(In Chambers)

On appeal from: An order of the Supreme Court of Yukon, dated November 10, 2023 (*R. v. Reeves*, 2023 YKSC 61, Whitehorse Docket 22-AP014).

Oral Reasons for Judgment

Counsel for the Applicant:	A. Steele
Counsel for the Respondent:	L. Lane
Place and Date of Hearing:	Whitehorse, Yukon February 16, 2024
Place and Date of Judgment:	Whitehorse, Yukon February 16, 2024

Summary:

This is an application for leave to appeal an order dismissing a summary conviction appeal. The applicant, who was convicted of several offences, brought a "Jordan" application in Territorial Court. That application was dismissed, as was a summary conviction appeal. The applicant contends the summary conviction appeal judge erred in law in dismissing his appeal. Held: Application dismissed. Leave to appeal from an order made by a summary conviction appeal judge is granted sparingly. The issues of law identified by the applicant have insufficient merit to warrant the granting of leave.

Introduction

[1] **WILLCOCK J.A.:** This is an application for leave to appeal from an order dismissing a summary conviction appeal to the Supreme Court of Yukon pronounced November 10, 2023.

[2] In December 2020, the applicant, Mr. Reeves, was charged with driving with a blood alcohol concentration exceeding 0.08%; driving while prohibited; and breaching the terms of a release order, contrary to ss. 320.14(1)(b), 320.18, and 145(5)(a) of the *Criminal Code*, R.S.C., 1985, c. C-46.

[3] On July 8, 2022, he was convicted on all charges in the Territorial Court. He was sentenced on January 20, 2023. On the same day, the judge dismissed Mr. Reeves' application for a stay of proceedings founded upon an allegation of delay that exceeded that described as permissible in *R. v. Jordan*, 2016 SCC 27 (the "*Jordan* application"). Reasons for that judgment are indexed at 2023 YKTC 7.

[4] Mr. Reeves brought a summary conviction appeal in the Supreme Court of Yukon on three grounds, one of which was that the trial judge had erred in denying the *Jordan* application. For reasons indexed as 2023 YKSC 61, the summary conviction appeal judge, Justice Wenckebach, dismissed the appeal.

[5] Mr. Reeves now seeks leave to appeal to this Court on two grounds, both of which relate to the *Jordan* application. The questions the applicant seeks to address on appeal are: (1) whether the summary conviction appeal judge erred by applying an incorrect standard of review for allocation of a *Jordan* delay; and (2) whether the

summary conviction appeal judge erred by upholding the trial judge's decision on the *Jordan* application.

[6] These description of the questions of law the applicant seeks to address on appeal are not particularly helpful. The first ground does not particularize the error of law alleged and the second amounts to no more than saying that the judge erred in law in some fashion. Helpfully, however, counsel have amplified upon those descriptions of the grounds of appeal in their written material and oral submissions.

Background

[7] The relevant background is comprehensively set out in the trial judge's reasons for judgment in respect to the *Jordan* application and the subsequent decision of the summary conviction appeal judge.

[8] At the commencement of the trial, on April 7, 2022, the Crown sought to introduce into evidence a "Certificate of Qualified Technician" and a "Designation of Qualified Technician". Defence counsel challenged the admissibility of the certificate on the ground the technician who collected the samples was not a "qualified technician", one designated as such pursuant to s. 320.4 of the *Criminal Code*:

> 320.4 The Attorney General may designate
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> (a) a person as qualified, for the purposes of this Part, to operate an approved instrument;
>
> (b) a person or class of persons as qualified, for the purposes of this Part,
>
> (i) to take samples of blood, or
>
> (ii) to analyze samples of bodily substances; and
>
> (c) a person or class of persons as qualified, for the purposes of this Part, to certify that an alcohol standard is suitable for use with an approved instrument.

[9] In response, the trial judge opened a *voir dire*. At the conclusion of the *voir dire*, the Crown sought an adjournment to research Mr. Reeves' evidentiary challenge. The trial judge also asked defence counsel to provide written submissions on the point. The proceedings were therefore adjourned. At the time of the adjournment, the Crown had not yet closed its case.

