

COURT OF APPEAL OF YUKON

Citation: *R. v. McDiarmid*,
2017 YKCA 2

Date: 20170518
Docket: 13-YU733
15-YU762

Between:

Regina

Respondent

And

Mark Lee McDiarmid

Appellant

Before: The Honourable Chief Justice Bauman
The Honourable Mr. Justice Donald
The Honourable Madam Justice Tulloch

On appeal from: Orders of the Supreme Court of Yukon, dated
May 3, 2013 (*R. v. McDiarmid*, Whitehorse Docket 12-01507); and
March 2, 2015 (*R. v. McDiarmid*, Whitehorse Docket 12-01513B)

Oral Reasons for Judgment

The Appellant appearing In Person:

Counsel for the Respondent:

N. Sinclair

Place and Date of Hearing:

Whitehorse, Yukon
May 18, 2017

Place and Date of Judgment:

Whitehorse, Yukon
May 18, 2017

Summary:

The Crown applies to dismiss Mr. McDiarmid's appeals for want of prosecution. Mr. McDiarmid has been unable to obtain the transcripts required to perfect his appeals despite numerous orders and directions from the case management judge to submit the materials necessary to pursue his appeals. Held: Applications allowed. Mr. McDiarmid has been afforded numerous opportunities to perfect his appeal, but has been unable to do so in the years since filing his notices of appeal. There is no reasonable prospect that Mr. McDiarmid will be able to prosecute his appeals within a reasonable period of time.

[1] **BAUMAN C.J.Y.C.A.:** The Crown applies to dismiss Mr. McDiarmid's appeal from conviction and sentence in appeal docket number 13-YU773 and his appeal from conviction in appeal docket number 15-YU762 for want of prosecution. This Court previously heard the Crown's applications in the May and November 2016 sittings. On 14 November 2016, the division adjourned the application to this week's sitting to provide Mr. McDiarmid with one "last chance" to secure the transcripts necessary to proceed with his appeals. The Crown again seeks to have Mr. McDiarmid's appeals dismissed pursuant to Rule 13 of the *Yukon Territory Court of Appeal Criminal Appeal Rules, 1993 (51/93-53)* (the "*Criminal Appeal Rules*").

[2] Mr. McDiarmid filed a notice of appeal in YU733 on 12 March 2014. He appeals against his conviction and sentence imposed on one count of dangerous driving (s. 249(1), *Criminal Code*, R.5.C. 1985, c. C-46) and one count of breach of undertaking (s. 145(5.1), *Criminal Code*). Justice Bennett neatly summarized the facts underlying these offences in her previous decision concerning Mr. McDiarmid's application for the appointment of counsel under s. 684 of the *Criminal Code* (indexed as 2015 YKCA 19):

[3] A jury convicted him of dangerous driving (s. 249(1)) and breach of an undertaking (s. 145(5.1)) under the *Criminal Code*, R.S.C. 1985, c. C-46. The undertaking was to have no contact with Mr. Britney. Mr. Britney parked on the road near the entrance to the McDiarmid family property and Mr. McDiarmid confronted him with a tire iron... The police were called.

[4] Cst. Nielsen arrived and parked his marked SUV in the middle of the roadway with his emergency lighting on... Mr. McDiarmid's truck was roughly 100 metres down the road and accelerated towards the police vehicle. Cst. Nielsen testified that he braced for impact and radioed another officer, saying "He's ramming me" twice... At the last moment before impact, Mr.

McDiarmid's truck veered past the right passenger side of the vehicle and became stuck in the snow bank...

[3] Mr. McDiarmid was sentenced to 4 months in jail on the dangerous driving count and 15 days in jail, consecutive, on the breach of undertaking. He also received a one-year driving prohibition.

[4] Mr. McDiarmid's second appeal (YU762) concerns his convictions for mischief; three counts of assault of a peace officer engaged in the execution of their duties; and one count of possession of a weapon for a dangerous purpose. The events underlying the appeal took place in October of 2011 and concern Mr. McDiarmid's response to RCMP officers' attempts to arrest him on an outstanding warrant. On 19 October 2011, a Sgt. Wallace initially confronted Mr. McDiarmid and he responded by using a sledgehammer to smash Sgt. Wallace's vehicle. The following day, six officers made a plan to arrest Mr. McDiarmid. The situation escalated quickly when Mr. McDiarmid threw a glass jar containing gasoline with a wick at the windshield of the police vehicle. He then rushed toward the officers holding a splitting maul above his head. The officers fired their service revolvers at him, and struck Mr. McDiarmid with three bullets. A jury convicted Mr. McDiarmid on 2 March 2015. He received a sentence of 40 months' imprisonment. He received 1.5:1 credit on the 41 months he spent in custody prior to sentencing, which left him with 21.5 months of unused pre-sentence custody. On 10 August 2015 he filed a notice of appeal against conviction.

