

Citation: *R. v. Buyck*, 2015 YKTC 56

Date: 20151202
Docket: 13-00373
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Chisholm

REGINA

v.

ROY KENNETH BUYCK

Appearances:
Jennifer Grandy
Roy Buyck

Counsel for the Crown
Appearing on his own behalf

RULING ON APPLICATION

[1] CHISHOLM J. (Oral): Mr. Roy Buyck entered a guilty plea to the offence of sexual assault on June 5, 2014. He makes application to withdraw that plea of guilt. He argues that the plea was not voluntary, fully informed, or unequivocal. Mr. Buyck submits that he understood he would have the ability to put forward his version of events at the time of sentencing. He also argues that the guilty plea was conditional on his being accepted into a circle sentencing process.

[2] In opposing the application, the Crown argues that the evidence before the Court clearly demonstrates that the criteria for a valid guilty plea are present. The Crown points to the fact that Mr. Buyck was represented by counsel at the time he entered the guilty plea.

[3] The sexual assault allegation dates to August 16, 2013.

[4] Mr. Buyck first appeared in court on September 25, 2013. The Crown proceeded by indictment.

[5] On October 23, 2013, Mr. Buyck, with the benefit of counsel, elected to be tried by judge and jury. He waived his right to a preliminary inquiry. The matter was scheduled for trial from April 23-25, 2014.

[6] A number of weeks prior to the scheduled trial dates, the Court permitted Mr. Buyck's first defence counsel to be removed as counsel of record.

[7] Mr. Buyck's second defence counsel, Ms. Atkinson, first appeared in court with him on May 13, 2014.

[8] On June 5, 2014, Mr. Buyck re-elected, with the Crown's consent, to be tried by the Territorial Court. Mr. Buyck pleaded guilty, by way of counsel, to the sexual assault allegation. He appeared by telephone from his home community of Mayo at the time the guilty plea was entered. The Court ordered the preparation of a Pre-Sentence Report. Defence counsel indicated that an attempt would be made to have a *Gladue* report prepared.

[9] The sentencing was subsequently adjourned to September 18, 2014.

[10] Defence counsel sought and obtained a few adjournments of the sentencing in order that a *Gladue* report and a non-court ordered neuropsychological assessment report could be completed.

[11] At the November 20, 2014 appearance, when another defence adjournment was being requested in order that reports could be finalized, Mr. Buyck's counsel mentioned that the defence was looking into community involvement by way of a circle sentencing. The Crown informed the Court that the victim was not interested in participating in a circle sentencing. Noting the case age of the file, the Court wondered whether a circle sentence was absolutely necessary, considering the numerous reports which would be available to the Court. No formal application for a circle sentencing was made to the Court at that time or at any subsequent appearance.

[12] On December 12, 2014, the Court allowed Ms. Atkinson to be removed as counsel of record.

[13] Ms. MacDiarmid became Mr. Buyck's third lawyer on this file on March 20, 2015.

[14] Shortly thereafter, an application to withdraw his not guilty plea on the sexual assault charge was filed. Mr. Buyck filed a short affidavit in support of the application. The application was set down for a hearing.

[15] After Mr. Buyck waived solicitor-client privilege, his former counsel, Ms. Atkinson, filed a detailed affidavit on May 26, 2015.

[16] On the same date, Mr. Buyck indicated to the Court, via counsel, that he was prepared to have the guilty plea stand. In effect, he abandoned his application to withdraw his guilty plea. Mr. Buyck advised the Court, through counsel, that the essential elements of the offence were not an issue. Mr. Buyck wished to add some

information to the draft Agreed Statement of Facts. The matter was subsequently adjourned for a sentencing hearing.

[17] The sentencing hearing was further adjourned, at the request of Mr. Buyck, from August to October and from October to November 19, 2015.

[18] At the October 9, 2015 court appearance, counsel spoke to the likelihood of a *Gardiner* hearing.

[19] On November 19, 2015, Ms. MacDiarmid indicated that, at that time, she was applying to be removed as counsel of record. That application was granted on November 24, 2015.

[20] Mr. Buyck submits that he pleaded guilty on the condition that he could have a circle sentencing in order that he could present his version of the facts. He further submits that the guilty plea was not made voluntarily and that he did not completely appreciate the consequences of his plea. He submits that any sexual contact between him and the complainant was consensual.

[21] The Crown submits that Mr. Buyck has not met the burden he faces in an application of this nature. He was represented by counsel and he was aware of the consequences of entering a guilty plea. In the facts of this matter, there is no real possibility that his plea was involuntary, uninformed, or equivocal.

[22] The law in this area is clear. A guilty plea is a formal admission of guilt. (*R. v. R.T.* (1992), 10 O.R. (3d) 514 (CA) at para. 13 (QL))

[23] In order for an individual to succeed in an application to withdraw a guilty plea, he bears the onus of demonstrating that the plea was invalid. A valid guilty plea must be voluntary, unequivocal, and fully informed. (*R. v. R.T.*; *R. v. Wiebe*, 2012 BCCA 519; *R. v. Krzehlik*, 2015 ONCA 168; and *R. v. Moser*, 2002 CanLII 49649 (ONSC))

[24] A guilty plea is voluntary if it is a "conscious volitional decision" of the accused to plead guilty for reasons the accused views as appropriate. (*R. v. R.T.* at para.16 (QL))

[25] A guilty plea is unequivocal if the accused was not confused, the plea was intended and not qualified, and there was no uncertainty regarding the accused's acknowledgment of the essential legal elements of the offence. (*R. v. Moser* at para. 32)

[26] A guilty plea must not only be unequivocal but also unconditional. An example of an unconditional plea of guilt is found in the decision of *R. v. Kleinsteuber*, (1997) 90 B.C.A.C. 223, where the understanding between the Crown and defence was that the guilty plea was conditional on the Court accepting the joint submission. If it was not accepted by the Court, the Crown had agreed the plea could be withdrawn. The British Columbia Court of Appeal found that a "conditional plea" does not exist in Canadian criminal law. In those circumstances, the Court allowed the appellant to withdraw his guilty plea.

