

CANADA / JUDGMENT

R. v. Khungay

2020 BCCA 269

COURT

British Columbia Court of Appeal

DECIDED

6 October 2020

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2020 BCCA 269 R. v. Khungay

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Khungay,

2020 BCCA 269

Date: 20201006

Docket: CA46754

Between:

Regina

Respondent

And

Sukhvinder Singh Khungay

Appellant

Before:

The Honourable Madam Justice DeWitt-Van Oosten

(In Chambers)

On appeal from: An order of the Provincial Court of British Columbia, dated May 13, 2009 (R. v. Khungay, Surrey Docket 169455-3C).

Counsel for the Appellant (via teleconference):

A.C. Campbell

Counsel for the Respondent (via teleconference):

J.R.W. Caldwell

Place and Date of Hearing:

Vancouver, British Columbia

August 31, 2020

Written Submissions Received:

September 21, 28, 2020

Place and Date of Judgment:

Vancouver, British Columbia

October 6, 2020

Summary:

The appellant is a permanent resident of Canada. He seeks an extension of time to appeal from conviction. In 2009, the appellant entered guilty pleas to five counts of robbery and an offence involving an imitation firearm. He seeks to have those guilty pleas set aside on the basis that when they were entered, he did not know that he could be declared inadmissible in Canada and removed for "serious criminality". Held: An extension of time is granted. In the particular circumstances of this case, an extension is in the interests of justice.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

- [1] The applicant seeks an extension of time to file an appeal from convictions entered in 2009. He is not a Canadian citizen and the Immigration Division of the Immigration and Refugee Board of Canada ("IRB") has ordered him deported.
- [2] The applicant pleaded guilty to the offences. He says that when he did so, he was unaware the convictions and resultant sentences carried the potential for removal from Canada. He seeks to have the convictions set aside on the ground that his guilty pleas were uninformed and therefore invalid.
- [3] This case falls close to the line; however, for the reasons that follow, I am satisfied that the interests of justice are best served by granting an extension.

Background

- [4] The applicant is 53 years old and a citizen of the United Kingdom. He immigrated to Canada with his parents in May 1979, obtaining landed immigrant status. His parents returned to England for several years and he remained in the custody of two older brothers in Canada. He is a permanent resident and has two Canadian-born children, both of whom are now adults.

- [5] After a workplace accident that led to significant back surgery, the applicant developed a cocaine addiction. His marriage dissolved in 2000 and he succumbed to criminality.
- [6] In July 2008, he was charged with five counts of robbery and five counts of use of an imitation firearm while committing or attempting to commit an indictable offence (Criminal Code, R.S.C. 1985, c. C-46, ss. 344 and 85(2)). On May 13, 2009, the applicant pleaded guilty to the robberies, as well as one (rolled up) count under s. 85(2).
- [7] In July 2009, the applicant was sentenced to two years' imprisonment, concurrent, for each of the robberies, and one year consecutive for the imitation firearm offence. He received two years' credit for time spent in pre-sentence custody. With that time taken into account, the global sentence imposed in the Provincial Court of British Columbia amounted to the equivalent of five years.
- [8] Three of the five robberies involved stealing money from business employees or owners using an imitation handgun. During one of those robberies, the applicant threatened to kill the victim if he did not produce cash. A fourth robbery involved stealing a vehicle by threatening the driver with the imitation handgun, pushing him out of the driver's door, and then fleeing with the vehicle. A fifth robbery involved approaching a 74-year-old man who was walking down his driveway, threatening to shoot him and demanding cash. The applicant revealed the barrel of the imitation handgun to that victim. He was unsuccessful in obtaining money.
- [9] All of the offences occurred within a span of one month. At sentencing, the Crown described them as a "spree". The robberies were said to have been committed to pay an outstanding drug debt and to obtain money for more drugs.
- [10] The applicant had a lawyer when he entered his guilty pleas. There was no plea comprehension enquiry as mandated by s. 606(1.1) of the Code. As noted in *R. v. Gates*, 2010 BCCA 378, asking questions directly of the accused ensures that they comprehend the consequences of their plea, but also serves the "salutary purpose of reminding the court, counsel, and the accused that a criminal hearing is not a mere colloquy between the bench and the bar, but rather a process in which the accused is directly and centrally involved" (at para. 21).
- [11] Submissions on sentencing occurred on July 20, 2009. A pre-sentence report was prepared for that purpose. The report noted that the applicant immigrated to Canada as a child. Crown counsel made mention of this fact in her submissions. Defence counsel did not. No one informed the judge of the potential impact of the convictions and sentences on the applicant's immigration status.
- [12] Sentence was imposed on July 22, 2009. The judge identified a number of mitigating factors: no criminal record; the applicant personally destroyed the imitation handgun to stop himself from committing further robberies; he acknowledged responsibility when arrested; he immediately and repeatedly expressed remorse; he entered guilty pleas prior to trial,

