

CANADA / JUDGMENT

R. v. Hexamer

2018 BCCA 142

COURT

British Columbia Court of Appeal

DECIDED

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2018 BCCA 142 R. v. Hexamer

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Hexamer,

2018 BCCA 142

Date: 20180418

Docket: CA43881

Between:

Regina

Respondent

And

Ibata Noric Hexamer

Appellant

Restrictions on publication: Pursuant to orders made under ss. 486.4(2) and 486.5(1), and 486.5(9) of the Criminal Code, no information that could identify the complainants, witnesses, or police undercover operators may be published in any document or broadcast or transmitted in any way.

Pursuant to s. 16(4) of the Sex Offender Information Registration Act [SOIRA], no person may disclose any information collected pursuant to an order under the SOIRA or the fact that information relating to a person is collected under the SOIRA.

Before:

The Honourable Madam Justice D. Smith

The Honourable Madam Justice Dickson

The Honourable Mr. Justice Fitch

On appeal from: An order of the Supreme Court of British Columbia, dated August 3, 2012 (R. v. Hexamer, Vancouver Docket 25968).

Counsel for the Appellant:

G. Botting

Counsel for the Respondent:

D. Layton, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia

March 15, 2018

Place and Date of Judgment:

Vancouver, British Columbia

April 18, 2018

Written Reasons by:

The Honourable Mr. Justice Fitch

Concurred in by:

The Honourable Madam Justice D. Smith

The Honourable Madam Justice Dickson

Summary:

The appellant pleaded guilty to various charges after reaching a plea agreement with the Crown. In exchange for his guilty pleas and agreement to a joint sentencing submission of 15 years' imprisonment, the Crown agreed to refrain from initiating dangerous offender proceedings. The appellant later instructed his lawyer to withdraw from the joint submission. The Crown then applied for a dangerous offender assessment under s. 752.1 of the Criminal Code. Following the completion of the assessment, the appellant applied to withdraw his guilty pleas. The judge dismissed his strike plea application on the basis that the appellant made a conscious and informed decision to withdraw from the joint submission in the hopes of obtaining a favourable s. 752.1 assessment and a shorter determinate sentence. On appeal, the appellant submitted that the Crown breached the plea agreement and that his guilty pleas were uninformed, involuntary and equivocal. He argued that the judge erred in refusing to permit him to withdraw the guilty pleas. He also submitted that alleged Charter breaches in the course of the police investigation required a stay of proceedings or, in the alternative, an order for a new trial. Held: Appeal

dismissed. The judge exercised his discretion judicially in refusing leave to withdraw the pleas. His finding that the appellant, not the Crown, resiled from the terms of the plea agreement was well-supported in the evidence and does not reflect palpable or overriding error. Since the appellant's pleas were valid, it is unnecessary to consider Charter arguments that could conceivably have been advanced had the matter gone to trial.

Reasons for Judgment of the Honourable Mr. Justice Fitch:

I. Introduction

- [1] On August 3, 2012, the appellant, who was represented by counsel, personally entered guilty pleas before a judge of the Supreme Court of British Columbia to one count of sexual assault, three counts of sexual assault with a weapon and two counts of unlawful confinement. The offences encompassed three incidents that occurred in 1995, 2007 and 2009. The victims were minors. While it is unnecessary to detail the circumstances of the offences to address the appellant's grounds of appeal, by pleading guilty to these offences the appellant admitted to conduct that was predatory, violent and shockingly invasive.
- [2] The guilty pleas followed resolution discussions which culminated in an agreement with these essential terms: (1) the appellant would plead guilty to the above-noted offences; (2) the Crown would stay proceedings on the remaining 17 counts on the indictment; (3) a joint submission would be made that the appellant receive a sentence of 15 years' imprisonment; and (4) the Crown would not make an assessment report application under s. 752.1 of the Criminal Code, R.S.C. 1985, c. C-46, a step preliminary to the commencement of dangerous offender proceedings.
- [3] About two years after the guilty pleas were entered and 19 months after an Agreed Statement of Facts was filed respecting the circumstances of the offences, but before sentence was imposed, the appellant applied to the sentencing judge to withdraw his pleas.
- [4] In support of the application, the appellant filed a 234-paragraph affidavit alleging that the Crown reneged on the plea agreement by making, on January 29, 2013, an application for an assessment report pursuant to s. 752.1. In addition, the appellant advanced what amounted to ineffective assistance of counsel allegations against four of the six lawyers who represented him from 2010 to 2014.
- [5] The appellant waived solicitor client privilege to the extent necessary to permit his former lawyers to address the circumstances surrounding the entry of his guilty pleas and the allegations made against them by the appellant. A seven-day hearing ensued. The appellant was cross-examined on his affidavit. Five of the lawyers who represented the appellant leading up to the strike plea application were cross-examined by the appellant's counsel.