[27] A guilty plea is informed if the accused understands the nature of the charge, the legal effect of a guilty plea, and the consequences of such a plea. (*R. v. R.T.* at para. 14 (QL) and *R. v. Moser*, at para. 34)

[28] 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. (*R. v. R.T.* at para. 36 (QL) and *R. v. Moser* at para. 35)

[29] Before accepting a guilty plea, a court is not obligated to have a summary of the facts presented. It is sufficient that the accused understands the essential elements of the offence. (*R. v. Ross*, 2013 SKCA 45 at para. 29 and *R. v. Eizenga*, 2011 ONCA 113 at para. 47)

[30] The entry of a guilty plea by an accused who is represented by counsel is presumed to be a valid plea. (*R. v. Eastmond*, 2001 CanLII 7498 (ONCA) at para. 6)

[31] The Court in *R. v. Moser* 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.

[32] A court must be satisfied in cases of this nature that allowing a guilty plea to stand would not result in a miscarriage of justice. (*R. v. D.M.*, 2015 BCCA 115)

[33] Mr. Buyck initially sought to bring this matter to trial while represented by counsel. He decided to enter a guilty plea after retaining another lawyer. There is no evidence that he was pressured or coerced to plead guilty. There is no evidence he was under the influence of any drug or that his ability to make a decision was impaired by any mental disorder. The guilty plea was voluntary.

[34] In terms of whether the plea was equivocal, Mr. Buyck says he was confused about the process. He says he believed he could challenge the testimony of the

complainant. However, Mr. Buyck knew what a circle sentencing entailed, as he told the Court that he had already participated in such a sentencing. Having done so, he would have known that this process is restorative, as opposed to confrontational in nature.

[35] He is an experienced litigant in the criminal justice system. His criminal record commences in 1975 and his most recent conviction is in May 2015. He has been convicted of criminal offences on 35 occasions. He has admitted under oath at this hearing that he has had trials with respect to some of his previous criminal matters.

[36] I find that Mr. Buyck knew the difference between a trial and a sentencing, and was not confused in this regard.

[37] Having reviewed the record, Mr. Buyck displayed no indication that the plea was equivocal, nor has he presented any evidence during this application to convince me of this.

[38] Turning to the issue of whether the guilty plea was unconditional, Mr. Buyck agrees that it was his idea to plead guilty, but he says that he did so understanding that the matter would proceed to circle sentencing.

[39] When Mr. Buyck entered his guilty plea on this charge on June 5, 2014, he had already pleaded guilty and was awaiting sentencing on a drinking and driving offence. Both files were before the Court on June 5. It was clearly the intention at that point to proceed to sentencing on both files at the same time. His counsel stated on the record that there had been some discussions about a circle sentencing but that, based on the

fact the Crown was filing a notice of intention to seek greater punishment on the drinking and driving offence, there was no real need to consider that possible avenue.

[40] If Mr. Buyck had only been entering the guilty plea on the sexual assault matter on the understanding he would be sentenced in a circle sentencing format, it is very curious that he did not object to what his counsel was advising the Court on that date.

[41] It does appear that, at some later point, discussions were had with respect to a possible circle sentencing, but I find that Mr. Buyck did not enter his guilty plea to the sexual assault charge on the understanding there would be a circle sentencing. There is no indication that the Crown agreed to such an arrangement.

[42] If, indeed, Mr. Buyck had been intent on this type of sentencing, he would have surely instructed his third counsel to make this application to the Court after he abandoned his application to withdraw his guilty plea on May 26, 2015. No mention was made by his third counsel of applying for a circle sentencing. Mr. Buyck was clearly prepared between May and October 2015 to proceed to a sentencing hearing.

[43] Mr. Buyck's plea was unconditional.

[44] In terms of whether Mr. Buyck was fully informed when entering his guilty plea, his counsel at the time the guilty plea was entered has provided evidence that she reviewed the provisions of s. 606(1.1) of the *Criminal Code* with Mr. Buyck. She confirmed this in a December 12, 2014 letter to Mr. Buyck outlining to him this very point.

[45] Mr. Buyck's experience in the criminal justice system would undoubtedly have equipped him with the knowledge that pleading guilty meant that he would not be able to call evidence as to his innocence at a sentencing hearing.

[46] When questioned by the Crown as to his understanding of a guilty plea, he indicated at this hearing that he knew that he was admitting to having committed the offence.

[47] In all the circumstances, his bald assertion during this hearing of not understanding the process cannot be given any weight. I find that his guilty plea was fully informed.

[48] Finally, there has been no specific information proffered as to Mr. Buyck's defence to the charge. There is no suggestion that a miscarriage of justice would occur if the Court declined Mr. Buyck's application.

[49] As a result, I find that Mr. Buyck's guilty plea is valid. His application to set aside the guilty plea is dismissed.

CHISHOLM T.C.J.