saving judicial resources and avoiding the need for testimony; and there were positive prospects for rehabilitation. The reasons for sentence make no mention of the applicant's immigration status or the potential for collateral consequences.

- [13] Victim impact statements were filed at sentencing. The judge described the offences as "frightening and [ones that] would create an immediate sense of fear and concern for one's own safety". The judge was told that for some of the victims, the offences affected their ability to feel safe and their physical health, and that one or more of them suffered financial loss because of a resultant inability to work. However, according to the pre-sentence report, some of the victims were minimally affected.
- [14] When the applicant entered his guilty pleas, his lawyer knew the applicant was born in the United Kingdom and that he came to Canada as a landed immigrant. He does not recall if he spoke with the applicant about the possibility of a deportation order, but doubts he would have done so. From his perspective, it was not until the Supreme Court of Canada released its decision in *R. v. Pham*, 2013 SCC 15, that the potential for removal was "widely known" as a collateral consequence. The applicant says he was not told about removal before entering his pleas. He does not recall telling his lawyer about his lack of Canadian citizenship. He remembers the conversations as predominantly focused on the length of sentence he could expect to serve and whether the Crown might agree to have the robbery sentences run concurrently.
- [15] In December 2009, while serving his sentence, the applicant received a letter from the Canada Border Services Agency ("CBSA") telling him that his convictions and sentences likely rendered him inadmissible to Canada on grounds of "serious criminality" (s. 36(1)(a) of the Immigration and Refugee Protection Act, S.C. 2001, c. 27 [IRPA]). The CBSA also said it was contemplating a referral to the Immigration Division of the IRB for an admissibility hearing. The applicant says this is the first time he became aware of the potential for removal. He describes being "shocked" at the news. He "assumed [he] was already being punished for the offences, and suddenly [he] felt there was an additional punishment being laid on top of [his] carceral sentence". He was "filled with dread" at the possibility of being separated from his children and other family members.
- [16] The applicant retained a lawyer for submissions to the CBSA. In June 2010, the CBSA notified the applicant that there would be no referral. However, the letter advised him that: "in the event additional adverse information [was] received, [he] may be directed to an immigration admissibility hearing, which could result in [his] removal from Canada". The applicant's immigration lawyer does not recall his conversations with the applicant, including whether there was discussion about appealing his 2009 convictions. The applicant says there was no such discussion, and, as a result, he was not aware that appealing those convictions or sentences might prevent his removal from Canada.
- [17] The applicant says that after the June 2010 letter, he did not believe he was at risk of removal, but understood this was a possibility in the event he engaged in further crime.

- [18] Although sober while incarcerated, and for approximately one year after, the applicant relapsed into drug use in October 2012 when his mother passed away. He says he began drinking and using cocaine to "cope with [his] grief". One of the applicant's brothers subsequently died of lung cancer. This also had a profound impact.
- [19] After relapsing into substance abuse, the applicant committed further criminal offences. These included:
- common assault against an intimate partner, for which the applicant received the equivalent of 25 days' imprisonment, plus one year of probation (June 2015);
 - assault with a weapon against an intimate partner; common assault against that same individual; and breach of a probation order. The applicant received the equivalent of 91 days' imprisonment, plus two years of probation (April 2016);
 - criminal harassment and breach of a probation order. The applicant was sentenced to a four-month conditional sentence (June 2016); and,
 - three counts of trafficking in cocaine. These offences occurred in 2015-2016. The sentencing judge suspended the passing of sentence and placed the applicant on probation for two years (July 2018). The judge found "exceptional circumstances". Among other things, the applicant was off drugs (he had been abstinent since February 2016); he had taken counselling; he was employed; and he had a support system in place.
- [20] In December 2017, the CBSA sent a letter to the applicant telling him that because of his further offences, he might again be referred for an admissibility hearing. The applicant was invited to make submissions. He told the CBSA that he wanted to consult with a lawyer. He did not follow through with submissions.
- [21] In September 2018, the applicant received another letter from the CBSA, telling him that two new reports had been prepared for the purpose of an IRB referral: one relating to the drug trafficking offences and a second arising out of the convictions for assault with a weapon and criminal harassment. He was again invited to make submissions. This letter noted that the applicant had been "granted several extensions" to respond to the December 2017 correspondence, but had not acted on them.
- [22] The applicant says he was unable to retain legal counsel to assist with the December 2017 and September 2018 letters because of health concerns and periods of homelessness. Between April 2017 and May 2018, he suffered a series of heart attacks that resulted in major surgery in May 2018. He was also evicted from his home, and, following his surgery, he experienced a year without stable housing.