[6] The grounds advanced in support of the strike plea application are not easily summarized. This is, in no small measure, attributable to the failure of the appellant's counsel to file a notice of application clearly articulating the basis upon which the appellant should be permitted to withdraw his pleas. In any event, I understand the appellant to have relied on the contents of his affidavit to argue that:

- his guilty pleas were "coerced" by the conduct of the Crown and his defence counsel and therefore involuntary;
- his guilty pleas were not informed because he did not personally have all of the disclosure materials when he gave instructions that he would plead guilty to the aforementioned counts;
- his guilty pleas were not unequivocal;
- the original terms of the plea agreement were that he would plead guilty and participate in a joint submission for a 15-year determinate sentence in exchange for which the Crown agreed not to initiate dangerous offender proceedings;
- after the pleas were entered, he was led by his fourth counsel to believe that the original terms of the plea agreement had been revised consistent with his wishes and that the Crown had agreed to proceed with a regular sentencing hearing with no joint submission which would be informed by a psychological report the appellant would obtain;
- he withdrew from the agreement to participate in the joint submission not knowing that the Crown would proceed with a s. 752.1 assessment report;
- the Crown resiled from the revised terms of the plea agreement;
- his fourth lawyer failed to advise him of the extent of his jeopardy if he refused to proceed to sentencing on the basis of the joint submission;
- he was incompetently represented by lawyers who refused to personally provide him with the contents of the disclosure brief including, most significantly, material that would inform his assessment of whether an application might successfully be mounted under s. 8 of the Charter to exclude under s. 24(2) critical evidence obtained by the police and used to establish his identity as the perpetrator;
- he was incompetently represented by lawyers who did not explain to him the criteria for designation as a dangerous offender;
- his third lawyer refused to pursue alleged Charter violations said to have occurred in the course of the investigation;
- he was coerced into accepting the Agreed Statement of Facts; and
- his fourth lawyer failed to follow his instructions when she consented to the Crown's application for a s. 752.1 assessment report.

- [7] The appellant's application to withdraw his guilty pleas was dismissed on January 30, 2015, for reasons indexed as 2015 BCSC 1176. The judge found that the guilty pleas were valid. Further, he found that the Crown did not repudiate the plea agreement and that the appellant's fourth lawyer did not act contrary to his instructions by failing to oppose or otherwise take issue with the propriety of the Crown's application for an assessment report pursuant to s. 752.1 of the Code. To the contrary, the judge found that the appellant made an informed choice to withdraw from the joint submission. In doing so, he knowingly courted the risk that the Crown would take the first step towards the institution of dangerous offender proceedings. He did so because he thought the assessment report would be favourable to him and that he would ultimately receive a sentence less than the 15-year determinate sentence contemplated by the joint submission. The judge rejected the appellant's claim that he did not know the Crown would be free to seek an assessment order under s. 752.1 if he withdrew from the joint submission.
- [8] The appellant argued on appeal that the judge erred in dismissing the strike plea application. Among other things, he argued that: the conduct of the police in gathering evidence in the course of the investigation violated his Charter rights; the Crown reneged on its subsequent agreement to proceed with a regular sentencing and no joint submission; the judge erred by failing to find that his guilty pleas were invalid; and, in dismissing the strike plea application, the judge made factual findings that are clearly wrong and reflect palpable and overriding error. He sought orders setting aside the guilty pleas and convictions and either staying the proceedings or directing a new trial.
- [9] We dismissed this appeal from the bench with reasons to follow. We did so because there is no merit in any of the grounds advanced by the appellant.

II. Background

- [10] In light of the appellant's contention that critical factual findings made by the judge are clearly wrong and reflect palpable and overriding error, it is necessary to summarize the events that gave rise to the strike plea application to put those findings in context and explain why we dismissed this appeal.
- (a) The Investigation
- [11] DNA obtained from semen deposits left in the 1995, 2007 and 2009 incidents established that the same man committed all of the attacks. By obtaining cell phone usage records for the time and location of the 2007 and 2009 attacks, the police identified 45 phone numbers common to both incidents. As I understand it, the police used the victims' accounts as well as factors relating to the age, gender and ethnicity of the perpetrator to identify the appellant as the prime suspect.

- [12] On November 18, 2010, the police attended at a residence occupied by the appellant and his mother. The appellant was not home at the time. Using a ruse, the police persuaded the appellant's mother to lick and seal an envelope. The DNA of the appellant's mother thereby obtained was compared to the DNA of the perpetrator. The police learned it was 20,000 times more likely that the appellant's mother was the biological mother of the perpetrator than someone randomly picked from the Canadian population.
- [13] With this information, the police concluded they had reasonable grounds to arrest the appellant without warrant. They did so on December 10, 2010, at a restaurant. The police seized a fork the appellant was using at the time of the arrest. The police then obtained a warrant to take bodily substances from the appellant for DNA analysis. The DNA profile from the fork was compared to the male profile left at two of the crime scenes. The profile on the fork matched both crime scene profiles. The frequency of occurrence of that profile in the Canadian Caucasian population was estimated to be 1 in 1.0 quadrillion. Sample matches of the same strength were made by comparing the appellant's profile obtained through the DNA warrant to the DNA recovered from the crime scenes.
- (b) Evidence on the Strike Plea Application
- [14] The appellant's first lawyer testified on the strike plea application that when he first met with the appellant, the appellant was willing to take responsibility for his conduct but wanted to do as little jail time as possible.
- [15] On the issue of disclosure, the appellant's first lawyer testified that he was concerned about leaving the appellant with disclosure materials while he was in custody for safety reasons and to protect the appellant from "jailhouse rats". He advised the appellant not to take personal possession of the disclosure materials and said the appellant understood and seemed to accept this advice. He discussed the disclosure with the appellant as soon as it was received, including the specifics of the allegations. The first lawyer went over the disclosure with the appellant while visiting him in prison. He testified that he talked to the appellant about all of the details and "satisfied myself that he knew everything that was -- that was relevant and necessary and had access to whatever was required". The first lawyer told the appellant there was a possibility, if not likelihood, that the Crown would consider the institution of dangerous offender proceedings if the appellant was convicted.
- [16] The appellant's central concern at this time related to the manner in which the police obtained DNA from his mother. The first lawyer told the appellant that even if he had standing to challenge the manner in which DNA was obtained from his mother, they would have a battle in seeking to have the evidence excluded under s. 24(2).