I. NATURE OF MR. MCDIARMID'S APPEALS

[5] Mr. McDiarmid has filed lengthy notices of appeal in both matters, raising 32 grounds of appeal in the 2013 appeal and 89 grounds of appeal in the 2015 appeal. While he has yet to file a factum, he has submitted fairly comprehensive arguments on those grounds of appeal - a fact the Crown acknowledged in the hearing before the division in November of 2016.

[6] With respect to the 2013 appeal, Justice Bennett summarized the numerous grounds of appeal in Appendix "A" to her reasons indexed as 2015 YKCA 19. On his

conviction appeal, Justice Bennett found that Mr. McDiarmid advanced arguable grounds of appeal concerning the impeachment of a police witness, improper disclosure, certain lost evidence, and the judge's failure to instruct the jury on defences (at paras. 28-35). On the sentence appeal, she found that Mr. McDiarmid had raised arguable points on the fitness of his sentence, the involvement of his *amicus*, and his exclusion from the courtroom when he insisted on objecting to the appointment of the *amicus* (at paras. 36-42).

[7] As it relates to the 2015 appeal, Mr. McDiarmid advances 89 grounds of appeal that can broadly be grouped into the following categories: errors concerning the admission and exclusion of expert evidence; errors in the jury process that caused unfairness to Mr. McDiarmid; deficiencies in the jury charge; procedural errors that prejudiced his ability to present his defence; improper exclusion and misapprehension of relevant evidence; errors in dismissing his mistrial application; and new evidence that would have advanced the defence's theory of the case. As with Mr. McDiarmid's 2013 appeal, many of these grounds of appeal lack merit. However, it may well be the case that some of his procedural points are at least arguable.

[8] Indeed, today, apart from his formal notice of appeal, Mr. McDiarmid suggested that he would limit the grounds of appeal to six or seven grounds, but they still represent varying grounds of appeal from that particular trial.

[9] More important to the present applications is the procedural history of these appeals, and the numerous opportunities Mr. McDiarmid has been given to file the documents necessary to pursue his appeals.

II. PROCEDURAL HISTORY UNDERLYING THE PRESENT CROWN APPLICATIONS

[10] Mr. McDiarmid is a self-represented litigant. He has struggled to obtain the funds necessary to pay for the transcripts required to perfect his appeals. As I indicated earlier, he previously filed a s. 684 application, essentially seeking a lawyer

for the limited purpose of providing him with transcripts. Justice Bennett was prepared to grant him the s. 684 appointment, but not for the sole purpose of providing him with transcripts: 2015 YKCA 19 at paras. 42-52. To date, he has yet to provide the necessary transcripts. For the 2013 appeal, he has paid for one quarter of the transcripts for the two-week trial. He has not obtained any of the transcripts for the approximately six-and-a-half-week trial at issue in the 2015 appeal. He attributes much of his difficulty in obtaining the necessary funds to his time spent in custody.

[11] The procedural history of this matter can be summed up as follows: on numerous occasions Mr. McDiarmid has reiterated his intention to move forward, as he has done so today, by saying he will pay for the transcripts and then fails to carry through with his plans to pay for the transcripts. This Court has afforded him numerous opportunities to comply with its orders.

[12] This Court gave orders and directions to Mr. McDiarmid regarding the transcripts required to perfect both of his appeals on the following dates:

- a) 9 October 2015: Justice Bennett ordered that if Mr. McDiarmid is unable to pay for his transcripts within a reasonable time, both appeals will go before the Division in Whitehorse in May 2016 on an application to dismiss for want of prosecution.
- b) 3 December 2015: Justice Bennett set a further date for case management to permit Mr. McDiarmid to show his efforts to obtain transcripts after he indicated during the hearing that he had encountered financial and logistical difficulties in ordering his transcripts. He said he would pay \$1,000 the following week toward transcripts and anticipated being able to pay as much as \$1,000 per week over the coming months towards transcript orders.
- c) 20 January 2016: Justice Bennett directed Mr. McDiarmid to provide proof of ordering and paying a deposit for the transcripts at the 19 February 2016 case management conference, failing which the Crown

would be at liberty to apply to have the appeals dismissed for want of prosecution.

- d) 19 April 2016: Justice Bennett ordered that the transcripts of the court proceedings before Justice Gower be filed by 6 September 2016.
- e) 6 September 2016: Justice Bennett granted Mr. McDiarmid an extension to file the transcripts or prove they had been ordered by 4 October 2016.

[13] Mr. McDiarmid failed to file or order the transcripts by the October 2016 deadline. Accordingly, Justice Bennett referred the matter to a division of the court and the Crown renewed its application for an order dismissing the appeals for want of prosecution. A division of this Court heard the application on 14 November 2016. After hearing submissions from both the Crown and Mr. McDiarmid, the Court adjourned the application to the present sitting, holding:

We've had an opportunity to consider the Crown's application, and in light of Mr. McDiarmid's assertions with respect to his impaired ability to earn income and pay for the transcripts that have been ordered on many occasions by reason of his custodial status, we have agreed amongst ourselves that the appropriate disposition of this application is to adjourn it to the - adjourn the Crown's application to the next sitting week of this court, which is to be held between May 15 to 19, 2017.