- [23] In May 2019, the CBSA sent a letter to the applicant telling him that it had re-opened its report on the 2009 convictions and would be referring the applicant for an admissibility hearing. The CBSA was of the view that any "humanitarian and compassionate grounds" weighing against a referral had been "out balanced by [the applicant's] ongoing commission of serious criminal offences".
- [24] In January 2020, the applicant received a notice to appear before the IRB. He retained a lawyer, who unsuccessfully sought an adjournment of the hearing. The applicant says it was during his discussions with this lawyer that he first became aware that his 2009 guilty pleas could be invalid because he did not know of the collateral consequences when they were entered.
- [25] On February 21, 2020, the applicant was found inadmissible and a deportation order issued. As I understand it, the applicant filed an appeal from that decision with the Appeal Division of the IRB. However, the appeal was dismissed for want of jurisdiction on the ground that the appellant had no right of appeal. Effective 2003, the IRPA denied permanent residents an appeal if sentenced to at least two years' imprisonment. In 2013, Parliament reduced the threshold for no appeal to a sentence of at least six months' imprisonment (ss. 64(1) and (2), IRPA).
- [26] The applicant filed a notice of appeal from the 2009 convictions on March 13, 2020. Through his counsel, he has indicated that if he is granted an extension of time and succeeds in having his guilty pleas struck, the applicant will seek to re-open his IRB appeal and ask for reconsideration of the removal order.

Issue

- [27] The sole issue on this application is whether the Court should grant the applicant an extension of time to file his appeal from convictions under s. 678(2) of the Criminal Code and Rules 3, 16 and 18 of the British Columbia Court of Appeal Criminal Appeal Rules, 1986, B.C. Reg. 145/86 ["Rules"]. The parties agreed to have this issue determined by a justice in Chambers.
- [28] Rule 3(1) requires an appellant to file a notice of appeal within 30 days of the imposition of sentence. For the applicant, that deadline had expired by the end of August 2009.

Governing Framework

- [29] The legal principles governing an application for an extension of time are well established. They were succinctly stated by Justice Bennett in *R. v. Tallio*, 2017 BCCA 259:
- [8] A justice of this Court may extend the time to file a notice of appeal or application for leave to appeal: Court of Appeal Act, R.S.B.C. 1996, c. 77, s. 10(1). The criteria applicable to granting an extension of time are found in *Davies v. C.I.B.C.* (1987), 15 B.C.L.R. (2d) 256 at 260 (C.A.) and are summarized as follows:

- 1) Was there a bona fide intention to appeal?
 - 2) When were the respondents informed of the intention?
 - 3) Would the respondents be unduly prejudiced by an extension of time?
 - 4) Is there merit in the appeal?
 - 5) Is it in the interests of justice that an extension be granted?
- [9] In *Davies, Seaton J.A.* for the Court said the fifth factor "encompasses" the other factors and "states the decisive question" (at 260)
- [10] These same factors apply in the criminal context: *R. v. Smith*, 1990 CanLII 1028 (B.C.C.A.) at 2-3.

[Emphasis added.]

See also *R. v. Coffey*, 2017 BCCA 359 at paras. 20-21; *R. v. Sunshine*, 2013 BCCA 437; *R. v. Beuncamino*, 2012 BCCA 265; *R. v. Kereliuk*, 2007 YKCA 2; *R. v. Roberge*, 2005 SCC 48 at para. 6; *R. v. Smith* (1990), 11 W.C.B. (2d) 445 (B.C. C.A.) at paras. 4-5.