- [17] The appellant's second lawyer testified on the strike plea application that he made the appellant aware that if he was convicted the Crown wanted an assessment order under s. 752.1. He explained to the appellant what that meant and warned the appellant that if an assessment was obtained, he would likely be designated a dangerous offender and sentenced to an indeterminate period of incarceration.
- [18] The appellant instructed his second lawyer to initiate a plea resolution discussion that had as its goal avoiding a dangerous offender designation and the imposition of an indeterminate sentence.
- [19] Acting on those instructions, the appellant's second lawyer discussed with the Crown and then with the appellant a resolution that would involve guilty pleas to some counts and a joint submission for a determinate sentence of 15 years' imprisonment in return for which the Crown would not seek an assessment order under s. 752.1. The appellant's second lawyer testified that the appellant knew guilty pleas and the imposition of a lengthy determinate sentence was the "trade-off" for obtaining the Crown's agreement to forego consideration of a dangerous offender application:

Q. Paragraph 38 [of the appellant's affidavit] indicates that the agreement you entered into with the Crown was done without instructions. I think you've talked about that but maybe want to just address it more fully.

A. At all times that I negotiated with [the Crown], Mr. Hexamer was not only apprised of it, he was attempting to voice things that he wanted or things that I could get. Always asking me to get less time obviously and he thought that 15 years

was too much, and that he had hoped, you know, to get less than that -- that he could get less than that. I was obviously telling him -- trying to remind him that -- that the DO, LTO proceedings were -- were there.

One of the things that was the -- the disconnects for Mr. Hexamer was -- is that once he heard that the Crown was prepared to do a deal for determinate sentence, it was as if there was no -- the DO, LTO was gone then once the Crown had said that they would do that. And I kept telling him that, you know, that that wasn't the case, that if we don't do this lengthy -- the -- the trade is this lengthy sentence.

- [20] The appellant's second lawyer testified that the appellant was "well aware" that rejecting the deal would expose him to a dangerous offender finding and the imposition of an indeterminate sentence. He cautioned the appellant that walking away from this type of deal was a very serious mistake that might backfire.
- [21] On the issue of disclosure, the appellant's second lawyer assembled a detailed brief to prepare for the preliminary inquiry and took steps in correspondence with the Crown to ensure that nothing in the possession of the Crown or police that attracted a Stinchcombe disclosure obligation remained undisclosed.

- [22] The second lawyer also discussed with the appellant concerns the appellant raised about the way in which the police gathered the DNA from his mother. Among other things, the second lawyer considered bringing an application pursuant to s. 8 of the Charter but testified that whether the appellant had standing to mount such a challenge represented "a very high hurdle". In addition, he was aware that the police had obtained the appellant's DNA at the scene of the arrest and that the Crown would be in a position to prove identity without admission of the mother's DNA.
- [23] The second lawyer testified that he was concerned throughout to ensure that the disclosure provided by the Crown did not fall into the hands of third parties unrelated to the litigation. Despite this concern, he testified that, "I went through every bit of disclosure that Mr. Hexamer wanted to go through, with him". He said the appellant "had a -- in terms of the disclosure, he had a full -- fulsome knowledge of it".
- [24] The appellant ultimately rejected the proposed resolution and discharged his second lawyer. He hoped to secure a joint submission for a lower determinate sentence.
- [25] Another lawyer was engaged between the appellant's second and third lawyers for the limited purpose of providing an opinion on whether the appellant could mount a successful Charter challenge to the admissibility of the DNA evidence surreptitiously obtained from his mother. Consistent with advice appellant had received from his previous counsel, this lawyer advised the appellant that it was highly unlikely such a challenge would succeed given that the appellant had no standing to complain about the alleged breach of a third party's privacy interests. He also advised the appellant that successfully pursuing this issue would, in any event, amount to a "pyrrhic victory" as the Crown had available to it the appellant's cast-off DNA from the scene of the arrest and (by then) his DNA from execution of the warrant.
- [26] The appellant's third lawyer was aware of the resolution discussions that had taken place before he was retained. The third lawyer was also reluctant to give the appellant personal possession of all disclosure materials. He testified that prison is an unsafe environment for confidential materials and was concerned about jailhouse informants. He sent the appellant some of the disclosure materials, met with him in the prison to review the materials and had many telephone discussions with the appellant. He testified that the appellant "seemed to have a very strong handle" on the circumstances that led to his mother providing a DNA sample. The third lawyer also discussed with the appellant challenges he would face in establishing that he had standing to seek exclusion of the DNA obtained from his mother. He also discussed with the appellant the merit of proceeding with such a challenge given that the Crown had available to it his cast-off DNA from the fork that had been linked to the crime scenes.

[27] The third lawyer discussed with the appellant the risks associated with the Crown obtaining an assessment report under s. 752.1 and the advisability of pleading guilty with a joint submission for a determinate sentence. The appellant's third lawyer attempted to negotiate a joint submission for a 12-year determinate sentence. The Crown responded to this proposal by letter dated July 4, 2012. The letter reads, in material part, as follows:

I am writing in response to your letter of June 29th in which you asked the Crown to reconsider our sentencing position on the basis that the proposed disposition is "unduly harsh and long." Suffice it to say that the position was one advanced by previous defence counsel.

In any event, after consultation with the complainants, the Crown accepted the proposed disposition offered by [the appellant's second lawyer]. Respectfully, it does not lie well in the mouth of accused to complain about the length and/or harshness of the sentence given it was one he proposed.

Secondly, as I understood our last conversation, I had left your client with a choice. Maintain his position with respect to the length of sentence or take his chances with the Crown obtaining its own report. I had understood that we had reached an agreement that a report would be ordered. To be clear, I have no intention of going back to the complainants on another proposed disposition without first having a report.