Mr. McDiarmid, this means that you have about six months to secure the transcripts that are fundamentally necessary to proceed with your appeals, and you will understand that we are giving you a break here.

This is your probably last chance - in fact. I would say with certainty your last chance to obtain these transcripts and proceed with your appeals.

[Emphasis added.]

[14] On 20 December 2016, Justice Bennett ordered Mr. McDiarmid to file the transcripts, appeal books and factums for both appeals by 31 March 2017. She also directed that if he failed to do so the Crown would be at liberty to again apply to have the appeals dismissed in May of 2017. Mr. McDiarmid has again failed to comply with this order.

III. ANALYSIS

[15] The Crown renews its applications to dismiss the appeals for want of prosecution under Rule 13 of the *Criminal Appeal Rules*, relying on the same materials that it filed in connection with the November 2016 hearing of its application.

[16] Rule 13 of the *Criminal Appeal Rules* reads as follows:

13 (1) Where the appellant fails to

(a) diligently pursue his appeal, or

(b) comply with these Rules,

the respondent may apply to the court or, on an appeal where leave is required, to a justice, for an order that the appeal be dismissed.

(2) On an application under subrule (1) or a reference under subrule (3),

(a) the court may dismiss the appeal or make any other order it considers just; or

(b) where the appeal required leave and leave has not yet been granted, the court or a justice may dismiss the appeal or make any other order that the court or justice considers just.

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

(4) Where the registrar makes a reference under subrule (3),

(a) he shall serve the appellant and respondent with at least two days' notice of the hearing of the reference; and

(b) the grounds in paragraphs 17(3)(a) and (b) for not requiring service on an unrepresented appellant apply.

[17] It is clear that the several year delay in Mr. McDiarmid obtaining the transcripts and his inability to comply with directions and orders from this Court place him in breach of the *Criminal Appeal Rules*. The delay also supports a finding that he has failed to diligently pursue his appeal. The question for this division is the appropriate disposition under Rule 13(2).

[18] This case bears some resemblance to that in *R. v. Rutley*, 2014 YKCA 9 and 2015 YKCA 4, where the Court similarly considered and allowed a Crown application to dismiss Mr. Rutley's appeal for want of prosecution.

[19] Mr. McDiarmid has failed to provide any evidence of having ordered the remaining transcripts. In the 14 November 2016 ruling, Justice Kirkpatrick clearly warned Mr. McDiarmid that the approximately six-month period between the November 2016 and May 2017 sittings would be his last chance to obtain the transcripts. Mr. McDiarmid has not taken any further steps to obtain the transcripts necessary to perfect his appeals. Nothing that he has set out in today's affidavit, which he has filed in this application, suggests to me that anything has changed. Accordingly, in my view, this Court should exercise its jurisdiction under Rule 13(2)(a) to dismiss the appeals.

[20] I say all of the foregoing without commenting on the merits of Mr. McDiarmid's appeals. As I have indicated, Mr. McDiarmid raises several arguable points with respect to both appeals.

[21] But at a certain point it is open to this Court to find that there is no reasonable prospect that Mr. McDiarmid will be able to prosecute his appeals. This was true in the recent decision in *R. v. Burcke*, 2017 BCCA 5, where a third Rule 13(3) application by the Crown finally succeeded after an acknowledgment by Mr. Burcke that there was no reasonable prospect that he would be able to prosecute his appeal. This followed on two opportunities afforded to Mr. Burcke to sell a vehicle to permit him to pay for transcripts.

[22] Similarly, this Court has afforded Mr. McDiarmid numerous opportunities to obtain the funds to pay for transcripts. These opportunities have coincided with the winter season during which Mr. McDiarmid says he earns the money that gets him through the rest of the year.

[23] I acknowledge that transcripts are expensive. However, this is a third Rule 13 application; 21 months have passed since the filing of his 2015 appeal; and 38 months have passed since the filing of his 2013 appeal. He has been unable to progress his appeals in any meaningful way.

[24] I wish to again highlight the fact that the case management judge previously saw fit to exercise her jurisdiction under s. 684(1) of the *Criminal Code* to appoint Mr. McDiarmid counsel to argue his conviction and sentence appeal in YU733: 2015 YKCA 19 at para. 46.

[25] In fact, Justice Bennett went so far as to restrict the appointment to counsel who has not previously worked for Yukon Legal Aid to accommodate Mr. McDiarmid's concerns about conflicts of interest, which she observed to have no objective merit (at paras. 43-44). This appointment would have permitted the assigned counsel to order the necessary transcripts in that appeal (s. 684(2), *Criminal Code*). Mr. McDiarmid advised the case management judge that he did not accept the appointment of counsel on those terms (at para. 48). With Mr. McDiarmid unwilling to accept the appointment of counsel and unable to prosecute his appeals otherwise, this Court is at an impasse.

[26] I would grant the Crown applications and dismiss the appeals.

[27] **DONALD J.A.:** I agree

[28] **TULLOCH J.A.:** I agree.

“The Honourable Chief Justice Bauman”