Positions of the Parties

- [30] The applicant says he formed a bona fide intention to appeal as soon as he became aware in early 2020 that he could appeal his convictions on grounds that his pleas were uninformed. Before then, he did not know that the law allowed for this remedy. In any event, the applicant says that between June 2010, when he received the cautionary letter from the CBSA, and early 2020, his life circumstances were such that he did not realistically have capacity to make the relevant inquiries and move things forward. Many of those years involved drug-addiction, serious health issues and periods of homelessness.
- [31] The applicant says that since February 2020, he has diligently pursued his appeal. He contends it is readily apparent that his pleas were uninformed, and, had he known about the potential for removal from Canada before pleading guilty, he would have conducted himself differently. He says an extension of time minimally prejudices the Crown. Finally, deporting a long-term permanent resident of Canada who has rehabilitated would be "inherently unjust". After years of drug abuse, criminality and poverty, the applicant has achieved stability and is conducting himself in pro-social ways. He has served the 2009 sentence. All of his immediate family reside in Canada, as well as his common-law partner. The applicant says the effects of deportation should weigh heavily in the extension analysis, especially in light of the evidence that the triggering events for his deportation--the 2009 guilty pleas--were uninformed.
- [32] The Crown opposes an extension of time. It says it took the applicant far too long to initiate his appeal and there is significant prejudice to the Crown should an extension be granted. Highly probative exhibits are no longer available. The victims' memories are likely to have

faded. It would also be unfair to ask those victims to relive their traumatic experiences through court involvement (the 74-year-old victim of the robbery in the driveway is now 86). Finally, the Crown says the applicant's appeal is not strong. Any suggestion that he would have acted differently had he known about the potential for removal before entering his pleas, is "belied by his own inaction for so many years after he was spared such a consequence in 2010".

Application of Framework

- [33] I will address each of the five Smith factors in turn, appreciating that they are not exhaustive and the weight to be assigned to each will vary from case to case: *R. v. M.A.G.*, 2002 BCCA 413 at para. 28.
- [34] Ultimately, the question before me is whether there are special circumstances that render an extension of time in the interests of justice. The applicant bears the onus of meeting this test: *R. v. Holmes*, [1990] Y.J. No. 142 (C.A.).

Was there a bona fide intention to appeal?

- [35] The applicant did not turn his mind to appealing his convictions until January 2020 at the earliest, more than 10 years past the Rule 3(1) deadline. Generally, a bona fide intention to appeal requires that the intention form before the end of the prescribed filing period. In many cases, the failure to do so "will be the end of an application to extend the time": *Tallio* at para. 18, referencing *R. v. Thomas*, [1990] 1 S.C.R. 713 at 716. However, there are also cases in which this factor is not dispositive: *M.A.G.* at paras. 13, 28. Delay in filing is highly relevant to the analysis; however, it may attract diminished weight in light of other compelling factors: *M.A.G.* at para. 13.
- [36] Here, the applicant argues that the delay in filing should attract minimal weight. Before January 2020, he did not know his convictions were appealable. Although he had legal counsel through to sentencing on the 2009 matters, that lawyer did not flag the possibility of removal from Canada. In 2009-2010, when dealing with the CBSA, he again had counsel and that lawyer did not tell him that he could challenge the convictions. Indeed, even after the Supreme Court released its decision in *Pham*, the applicant was sentenced for additional crimes and on the face of it, none of the lawyers involved in those proceedings identified removal as a potential collateral consequence, or provided advice specific to that issue. In light of that fact, the applicant poses the question: if the lawyers did not identify the issue or suggest remedial steps, is it fair to expect that he should have done so and filed an appeal?
- [37] The Crown responds by emphasizing that what the applicant did know, as early as December 2009, was that his convictions and sentences could lead to an admissibility hearing and deportation. Although the CBSA told the applicant in 2010 that it would not proceed with a referral at that time, it left open the possibility of a future referral. The applicant took no steps to address that issue or to make further enquiries, even though the thought of leaving Canada, his children and his family is said to have been profoundly disturbing to him. On

his evidence, he learned of the CBSA's position during a period in which he was sober, not experiencing significant physical health issues, and had the capacity to reach out for advice and assistance.