Again, Mr. Hexamer has a choice. He can abide by the offer he made, or have a psychiatric report prepared pursuant to s. 752.1.

[28] On July 23 or 24, 2012, the appellant gave his third lawyer verbal instructions that he would enter guilty pleas on some of the counts to resolve the matter by way of a joint submission for a 15-year determinate sentence. The Crown eventually agreed that the appellant should be given credit for time served in pre-sentence custody, but the terms of the original deal otherwise remained unchanged.

[29] The third lawyer testified that he told the appellant he would require written instructions before the guilty pleas were entered. On August 3, 2012, the appellant executed a document entitled "Instructions to Counsel". It reads as follows:

I, Ibata Noric Hexamer, hereby direct and instruct you that I wish to resolve my matter under Court File 25968 (attached).

I understand that I cannot plead guilty unless I am in fact guilty. I acknowledge that I am guilty of the counts 1, 5, 6, 19, 22, & 23.

I admit as true facts the relevant facts that prove each of the offences I intend to plead guilty to under Court File 25968.

I understand that by pleading guilty to the charges, I am giving up my right to a trial and the right to be presumed innocent until proven guilty beyond a reasonable doubt.

You have advised me that there is a joint sentencing position to be presented to the sentencing court.

I understand that I will not be able to appeal my conviction once I have pleaded guilty.

I am aware that the joint sentencing position entails a custodial sentence of 15 years for the offences.

I understand that the sentencing Judge is not bound to accept the abovementioned joint recommendation for sentence, and that the Court could impose a sentence in its discretion that is greater than the recommendation of both counsel.

I have been advised by you that the maximum sentence for these accumulated offences is a Dangerous or Long Term Offender designation by the Sentencing Judge.

I instruct you that I am guilty of the offences and that I wish to plead guilty to these charges. I am making this decision and instruction voluntarily and of my free will.

[Signed]

Ibata Noric Hexamer

- [30] The guilty pleas were entered on August 3, 2012, before a different judge. The appellant's third counsel testified that he did not waive reading of the charges on the date fixed for entry of the guilty pleas because he "wanted to make sure that if [the appellant] had any doubt or any hesitation he was given the opportunity to say no, he didn't want -- you know, not guilty, or no, I'm not pleading guilty to that".
- [31] As noted earlier, the appellant personally entered the guilty pleas. The record does not support the appellant's evidence that he hesitated and sought an opportunity to consult with his third lawyer before entering the pleas. Further, it was not put to the appellant's third lawyer in cross-examination that this occurred.
- [32] Following a brief plea comprehension inquiry conducted by the judge pursuant to s. 606(1.1) of the Code, the appellant confirmed his understanding that by pleading guilty he was admitting all essential elements of each of the offences with knowledge that the sentencing judge would not be bound by a joint submission.
- [33] Sentencing was set for December 21, 2012. As the date fixed for sentencing approached, the appellant's sister raised the idea of obtaining a pre-sentence psychological report. The appellant agreed that obtaining his own psychological report for use on sentencing should be pursued. He instructed his third counsel to seek an adjournment of the sentencing without telling the court why. His counsel refused to proceed on this basis. The appellant fired his third counsel and, as a result, sentencing did not proceed on the scheduled date. Sentencing was adjourned to January 29, 2013. The appellant then retained his fourth lawyer.

[34] The appellant's fourth lawyer testified the appellant was upset that the only two options he had were a joint submission for a 15-year determinate sentence or the potential that a dangerous offender proceeding would be commenced by the Crown. Her evidence on this point is captured in the following excerpts:

A. He was just very upset that the only two choices he had was 15 years or to consent to the DO/LTO application. He constantly called it the DO or the LTO application. He knew exactly that it was going to be asked for you [the Crown], that you were holding his feet to the fire, or he had to look at the other option was the 15 years you would ask for.

A. So we did some research and found that there certainly were people very much like Mr. Hexamer in the nine to 12 year range of sentencing and brought that to his attention, that there are cases in the nine to 12 year range, but always he knew, and we discussed it, if you leave the 15-year mark you are going to be consenting to an assessment by someone you have no control over

We went through all of the pros and cons. There was a lot of discussion about whether to launch off and leave the 15 year, but at one point he had just made his mind up that he did not want to take the 15 year deal.

Q. Now, did you discuss with him, though, the risk that in the event of a -- an unfavourable report that he could be declared either a DO or an LTO?

A. A DO, yeah, we discussed that. I said DO is very bad to him. I said an LTO is not that bad, and I explained to him some of my clients are LTOs, that it's not as -- certainly as bad as a -- as a dangerous offender, from the sense of the loss of control of -- of the Parole Board bringing you back in, and the time you could end up spending in prison. He didn't like the L -- he actually said he didn't like the LTO issue either, but he knew that. That was the funny thing. He didn't like the D -- he certainly didn't like the DO, and he didn't like the LTO, but he made that choice to -- to change the sentence.

Q. [Mr. Hexamer] is saying that you should have advised him not to run that risk, and I gather --

A. Well, he did -- we did -- no, he -- Mr. Hexamer is very, very strong minded and he heard all the negatives about it. Nobody suggested he do that, and so that's quite surprising to me. I think [the appellant's third counsel] I'm sure tried to talk him out of it, too, but sometimes your clients are -- they can make their decision and sometimes they're right, sometimes they do end up with a good assessment, so --

[35] The appellant's fourth lawyer testified that in her discussions with the appellant they consistently referred to the s. 752.1 assessment report application as "the Crown assessment". She testified that "it was clear" from her discussions with the appellant that "the Crown assessment" meant an assessment under s. 752.1 preliminary to the institution of dangerous or long-term offender proceedings.