[10] The Crown subsequently brought an application to re-open the *voir dire*, which was heard on April 29, 2022. The judge ordered that it be re-opened, and the trial was then set to continue on June 13, 2022.

[11] At some point (although the timing is not entirely clear on the record), and apparently as a result of the trial judge's request for written submissions and consideration of the position taken by the Crown, defence counsel withdrew its challenge to the officer's designation.

[12] Mr. Reeves initially filed a *Jordan* application on either May 24 or May 25, 2022, but did not pursue that application until December 8, 2022. The trial judge then ordered written submissions and evidence. After consideration of the submissions, the application was dismissed on January 20, 2023.

[13] On the *Jordan* application for a stay, the trial judge noted the presumptive ceiling for a trial in Provincial or Territorial Court is 18 months.

[14] He considered the delay that had elapsed in the prosecution ran from the laying of charges on December 8, 2020, to the sentencing on January 20, 2023, a total, in his calculation, of 25 months and 12 days.

[15] He attributed 14 months and six days of the delay to the defence, calculated as follows:

- Four months and 23 days: delay in resetting a fixed trial date that was implicitly waived by the defence, or at least acquiesced to, on June 8, 2021;
- Two months and seven days: delay between April 7 or 8 and June 13, 2022, occasioned by the challenge to the technician's designation, which is principally the subject of the appeal that is intended to be pursued by the applicant;
- 25 days: delay from June 13, 2022 to July 8, 2022, when Mr. Reeves had COVID;

- Three months and 12 days: delay after conviction for the preparation of a pre-sentence report;

- 46 days: delay from October 20, 2022, when Mr. Reeves did not appear in court for sentencing, to the rescheduled sentencing date of December 8, 2022; and

- 43 days: delay resulting from an adjournment from December 8, 2022, to January 30, 2023, to deal with the *Jordan* application.

[16] Considering all the circumstances of the case, the judge concluded there had been no excessive delay in the matter, and dismissed the *Jordan* application:

> [22] On step four of the *Jordan* analysis, I find that the remaining net delay is therefore 11 months and six days resulting from an overall delay of 25 months and 12 days, less the 14 months and six days of delay attributable to the defence. This, of course, is well below the 18-month threshold set out in *Jordan*.

[17] In his reasons, the judge addressed the delay attributable to the challenge to the qualification of the technician as follows:

> [12] A further defence delay arose as a result of an application without notice brought on April 7, 2022, challenging the authority of an official to designate an officer with certain powers. That application was ultimately abandoned by the defence and resulted in a delay of two months and seven days between April 7 and June 13, 2022. That delay is solely attributable to the consequences of defence actions in bringing an application that was ultimately abandoned when written submissions were sought.
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> [13] I find that counsel's strategy in advancing this argument as a defence appears to have been inconsistent with the principles of *Jordan*, that counsel moved to actively advance the client's rights within a reasonable time and collaborate with Crown to use court time efficiently. In these circumstances, the defence assumed the burden of any delay associated with their application.
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> [Emphasis added.]

[18] On the summary conviction appeal, it was common ground that the trial judge had erred in calculating the relevant time elapsed for purposes of the *Jordan* analysis by using the date of sentencing as the end date rather than the date of conviction.

[19] The summary conviction judge removed the period between conviction and sentencing when calculating the total delay and from her calculation of the delay attributable solely to the defence.

[20] There was no dispute that the delay of 25 days in mid-2022, when Mr. Reeves had COVID, was attributable to the defence. After making allowance for that delay alone, the summary conviction appeal judge determined that the *Jordan* limit was exceeded in this case by only six days.

[21] The issue was therefore reduced to whether the trial judge erred in his treatment of two periods for which defence was held to bear responsibility: the delay of four months and 23 days occasioned by resetting the June 2021 fixed trial date, held to have been implicitly waived or at least acquiesced to by the defence; and the delay of two months and seven days between April 8 and June 13, 2022, occasioned by the challenge to the technician's designation.