- [38] The CBSA brought the potential for inadmissibility and deportation to the applicant's attention again in December 2017 and September 2018. The applicant did not respond in any substantive way. There were extenuating circumstances involving health concerns and residential instability, but it is clear from the evidence that the applicant was communicating with the CBSA during this period and seeking extensions on the deadlines for submissions. The Crown says the applicant had the capacity to make enquiries, but did not do so. It was not until a deportation order issued in February 2020 that he finally took steps to file an appeal. This was too late in the day.
- [39] In support of his argument on the first of the Smith factors, the applicant points to *R. v. Reid*, 2017 BCCA 53. There, the appellant pleaded guilty to an offence in March 2004. He sought to appeal the conviction in 2015, not understanding, until then, that a lack of knowledge about the potential for removal provided a basis for setting the plea aside. The extension was granted, notwithstanding substantial delay in forming the intention to appeal. Like the applicant in this case, the appellant in *Reid* knew of the potential for removal several years prior to filing his appeal, but did not take steps to challenge the conviction until 2015 (at paras. 13-15).
- [40] As the Crown has pointed out, there are substantial differences between *Reid* and this case. In *Reid*, the Crown agreed to the extension, accepting that in addition to the issue of collateral consequences, Mr. Reid "could not in law have been properly convicted" of the charged offence (at para. 18). He pleaded guilty to an indictment that was "not supported by the factual circumstances" (at para. 24). Moreover, granting an extension did not involve the potential for a new trial. Rather, the Crown agreed to a conviction on an amended charge, or, in the alternative, an acquittal (at paras. 19-21). It was in the context of those "unusual circumstances" that the Court granted an extension, despite the passage of time (at para. 22).
- [41] On balance, I do not agree with the applicant that his delay in forming an intention to appeal should attract minimal weight. Over a 10-year time span, the CBSA thrice brought the potential for removal to the applicant's attention. Throughout that time, he had periods of instability. However, there were also periods of stability: in particular, between the years 2009-2012, in 2016 and in early 2018. A pre-sentence report prepared for the drug sentencing in 2018 noted that:

Since October 2017, the subject has been residing in an apartment in Surrey. He has no plans to relocate. His residential history is stable with minor interruptions due to recent health complications. The subject's employment history is for the most part stable. He has been working at Sunrise Kitchens as a labourer on and off for several years. Currently, the subject is working in the capacity of a site supervisor for Sunrise Kitchens. He has some debt and no assets.

With regard to addiction history, the subject began using cocaine followed by crack in the 1990's after a back injury. His use progressed resulting in legal, employment and relationship difficulty. According to file information, the subject has incurred prior offences including robbery, breach and assault which he says is related to his addiction issues. To his credit, the subject reports to have abstained from illicit substances since February 2016. He has been an active participant in individual drug and alcohol counselling through Diversecity.

[Emphasis added.]

[42] In my view, there was reasonable opportunity for the applicant to make enquiries after the 2010, 2017 and 2018 letters from the CBSA, to seek advice on what to do about his 2009 convictions, and to make efforts to have the matter addressed.

[43] Although not on all fours, this application shares aspects in common with Coffey, where an extension was denied, in part, because the applicant was aware of the potential immigration consequences when he entered his guilty pleas, but chose not to pursue the matter when it was raised with him (at paras. 46-47). The Court found an element of "wilful blindness" in Mr. Coffey's approach to the matter. In my view, the same can be said here, although admittedly not to the same degree.

[44] To me, the real question in this case is whether the failure to file an appeal until 10 years after learning of the potential for removal is outweighed by other, more compelling factors.

Was the Crown informed of the intention to appeal?

[45] The first time the Crown was made aware of the applicant's intention to appeal was March 2020.

Would the Crown be unduly prejudiced by an extension of time?

[46] The effects of time on the memory of witnesses and the reduced availability of confirmatory evidence in support of a prosecution, through the destruction of investigative exhibits or otherwise, can result in a finding of undue prejudice: *R. v. McAvoy*, 2005 BCCA 325 at paras. 23-25; *R. v. White*, 2006 BCCA 87 at paras. 11-13. Even where it is possible to reconstruct destroyed evidence, the need to reconstruct may diminish the integrity of that evidence and render it less reliable: *McAvoy* at para. 25; *White* at para. 12.