- [36] With this knowledge, the appellant instructed her that he wanted to move away from the joint submission for a 15-year determinate sentence in return for which he would consent to the preparation of an assessment report under s. 752.1. The appellant's fourth lawyer testified that the appellant decided to take a chance that the assessment report would be a favourable one, that the Crown would not commence dangerous offender proceedings, and that he would end up with a determinate sentence less than 15 years.
- [37] This proposal, which constituted a variation of the original plea agreement, was verbally conveyed to the Crown on January 22, 2013, accepted by the Crown and confirmed by the appellant a few days later, likely on January 24, 2013. On that day, the Crown advised the Supreme Court registry in writing that there would no longer be a joint submission and that the Crown would be making an unopposed application for an assessment report under s. 752.1.
- [38] On January 25, 2013, the appellant's fourth counsel delivered to him a letter that reads, in material part, as follows:

It is my understanding that you are not content with the joint submission for 15 years.

Further to our conversation yesterday, I understand the Crown is prepared to withdraw the joint submission plea bargain in exchange for your participation in a psychological assessment, after which the sentencing quantum will be at the discretion of the judge.

[Emphasis added.]

- [39] Also on January 25, 2013, the appellant signed a document prepared by his fourth lawyer confirming that he had instructed counsel to adjourn the sentencing proceeding set for January 29, 2013, and that "I intend to consent to a Psychological Assessment which I understand will be requested by the Crown" [emphasis added].
- [40] The thrust of the fourth lawyer's evidence was that, in the context of her dealings with the appellant as a whole, he could not have understood that what he was consenting to was a private report to be prepared by a psychologist for use in the context of a regular sentencing proceeding, as opposed to a s. 752.1 assessment report to be used in a potential dangerous offender application. She testified that, "I don't know how that could be, because right from the very get-go on this the issue was always 15 years or consent to the DO".
- [41] On January 29, 2013, the Crown informed the trial judge that the joint submission that had been agreed to "has gone by the way" and that the Crown would be making application under s. 752.1 that the appellant be remanded for the preparation of an assessment report. The appellant's fourth counsel said the application would not be opposed. The appellant was present for this appearance but said nothing. He says in his affidavit he was "shocked" to hear his counsel tell the court that he was consenting to an order under s. 752.1. The appellant says that he vehemently protested to his counsel immediately after the proceedings and told her in no uncertain terms that he had not agreed to an order under s. 752.1. According to him, counsel said, "don't worry; I can get that changed in chambers".

- [42] Contrary to the appellant's version of events, his fourth counsel testified that she met with the appellant after this appearance and he said nothing to suggest to her that he was not consenting to the s. 752.1 order.
- [43] The matter was adjourned to February 12, 2013, to allow the parties to finalize an Agreed Statement of Facts to be relied on by the court-appointed assessor and, ultimately, by the court.
- [44] The appellant testified that on January 31, 2013, he authored but did not send a letter to his fourth lawyer complaining that he had told her prior to the appearance on January 29, 2013, that he was agreeable to a psychological assessment only on the condition that it could not be used for a dangerous or long-term offender application. This unsent letter was appended to the appellant's affidavit filed for use on the strike plea application. It reads, "I therefore did not, at any time, authorize or agree to an assessment under s. 752.1 prior to my court appearance, and still maintain this position now." The appellant deposed that while he did not send this letter to his fourth lawyer, he called her and discussed the contents of the document with her. He said she did not appear to be listening to him. The appellant's fourth lawyer was not cross-examined on the call the appellant says he placed to her sometime after January 29, 2013.
- [45] The parties made further appearances on February 12, 2013, and February 19, 2013, to request more time to finalize the Agreed Statement of Facts. On both occasions, the judge was advised that the s. 752.1 application would proceed on a consent basis. On both occasions, the appellant was present. Again, he said nothing.
- [46] On February 28, 2013, the parties finalized and filed the Agreed Statement of Facts. The Crown made application that day for an assessment order pursuant to s. 752.1. The appellant's counsel said, "We're not opposing my friend's application". The appellant was also present on this occasion. Once again, he said nothing.
- [47] An assessment report, prepared by Dr. Jack, was filed on May 24, 2013. The appellant's fourth lawyer testified that the appellant was unhappy with the report and wanted to withdraw his guilty pleas and "go back to square one". The lawyer testified she responded to the appellant's stated wish this way:

I told him how can you withdraw your plea? You can only withdraw your plea if something has changed in terms of when you entered the guilt or innocence. The fact an assessment doesn't come out -- he thought because he was -- the assessment came out to be a DO the facts had changed and that would be grounds to pull the plea, and I said, well, it doesn't work that way.

- [48] The appellant's fourth lawyer ceased acting for him in November 2013. The appellant's fifth lawyer had no involvement relevant to this appeal and was not called as a witness on the strike plea application.

[49] The appellant was cross-examined on his affidavit. He maintained the positions summarized in paragraph 6 of these reasons.

[50] On February 5, 2016, the appellant was designated a dangerous offender and sentenced to an indeterminate period of incarceration.

III. The Reasons for Judgment

[51] The judge summarized the appellant's submissions on the strike plea application this way:

[24] Mr. Hexamer submits that the guilty plea was part of an unwritten plea agreement between himself and the Crown with the following terms:

- a. Mr. Hexamer would enter the guilty plea. The Crown would stay the other charges on the indictment at sentencing.
- b. The parties would present a joint submission for sentencing for the six counts for 15 years' imprisonment without credit for pre-sentence custody. The agreement appears to have been later amended by unwritten agreement to incorporate credit for pre-sentence custody.
- c. The Crown would not make an application under s. 752.1 of the Criminal Code in this proceeding for an order that Mr. Hexamer be remanded for an assessment for use as evidence in an application under s. 753 or 753.1 of the Code.