[22] The summary conviction appeal judge dealt in substance with only the latter question. Finding no error in the attribution or allocation of the delay occasioned by the challenge to the technician's designation to the defence, she held:

> [46] As noted above, the period of delay for Mr. Reeves' charges to reach trial extended over the *Jordan* threshold by 6 days. The delay between April 8-June 13 was over 60 days. Subtracting this period from the total delay brings the delay to less than 18 months. As the delay is below the *Jordan* threshold, I do not need to consider whether the trial judge erred in deciding that Mr. Reeves waived the delay period from June 17-November 9, 2021. The trial judge's decision on the s. 11(b) *Charter* application is upheld.

[23] She thus concluded the trial judge had made no error in denying the *Jordan* application, upheld the trial judge's decision in that respect, and dismissed the appeal: at paras. 46–47.

Legal Framework

[24] The sole issue on this application is whether leave to appeal from a decision of the summary conviction appeal judge on the specified grounds should be granted. The jurisdictional basis for the proposed appeal is s. 839(1) of the *Criminal Code*.

The test to be applied in granting leave was summarized in *R. v. Winfield*, 2009 YKCA 9, where the Court held:

> [13] To obtain leave to appeal from the decision of a summary conviction appeal court, the applicant must establish that (a) the ground of appeal involves a question of law alone, (b) the issue is one of importance, and (c) there is sufficient merit in the proposed appeal that it has a reasonable possibility of success. The overriding consideration in the exercise of the discretion to grant or refuse leave is the interests of justice: *R. v. Cai*, 2008 BCCA 332, 258 B.C.A.C. 235 at para. 26 (Chambers); *R. v. Gill*, 2008 BCCA 259 at para. 3 (Chambers).
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> [Emphasis added.]

[25] Leave to appeal from an order made by a summary conviction appeal judge is granted "sparingly" under s. 839(1) of the *Criminal Code*, as this Court held in *R. v. Smith*, 2023 YKCA 10 at para. 12; and the British Columbia Court of Appeal held in *R. v. University of British Columbia*, 2021 BCCA 188 at para. 17.

Analysis

Did the summary conviction appeal judge err by applying an incorrect standard of review for allocation of *Jordan* delay?

[26] Mr. Reeves argues the summary conviction appeal judge erred in her consideration of whether the trial judge had erred in allocating the period of delay between April 7, 2022, and June 13, 2022, to the defence. He submits she applied an incorrect standard of review.

[27] Mr. Reeves points to para. 44 of Justice Wenckebach's decision, where she wrote that a trial judge's "decision about whether defence counsel's actions were legitimate are findings of fact and entitled to considerable deference", and noted Mr. Reeves' appellate counsel had not "pointed to any errors in the trial judge's decision", but had instead sought to have her "re-examine the issue", something she concluded was "not [her] role".

[28] These passages, Mr. Reeves says, make it clear that Justice Wenckebach "adopted a standard of review of reasonableness and not correctness".

[29] While Mr. Reeves employs the term of "characterization of delay" in his argument, it is clear that he is referring to "allocation of delay". In *R. v. Virk*, 2021 BCCA 58, Justice Fenlon observed that allocation of delay is also commonly referred to as "characterization of delay". For clarity, she preferred to use the term "allocation" in this context of assigning delay to a particular category under the *Jordan* framework. Mr. Reeves argues the standard of review for the allocation of delay is correctness, relying upon *R. v. Boulanger*, 2022 SCC 2; and *R. v. Jurkus*, 2018 ONCA 489.

[30] In *Virk*, Justice Fenlon, writing for a five-judge division of the British Columbia Court of Appeal (constituted for the purpose of clarifying the law with respect to standards of review in *Jordan* cases), distinguished attribution of delay from allocation of delay. In attributing delay, the judge is making a finding of fact as to who or what caused the delay, including by making discretionary decisions such as whether the conduct was legitimate. By contrast, allocation involves the application of legal principles to the facts concerning the cause of delay, in order to categorize the period of delay within the *Jordan* framework. She wrote:

> [24] Underlying findings of fact and attribution of responsibility are reviewed on a deferential standard of palpable and overriding error. Discretionary decisions are reviewed on a deferential standard and will be interfered with only if there has been a misdirection in law, a palpable or overriding error of fact, or a clearly wrong decision that resulted in an injustice: [citations omitted]. The allocation of periods of delay is reviewed on a standard of correctness. The ultimate decision of a judge to impose a judicial stay for unreasonable delay is a question of law and is likewise subject to a correctness standard: [citations omitted].
>
> [Emphasis added.]