[47] The weight to be assigned to the loss or diminishment of evidence in the extension analysis will necessarily be informed by the nature and volume of the remaining evidence, the issues in dispute should a new trial be ordered, and the probative role the lost evidence would likely have played. In *R. v. Caron*, 2013 BCCA 475, for example, an extension was granted even though "key exhibits" had been destroyed. See also *R. v. D.R.H.*, 2017 BCCA 83. In that case, an extension was granted notwithstanding the destruction of exhibits, including DNA evidence linking the applicant to the offence (at para. 12).

- [48] Here, the Crown places considerable emphasis on the destruction of evidence and has filed affidavits addressing that point.
- [49] Sergeant Popat with the Royal Canadian Mounted Police ("RCMP") was the lead investigator of the 2008 offences. She has reviewed portions of the investigative file. The investigation involved a warranted search of the applicant's residence. Items seized from the residence included a key for a Nissan vehicle, a day timer, a piece of paper bearing the names of "Sheila Metikos" and "Oliver Putsep", and a Vancouver Canucks jacket.
- [50] Sheila Metikos was the registered owner of a Nissan Pathfinder stolen in one of the robberies and used in two others. She loaned the Pathfinder to her brother, who was the victim of the robbery. The vehicle had only one key associated with it. From subsequent discussions with Ms. Metikos, police came to believe that the key, the day timer and the piece of paper seized from the applicant's residence, belonged to Ms. Metikos or her then boyfriend, Mr. Putsep.
- [51] The Vancouver Canucks jacket was "very similar in appearance to the jacket worn by the perpetrator of the first robbery under investigation" in June 2008. Video footage of that robbery depicted a Vancouver Canucks jacket.
- [52] In support of its investigation, the RCMP also seized a Nike jacket from the applicant when arrested on an unrelated matter. That jacket was "very similar in appearance to the jacket worn by the perpetrator of another robbery" that formed part of the overall investigation in June 2008, again depicted in video footage.
- [53] The RCMP database indicates that by December 2009, a number of the exhibits associated with the robbery offences had been destroyed, including all of the ones mentioned above.
- [54] In his affidavit, the applicant's (then) trial counsel has identified various issues that would have been raised at a trial, including: "generic descriptors, lack of identification by witnesses, and the procedure used in photo lineups; and Charter issues relating to a vehicle stop, his arrest and the search of his residence". The destroyed exhibits would have carried evidentiary significance on these issues, particularly the issue of identification.
- [55] According to the submissions at sentencing, three victims were able to identify the applicant from a photo pack. His fingerprint was found on the exterior of the stolen vehicle. After his arrest, the applicant provided a warned confession, admitting to all five robberies. The Crown has confirmed that all of the witnesses remain available.
- [56] Based on the continued availability of some of the exhibits, as well as the witnesses, it does not appear that the challenges of launching a new trial would be insurmountable, at least with respect to some of the original counts. However, I accept that the destruction of exhibits with significant probative value on the issue of identity and the effects of time on memory will prejudice the Crown should an extension be granted and the convictions be set aside. The warned statement is not automatically admissible; it would be subject to a voluntariness ruling. Identification cases often depend for their strength on corroborative

circumstantial evidence, even where one or more of the witnesses remains able to recognize the accused. This is especially so when the alleged perpetrator is unknown to the witness and the crime unfolded quickly in the context of traumatic circumstances. In that context, tangible items that circumstantially link the accused to the crime carry heightened value. The Crown no longer has access to a number of those items.

- [57] The Crown is also correct that re-engaging the victims for the purpose of a new trial, should one be ordered, constitutes prejudice for purposes of an extension application: *R. v. Smarch*, 2019 YKCA 5 at para. 38. There is the potential for re-traumatization after reasonably expecting that the litigation had finalized because of the guilty pleas.

Is there merit in the appeal?