[25] A central component is Mr. Hexamer's contention that he has not at any point breached or repudiated the agreement since its formation. Instead, Mr. Hexamer submits that the second term of the agreement providing for a joint submission of 15 years' imprisonment was amended by an unwritten agreement between him and the Crown made on or around January 24, 2013. He says a provision for a contested sentencing hearing with a pre-sentence psychological report, that is not a dangerous offender assessment, was substituted for the second term of the agreement. He says the other terms of the agreement were to remain the same under this unwritten amendment.

[26] Mr. Hexamer submits that the Crown breached the amended agreement by making an application for a dangerous offender assessment on January 29, 2013. Furthermore, Mr. Hexamer submits that he never consented or instructed his counsel to consent to an application for a dangerous offender assessment. In the event this court finds the Crown has breached or repudiated the agreement in either the original or amended form by applying for the dangerous offender assessment, Mr. Hexamer submits that he should be permitted to withdraw the guilty plea which was an element of the agreement.

[27] Alternatively, it is submitted that in the event the court finds that Mr. Hexamer breached or repudiated the agreement in its original or amended form, he should be permitted to withdraw the guilty plea.

- [28] Mr. Hexamer submits that it would be unjust to uphold the guilty plea, because it was made as an element of an agreement and that agreement has been breached or repudiated. Furthermore, he contends that the Crown's application for the dangerous offender assessment was made contrary to the agreement. He says that to uphold a guilty plea under those circumstances would be unjust, which is the overarching factor to be considered on an application to withdraw a guilty plea.
- [52] In dismissing the strike plea application, the judge made the following critical findings of fact:
1. The appellant is an intelligent individual who was fully and knowledgeably engaged in the conduct of his case from the outset;
 2. The appellant, despite his protestations of inadequate disclosure, was well apprised of the relevant aspects of the case against him;
 3. The appellant gave considerable, careful thought to the issue of whether he would enter guilty pleas and on what conditions;
 4. An agreement was reached between the Crown and the appellant's second lawyer that the appellant would enter a plea of guilty to certain counts and there would be a joint submission for sentence of 15 years' imprisonment. In return the Crown would not pursue a dangerous offender application and would stay proceedings on the remaining counts. Before the agreement could be fully implemented, the appellant fired his second lawyer;
 5. When the guilty pleas were entered, an agreement had been reached between the appellant and the Crown that had three conditions: (i) the appellant would enter guilty pleas to six counts on the indictment. The Crown would stay proceedings on the remaining counts; (ii) the Crown and defence would make a joint submission for a 15-year term of incarceration; (iii) the Crown would not pursue a dangerous offender or a long-term offender application;
 6. When the pleas were personally entered by the appellant, who was then represented by his third counsel, the appellant understood the nature and consequences of pleading guilty. The appellant failed to discharge his onus of showing that the pleas should be set aside. The guilty pleas were valid; in other words, they were voluntary, informed and unequivocal;
 7. There was nothing in the evidence to suggest the appellant has any defence to the charges;
 8. The appellant was profoundly dissatisfied with the determinate sentence joint submission and came to believe that he had a good chance of avoiding a dangerous offender designation and securing a determinate sentence of something less than 15 years' imprisonment;

9. The appellant made a "conscious decision" to move away from the certainty of a joint submission for a determinate sentence and take his chance on avoiding a dangerous offender finding. In the vernacular, he decided to "roll the dice" contrary to the legal advice he had received that the best course of action was to avoid the potential for the institution of a dangerous offender proceeding;
10. The appellant was aware that proceeding in the manner he did would entail breach of the agreement that had been reached and that the Crown would be proceeding with an application pursuant to s. 752.1 of the Code for an assessment report as a preliminary step to the commencement of a dangerous offender proceeding;
11. When the appellant shifted his position, he was represented by experienced and able criminal counsel who was acting at all relevant times on the appellant's instructions;
12. The Crown's position was clear throughout - the appellant could "opt out" of the joint submission for a 15-year determinate sentence but, if he did, the Crown would apply for an assessment report under s. 752.1. The Crown did nothing to repudiate the agreement. Specifically, the Crown never agreed to forego its right to seek an assessment report and proceed to a regular sentencing with a pre-sentence psychological report to be obtained by the appellant. The appellant's allegation that the Crown repudiated the terms of the plea agreement is without merit;
13. The steps taken by the appellant after he entered the guilty pleas were consistent with a strategy that he believed at the time to be in his best interests;
14. While the appellant "may now have buyer's remorse" with respect to the outcome, there was no miscarriage of justice in the way in which that outcome was reached.

IV. Grounds of Appeal

- [53] Against this background, the appellant in his factum framed his two grounds of appeal in the following terms:
1. The threat of dangerous offender proceedings to secure a guilty plea constitutes abuse of process, contrary to s. 7 of the Charter. If the court finds that the Crown can use the threat of dangerous offender proceedings to negotiate a guilty plea, the judge erred in failing to strike the guilty plea when there was clear evidence that the appellant's plea agreement was entered into without full disclosure and only upon the Crown's undertaking that dangerous offender proceedings would not be initiated; and
 2. The search and seizure of familial DNA from a mother to implicate her son in alleged crime violates common decency and amounts to abuse of process, and is a violation of both sections 7 and 8 of the Charter, with remedy under sections 24(1) and 24(2) of the Charter. Furthermore, the warrantless arrest of Mr. Hexamer and the seizure of a fork that he had used in a public restaurant, which was characterized as cast-off DNA, violated his right to privacy and his right to be protected from unreasonable search and seizure. The DNA

evidence should have been excluded under s. 24(2) of the Charter. However, the cumulative effect of these many breaches demands the remedy of a stay of proceedings under s. 24(1) of the Charter.