[31] Attribution will often effectively determine allocation, but that is not always so, and different standards of review apply to each step: *Virk* at paras. 13, 23.

[32] Trial judges are uniquely positioned to gauge the legitimacy of defence action, as the Court held in *Jordan* at para. 65. The determination of whether defence conduct is legitimate is highly discretionary and is owed significant appellant deference, as the Court held in *R. v. Cody*, 2017 SCC 31 at para. 31, a passage

cited by the Crown on this application. For these reasons, the Court in *R. v. Pipping*, 2020 BCCA 104, applied a deferential standard of review to the judge's finding that the adjournment applications in that case were unnecessary and therefore not legitimate defence conduct. While this attribution finding, which was afforded deference, effectively determined allocation, this did not mean that allocation had not been reviewed on a correctness standard: see *Virk* at para. 16. The two steps may be closely linked and may not even expressly be distinguished in a trial judge's analysis. Nevertheless, they are separate steps to which separate standards of review attach.

[33] The summary conviction judge was alive to the importance of the standard of review and she was aware of the governing principles. She referred to these principles correctly at paras. 29–31 of her reasons for judgment; this reference included addressing the law as considered in *Virk*, which itself addresses a line of authorities cited by the applicant, including the decision in *Jurkus*. I am not persuaded that this proposed ground of appeal, which asserts that she nonetheless applied these principles incorrectly, has any reasonable possibility of success.

[34] Justice Wenckebach's reasoning must be understood in the context of the arguments to which she was responding. In the passage now impugned by the appellant (para. 44), she was responding to an argument that, in advancing the objection to the qualifications of the technician, defence counsel was acting "legitimately" because counsel was simply adhering to their ethical duties.

[35] The trial judge did not use the terms "legitimate" or "illegitimate" to describe the conduct of defence counsel in respect of the objection. He found that "counsel's strategy in advancing this argument as a defence appears to have been inconsistent with the principles of *Jordan*", and determined that "[i]n these circumstances, the defence assumed the burden of any delay associated with their application": at para. 13 (emphasis added).

[36] Justice Wenckebach, correctly in my view, appears to have interpreted the trial judge to have found, as a matter of attribution, that defence counsel's strategy in

advancing the objection was illegitimate, and to have held that therefore, as a matter of allocation, the resulting delay should be characterized as defence delay. And she appears to have understood Mr. Reeves' argument, which was expressly premised on the notion that defence counsel's actions were "legitimate", to have been a challenge to the trial judge's finding on attribution.

Did the summary appeal judge err by upholding the trial judge's decision on the s. 11(b) application?

[37] The second proposed ground of the appeal, as elaborated upon in written and oral submissions, impugns the trial judge's finding that the challenge to the technician's designation was a strategic decision inconsistent with the principles of *Jordan*, and, specifically, inconsistent with counsel's obligation to actively advance the client's rights within a reasonable time and to collaborate with Crown to use court time efficiently.

[38] It is suggested that the trial judge erroneously placed weight upon what he appears to have considered to be an application by defence counsel, and erroneously held that it was an obligation of defence counsel to give the Crown notice of their intention to object to a technician's designation.

[39] In my opinion, the trial judge's reasons support the conclusion that he attributed the delay arising from this strategic decision to the fact that the objection to the technician's designation achieved only delay. The fact that the objection was made at the outset of trial, without notice, necessitated the adjournment and was inconsistent with the efficient use of court time. The fact the objection was withdrawn led to the conclusion that the objection was strategic and served no legitimate purpose.

[40] In my view, the trial judge did not impose any specific notice requirement upon defence counsel, and the attribution was not founded upon any misapprehension with respect to whether an application was in fact brought, or with respect to whether there was an obligation on the part of counsel to give notice to the Crown of their intention to object to the qualification of the technician. I see no

reasonable prospect that a division of this Court would accede to this ground of appeal.

Disposition

[41] In my opinion, the issues identified by the applicant have insufficient merit to warrant the granting of leave to appeal and, for that reason, I dismiss the application for leave.

"The Honourable Mr. Justice P.M. Willcock"