- [58] This factor in the *Smith* analysis focuses on whether the applicant has identified a reasonably arguable ground of appeal.
- [59] In *R. v. Wong*, 2018 SCC 25, the Supreme Court confirmed that a guilty plea will not be valid unless it is voluntary, unequivocal and informed. The last of these criteria requires that the accused be aware of the nature of the allegations at the time the plea is entered, the effect of the plea, and its consequences, including any legally relevant collateral consequences that may flow from the conviction and impact serious interests of the accused.
- [60] Those who seek to withdraw their guilty plea on grounds that they were unaware of legally relevant consequences must establish a reasonable possibility that they would have proceeded differently had they known of them: *R. v. Miller*, 2019 BCCA 78 at para. 3. In *Wong*, the majority described this requirement as one of "subjective prejudice". The applicant must establish a "reasonable possibility" that they would have opted for a trial, or, pleaded guilty, but with different conditions (at para. 6).
- [61] For purposes of this application, there is evidence from which a division of the Court could reasonably conclude that the applicant was not made aware of the potential for removal from Canada before he entered his pleas. Indeed, the Crown takes no issue with that proposition for present purposes. There was no discussion of the issue before the sentencing judge, and, although the applicant's landed-immigrant status was known, no one appears to have turned their minds to what that meant if he were convicted and sentenced to a penitentiary prison term. In light of the evidence before me, the applicant has a strong argument that his 2009 guilty pleas were uninformed, appreciating that, as noted in *Coffey*, this determination involves a case-by-case assessment informed by the entirety of the record.
- [62] The applicant has deposed in a supplemental affidavit that he would have conducted himself differently had he known of the potential for removal. He says he "would not have instructed [his trial counsel] to negotiate a guilty plea with a sentence of two years or more". He would have "preferred to go to trial even if there was a chance that [he] might end up with a far lengthier sentence than was eventually agreed to in [his] plea bargain". He would not have

wanted to be away from his immediate family members, including his children, and he would have been concerned that if deported to the United Kingdom, he could not support himself there. As noted, an assertion of subjective prejudice is an essential element of the Wong threshold for appellate intervention (at para. 36).

- [63] The Crown has not sought to cross-examine the applicant on his affidavit for purposes of the extension application; however, it does challenge the credibility of that assertion, in light of the record as a whole.
- [64] In Wong, the Supreme Court held that in assessing the veracity of claimed subjective prejudice, the appeal court may look to "objective, contemporaneous evidence" (at para. 6). See also, R. v. Girn, 2019 ONCA 202 at paras. 66-70. The Crown says that in this case, the objective evidence would include the fact that the Crown had a strong case against the applicant. There is also evidence suggesting that the guilty pleas were firmly entrenched in a desire to accept early responsibility for the offending and that doing so outweighed any desire to defend the charges on their merits. The applicant's trial lawyer has deposed that:

Mr. Khungay wanted to take responsibility for his actions and write letters of apology to the victims, consistent with his statement to the police and despite the issues I had identified and discussed with him regarding the potential inadmissibility of his confession. My recollection is that we had several discussions about his desire to plead guilty and that I made notes of his instructions

The plea arrangement was made because Mr. Khungay consistently said he wanted to plead guilty, in part because he felt bad about the victims and his family and wanted to take responsibility for his actions

[Emphasis added.]

- [65] The applicant says, now, that his guilty pleas (as well as any apologies made for his conduct post-sentencing) were in fact driven by a desire to reduce the amount of time he spent in custody, particularly given his drug addiction. However, as the Crown has aptly pointed out, there are inconsistencies between that position and the submissions made at sentencing, in which defence counsel emphasized that the applicant had expressed remorse for his conduct immediately following his apprehension and had never wavered from his desire to take responsibility:

In relation to mitigating factors, as I indicated, the Crown, in my submission, has set out fully and fairly all of the mitigating factors. I would ask Your Honour to remember again, in particular, and perhaps it doesn't show my friend described it to, I think, perhaps the best as she could or one could, in saying, well, when he was confessing to the police, he was very emotional. And emotional with remorse and his regret over what he'd done and sorrow for the victims and expressing the desire at that point to write a letter of apology to the victims. And in my submission, that's quite important and telling, that he was actually arrested for four of the robberies and under investigation for the last one and he fully confessed to all of them. That's, in

my submission, quite important.

[Emphasis added.]

[66] The sentencing judge accepted that the applicant intended to take responsibility for his offences from the "earliest opportunity":

[32] He acknowledged his responsibility at what could only be described as the earliest opportunity, when confronted by the police. He indicated, on the occasion of when he provided a confession to them, that it was his intention to apologize to the complainants for what he had done, and that is a theme which has run consistent through to last Monday when he apologized in court.

[Emphasis added.]

[67] In challenging the credibility of the applicant's assertions, the Crown also points to the applicant's conduct between June 2010 and February 2020, when he did nothing to address the potential for removal. The applicant has deposed that had he known of a possible deportation order, it would have had a profound impact on his decision making. Yet he became aware of that possibility in 2010; future removal was not ruled out by the CBSA; and he took no action to address the matter.