[54] The appellant's first ground of appeal advanced in his factum has two central components.

[55] The first is whether the Crown's conduct in the course of the plea negotiations amounted to an abuse of process. On the hearing of the appeal, the appellant abandoned the claim made in his factum that the conduct of the Crown amounted to an abuse of process. He also abandoned any entitlement to a stay of proceedings on grounds of prosecutorial abuse. The concession made by the appellant's counsel in oral argument was necessary and well-grounded in the evidence. It does not appear that this issue was even argued in the court below. Further, there is nothing in the conduct of the Crown and nothing in the factual findings of the judge that could possibly support such a claim. Indeed, the argument of the appellant on the strike plea application did not focus on the conduct of the Crown, but on the conduct of his lawyers.

[56] The second component of the appellant's first ground of appeal concerns whether his guilty pleas were uninformed and therefore invalid because, among other things, his lawyers did not provide him with full disclosure of information that might ground a successful Charter argument resulting in the exclusion of evidence the Crown needed to prove its case.

[57] The appellant's second ground of appeal highlights issues relating to the admissibility of evidence that might have been litigated had the matter gone to trial. In our view, the second ground of appeal added nothing to the analysis. If the appellant failed to show any basis upon which this Court could overturn the judge's conclusion that the pleas were valid, it does not matter whether the appellant may have had arguable grounds to seek the exclusion of evidence in the trial court. Assuming the pleas to have been valid, the appellant waived his right to require the Crown to prove its case beyond a reasonable doubt and surrendered his right to make full answer and defence, including by pursuing Charter-based arguments in defence of the offences charged: *R. v. Adgey*, [1975] 2 S.C.R. 426 at 440; *R. v. T.(R.)* (1992), 10 O.R. (3d) 514 at 519, [1992] O.J. No. 1914 at para. 13 (Ont. C.A.); *R. v. Davidson* (1992), 110 N.S.R. (2d) 307 at para. 2 (N.S.C.A.).

[58] In short, this appeal turned on whether the appellant was able to demonstrate reversible error in the determination of the judge that the guilty pleas were valid and that the appellant's application to withdraw those pleas should therefore be dismissed.

V. Analysis

(a) The Conduct of the Crown

[59] While the abuse of process ground of appeal was abandoned in oral argument, the appellant did not abandon his claim that the Crown reneged on the agreement when it applied for the s. 752.1 assessment report. In our view, the factual findings of the judge constitute a complete answer to this point. The appellant's claim that those findings are clearly wrong or

reflect palpable or overriding error lack any merit. There was ample evidence upon which the judge could come to the conclusion that it was the appellant, not the Crown, who reneged on the sentencing component of the plea agreement. There was therefore no basis upon which this Court could properly accede to the appellant's argument on this issue.

(b) The Validity of the Pleas

[60] Determining whether to permit a guilty plea to be withdrawn is an exercise of discretion. It will not lightly be interfered with on appellate review: *Adgey* at 430. There is no suggestion in this case, nor could there be, that the judge failed to exercise his discretion judicially by failing to consider the factors that guide the analysis. In assessing the validity of the appellant's guilty pleas, the judge was cognizant of and applied the governing principles of law to the facts as he found them.

(i) Were the Guilty Pleas Uninformed?

[61] A valid guilty plea is one that is informed, voluntary, and unequivocal: *T.(R.)* at 519; *R. v. Alec*, 2016 BCCA 282 at para. 70.

[62] The appellant's principal submission on this point is that his guilty pleas were uninformed because the Crown failed to disclose to the appellant or his counsel, at any point prior to the entry of the pleas, that he was arrested without a warrant. The appellant submitted that he did not become aware of this until after the dangerous offender proceedings were underway. The appellant submitted that, had he known this, he would have been able to advance an argument that the police did not have reasonable grounds to effect his arrest without warrant under s. 495 of the Code, that the arrest was therefore arbitrary and in breach of s. 9 of the Charter, and that evidence obtained incidental to the arrest (cast-off DNA from the fork and a computer used by the appellant on which child pornography was found) should be excluded under s. 24(2) of the Charter. He submits that permitting the plea to stand in these circumstances would give rise to a miscarriage of justice.

[63] There can be little doubt that the integrity of resolution discussions is safeguarded by the Crown discharging its disclosure obligations: Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions (Toronto: Queen's Printer, 1993) at 288. Where the Crown fails to meet its disclosure obligation, an accused will be permitted to withdraw a guilty plea if the accused demonstrates a reasonable possibility that the undisclosed evidence, had it been known when the plea was entered, would have influenced the decision to plead guilty: *R. v. Taillefer*, 2003 SCC 70 at paras. 86, 90.

[64] This argument failed for a number of reasons. First and foremost, the appellant did not establish that the Crown failed to disclose he was arrested without a warrant. In support of this submission, the appellant asserted that "the assumption of his lawyers was that the police arrested [him] pursuant to a warrant". The submission is entirely speculative. The disclosure package does not contain an arrest warrant. In these circumstances, it is a reasonable inference that defence counsel would assume (correctly) that the appellant was

arrested without a warrant. The appropriateness of that inference was not challenged by any information put before us on appeal.