[68] The applicant's affidavits raise an arguable ground of appeal; however, in light of the record, as highlighted by the Crown, I do not find that the appeal is strong. In my view, it may well be difficult for the applicant to establish an objectively reasonable possibility that he would have conducted himself differently had he known there was a potential for removal from Canada.

Is it in the interests of justice that an extension be granted?

[69] The interests of justice is the "overarching concern" in an extension application and, in addition to the first four of the Smith factors, allows for consideration of other individual and societal considerations, specific to the case: *Smarch* at para. 23. See also *Clock Holdings Ltd. v. Braich*, 2009 BCCA 437 at paras. 23-24 (cited in *Tallio* at para. 11).

[70] In my view, this includes the importance of finality in plea resolutions, but also the strong public interest in ensuring that guilty pleas are voluntary, unequivocal and informed: *Wong* at para. 3. The interests of justice further allow the Court to consider the "magnitude" of the collateral consequences in issue, and their personal impact. In this case, that impact includes removal from a country in which the applicant has resided for over 40 years and which is the residence of his children and common law partner: *R. v. Ansari*, 2015 ONCA 891 at para. 31.

[71] After considering the entirety of the record, I am persuaded that special circumstances exist and justify an extension of time to appeal from conviction.

- [72] There is no question but that the applicant had time and opportunity to file a notice of appeal years before March 2020. He has known of the potential for removal since June 2010. He has faced difficult personal circumstances since then, but not for the entirety of the time. The Crown will also be prejudiced by an extension of time (albeit not irreparably), and although the applicant has an arguable case for setting aside his guilty pleas, I do not consider the appeal to be strong on the second element of the Wong enquiry. Whether I am correct in that assessment remains to be seen; it will be up to the division that hears the appeal to assess the credibility of the applicant's assertions and whether they provide a sufficient basis for setting the guilty pleas aside.
- [73] Finally, the victims of these offences have had reason to believe, since July 2009, that their testimonial involvement was not required because of the admissions of guilt. I am mindful of the detrimental impact re-engagement with the court system may carry for them.
- [74] However, this Court has previously granted extensions notwithstanding considerable delay before filing. See, for example, *R. v. Gusakov*, 2019 BCCA 279; *R. v. Rezaie*, 2019 BCCA 263; and *R. v. Gonzales*, 2016 BCCA 436. I appreciate that no two cases will ever be exactly alike and there are distinctions between those decisions and the case before me. However, the applicant has served his sentence for the 2009 convictions; he has been found to have made great strides in his rehabilitation (warranting the suspended sentence in 2018); his removal carries enormous consequences for him and his family; and although he may have difficulty meeting the Wong test for appellate intervention, he has an articulable argument to put forward, with an evidentiary foundation that could be interpreted in his favour. This includes troubling life circumstances between 2010 and 2020 involving drug addiction and serious physical health issues.
- [75] There is also merit to the question posed by the applicant's counsel in oral submissions. Namely, if so many with knowledge of the criminal justice system and the potential for collateral consequences did not appreciate the materiality of the issue until early 2020 and suggest that he appeal his convictions, why should a failure to act until then be held to be determinative against him? This Court has been urging counsel and sentencing courts to be mindful of immigration consequences since long before *Pham*. See, for example, *R. v. Martinez-Marte*, 2008 BCCA 136:
- [19] A number of recent cases in this Court have raised this issue. It is to be hoped that in future, the record will demonstrate adequate consideration of the immigration consequences of any sentence to be imposed. It is perhaps not too much to ask the Crown to address these matters before the sentencing judge in the event that defence counsel fails to do so.

[76] I find this case close to the line. Particularly in light of the delay in filing an appeal and the prejudice to the Crown arising from the passage of time. However, in light of the Court's jurisprudence on extensions, the particular circumstances of the case, and the critical importance of ensuring that guilty pleas are informed, I am not prepared to deny the applicant an opportunity to have his convictions reviewed. As noted, whether the appeal succeeds on its merits is for a division to decide, based on its own assessment of the record.

Disposition

[77] For the reasons provided, the application for an extension of time to appeal from the 2009 convictions is allowed, and an extension is granted to March 14, 2020.

"The Honourable Madam Justice DeWitt-Van Oosten"

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Prepared on 29 October 2026 · Esheria