- [65] In my view, this is sufficient to dispose of the matter. I would, however, make these additional observations. When reference was made in the course of the dangerous offender proceedings to the fact that the appellant had been arrested without a warrant, the appellant's counsel did not allege non-disclosure in relation to this fact or seek a timely remedy by applying to re-open the application to withdraw his guilty pleas. Rather, he said that while the lawfulness of the appellant's arrest was not being conceded, no remedy was being sought in the trial court. He suggested, however, that it was possible the issue would be pursued in this Court.
- [66] It was not open to the appellant's counsel to "back pocket" this issue for presentation in this Court. If the appellant believed that the alleged non-disclosure undermined the validity of his pleas, he was obliged to seek a remedy in the trial court.
- [67] Further, I note that in addressing the admissibility of the child pornography found on the appellant's computer in the context of the dangerous offender proceeding, the judge said, "[i]n my view, the evidence before this Court supports a conclusion that the arrest was lawful". I recognize that the judge made this determination only for the purposes of resolving the narrow issue before him. Even so, on the facts of this case, it is difficult to imagine how the warrantless arrest of the appellant could successfully be challenged or how the appellant could meet the Taillefer test even assuming non-disclosure on this point.
- [68] In a related but distinct submission, the appellant argued that his guilty pleas were uninformed because his lawyers did not personally provide him with all of the disclosure they received from the Crown. The judge found that, despite his protestations of inadequate disclosure, the appellant was well apprised of the relevant aspects of the case against him and knowledgeably engaged in his defence from the outset. The appellant's submission on this point did not succeed because it is contrary to the judge's factual findings, which are reasonable and well-supported in the evidence.

(ii) Were the Pleas Involuntary?

- [69] The appellant asserted in his factum that the judge erred by finding his guilty pleas to be voluntary. The point was not well-developed in oral argument.
- [70] A plea is voluntary if it is the product of an accused's conscious, volitional decision to plead guilty for reasons which he or she regards as appropriate: Alec at para. 72. A guilty plea entered in open court will be presumed to be voluntary unless the contrary is shown: T.(R.) at 520; R. v. J.G.T., 2003 BCCA 1 at para. 17. The judge's conclusion that the appellant's guilty pleas were voluntary is reasonable and supported by the evidence. It is a finding of fact to which appellate deference must be shown. Indeed, it is difficult to see how the judge could have come to any other conclusion on the evidence before him.

(iii) Were the Pleas Unequivocal?

- [71] The appellant suggested in his factum that his guilty pleas were equivocal and that this is evidenced by his subsequent refusal to sign off on certain aspects of the Agreed Statement of Facts. Again, the point was not well-developed in the factum and was not seriously pursued in oral argument.
- [72] A guilty plea must, of course, be unequivocal: *R. v. Eizenga*, 2011 ONCA 113 at para. 42. Where an accused personally enters a guilty plea, it tends to demonstrate its unequivocal nature: *Eizenga* at para. 51. A plea that is qualified, modified, uncertain or conditional may be an equivocal one: *T.(R.)* at 521.
- [73] The judge implicitly rejected the contention that the guilty pleas were equivocal when he refused to permit the appellant to withdraw those pleas. The judge found that the appellant gave considerable thought to whether he would plead guilty and had a clear understanding of the implications of doing so. The judge's conclusion on this point is reasonable and supported by the evidence. On the evidence before him, there was no basis upon which the judge could reasonably have come to any other conclusion. The appellant's contention that he hesitated before entering the guilty pleas was not supported by any other evidence and is entirely inconsistent with his course of conduct. It was not even put to counsel who represented the appellant at the time of the pleas that the appellant hesitated before personally pleading guilty to the six counts. Further, while the appellant disputed certain aspects of the Agreed Statement of Facts and negotiated some amendments to its content, none of this was shown to have affected in any way the validity of the pleas. The appellant failed to demonstrate any basis upon which this Court could properly interfere with what amounts to an entirely reasonable finding on this issue.

(c) Ineffective Assistance of Counsel

- [74] Although not framed as a discrete ground of appeal, an important component of the appellant's submission on the strike plea application and on appeal is that his fourth lawyer failed to warn him about the consequences of refusing to abide by his agreement to participate in a joint submission for a determinate sentence; namely, that the Crown would seek an assessment report under s. 752.1.
- [75] The judge rejected this argument, finding that the appellant made a conscious decision, despite his fourth counsel's advice to the contrary, to withdraw from participation in the joint submission because he believed he would fare well in the assessment report and, ultimately, obtain a determinate sentence shorter than the 15-year determinate sentence contemplated by the joint submission. The judge rejected the appellant's submission that his fourth lawyer acted contrary to his instructions in communicating to the Crown that the appellant would participate in the assessment report rather than proceed with the joint submission. There is ample evidence upon which the judge could reasonably come to this conclusion. His factual findings on this point have not been shown to be clearly wrong or the product of palpable and overriding error. Accordingly, there was no proper basis upon

which this Court could intervene.

(d) Charter Arguments Respecting the Admissibility of Evidence

[76] The appellant failed to show any basis upon which this Court could properly set aside the judge's conclusion that his guilty pleas were valid. The validity of the pleas having been affirmed, it could not assist the appellant to seek to raise on appeal Charter-based arguments respecting the admissibility of evidence that could conceivably have been advanced had the matter gone to trial. By entering guilty pleas that are valid in law, the appellant surrendered his right to make full answer and defence to the charges. In the result, it was unnecessary for us to address the appellant's arguments directed towards the admissibility of evidence gathered in the investigation.

VI. Conclusion

[77] It is for these reasons we dismissed the appellant's appeal from conviction.

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Madam Justice D. Smith"

I AGREE:

"The Honourable Madam Justice Dickson"

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