SUPREME COURT OF QUEENSLAND

CITATION:	*R v Wyllie* [2010] QCA 98
PARTIES:	**R** **v** **WYLLIE, Rohan James** (applicant)
FILE NO/S:	CA No 6 of 2010 CA No 279 of 2009 DC No 419 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Conviction) Sentence Application
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	30 April 2010
DELIVERED AT:	Brisbane
HEARING DATE:	13 April 2010
JUDGES:	Holmes and Chesterman JJA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for extension of time within which to appeal against conviction refused** **2. Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – NOTICES OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – where applicant pleaded guilty to attempted recording in breach of privacy – where applicant lodged an appeal against conviction out of time – where there was some explanation for the delay – where the delay not excessive – where applicant argued that he was improperly pressured by his legal counsel to plead guilty and that his plea of guilty amounted to a miscarriage of justice – where no prospects of success on appeal against conviction demonstrated – whether application for extension of time should be granted CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant pleaded guilty to attempted recording in breach of privacy – where applicant sentenced to two years probation, having already

served 33 days in pre-sentence custody – where conviction recorded – where applicant argued that recording of a conviction would adversely affect his future employment prospects – where applicant argued that the length of probation was manifestly excessive – whether trial judge erred in exercising his discretion to record a conviction – whether sentence manifestly excessive

Criminal Code 1899 (Qld), s 4, s 227A
Penalties and Sentences Act 1992 (Qld), s 12(2)

Meissner v The Queen (1995) 184 CLR 132; [1995] HCA 41, considered
R v Cay, Gersch and Schell; ex parte A-G (Qld) (2005) 158 A Crim R 488; [2005] QCA 467, cited
R v Tait [1999] 2 Qd R 667; [1998] QCA 304, considered

COUNSEL: The applicant appeared on his own behalf
G P Cash for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA**: On 19 October 2009, the applicant pleaded guilty to one count of attempted recording in breach of privacy, contrary to s 227A of the *Criminal Code*. A conviction was recorded and he was placed on probation for two years, with a special condition that he submit to medical psychiatric and psychological treatment as directed by an authorised Corrective Services Officer. On 5 January 2010, the applicant filed an application for an extension of time within which to appeal against both his conviction and sentence, although he had in fact filed an application for leave to appeal against his sentence within the appeal period.

The extension of time application

[2] The applicant's explanation for the delay was that he was labouring under some confusion as to the form of the notice of appeal he should file. Originally, and within time, he filed the notice of application for leave, which sought only to appeal against his sentence. On 3 December 2009, after the appeal period had expired, he mailed a further notice of appeal, together with an application for extension, but it was not received by the Registry. Consequently, it was necessary for him on 5 January to file yet another notice of appeal, against both conviction and sentence, and a further application for extension of time.

[3] In *R v Tait*[1] this Court considered the approach to be taken to the question of extending time in criminal appeals:

> "… the Court will examine whether there is any good reason shown to account for the delay and consider overall whether it is in the interests of justice to grant the extension. That may involve some assessment of whether the appeal seems to be a viable one. It is not to be expected that in all such cases the Court will be able to assess

1 [1999] 2 Qd R 667.

> whether the prospective appeal is viable or nor, but when it is feasible to do so, the Court will often find it appropriate to make some provisional assessment of the strength of the applicant's appeal, and take that into account in deciding whether it is a fit case for granting the extension."[2] (citation omitted)

[4] In the present case the delay was not extensive and there is some explanation for it. It is appropriate therefore to turn to a consideration of the merits of the proposed appeal, the grounds of which are as follows:

> "Plea of guilty was a product of barrister duress via direct threat, plea of guilty not a free exercise of will, miscarriage of justice and plea attended by such unfairness to justify new trial."

The Crown case

[5] The applicant shared his house with two women and a man who had responded to his advertisement for tenants. On the facts as alleged against the applicant at sentence, the tenants became suspicious that he was doing something untoward when they heard noises from the garage and sounds as if the applicant were moving about in the roof cavity. Exploring the house one day in his absence, they found pin holes in the walls and roof, and a camera mounted in the roof cavity above one of the women's bedrooms. There were signs of someone having spent time in the roof cavity: there were carpet tiles put down and cigarette butts lying about.

[6] The tenants called the police, who obtained a warrant and searched the house. They established that the camera was set up with a wire running to the applicant's computer, although the camera was not attached to a power source at the time it was found. An examination showed that the camera could be operated with a 12 volt power cord, while the computer had the capacity to record and capture video footage. However, the information on it was encrypted and police were not able to obtain access to its contents. There were, in all, six plastic mounts in the ceiling which could hold a camera, and a series of wires which led to the applicant's room. Originally the applicant was charged with four offences as a result of those discoveries. After a *voir dire* and negotiations between counsel, the Crown entered a *nolle prosequi* in respect of three of the charges.

The circumstances in which the applicant pleaded guilty

[7] The applicant pleaded not guilty to the remaining charge, of attempted recording in breach of privacy, but changed his plea to one of guilty after a conference with his legal representatives on the day set for trial. The applicant has filed affidavits as to the circumstances in which he decided to plead guilty, but the principal source of information as to what occurred at that conference is a tape recording which the applicant made, unknown to his lawyers. (The Crown has provided a transcript of the recording.) The essence of the applicant's complaint is that, in the conference, his barrister told him he would not run the case as the applicant wished him to, and that if the applicant insisted on his doing so he would withdraw. The applicant says that he was trapped into pleading guilty, because if his counsel withdrew he would have to represent himself and was more likely to face imprisonment. Consequently, he decided to plead guilty, with the firm intention of later appealing against conviction.

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2 At 668.

[8] The applicant's solicitor, Mr McDonald, and his barrister, Mr M J W Byrne, have also provided affidavits. Mr Byrne has attached to his affidavit a copy of an email he received from the applicant as to proposed defences. In it, the applicant summarised at some length his views on what amounted to attempt and the necessary intent. He raised a number of "potential arguments", including that he would give evidence that, while knowing that his acts would have the effect of invading the complainant's privacy, it was merely a "side effect", because he had acted for another reason; and that since his computer was not functioning, it was impossible for him to commit the offence and thus he could not have any intent to do so. He also had an argument that the search warrant executed on his house by police was invalid because it was served on one of his tenants, not himself, and that he was the occupier for the purposes of s 158 of the *Police Powers and Responsibilities Act* 2000 (Qld).

[9] At the conference which took place on the day set for trial, the applicant confirmed to his lawyers certain instructions as to matters of fact: he installed the camera and the camera mounts, with associated pin holes in the walls, and put in a wire for an externally mounted camera which was not connected to his computer. What appeared to be a wire connected to the ceiling camera was, he claimed, a fly lead. He had not laid the other wires. He set up this surveillance system because he believed that there was a conspiracy against him. He did not do anything further, because his male tenant had told him that he had served a gaol sentence for grievous bodily harm, which frightened him out of proceeding with any filming. That meant, he told his barrister, that he had desisted, as was proved by the fact that the camera had no power cord.

[10] The applicant had a particular view of the effect of s 4 of the *Criminal Code,* which was not shared by his counsel. The section is in the following terms:

> "**4 Attempts to commit offences**
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> (1) When a person, intending to commit an offence, begins to put the person's intention into execution by means adapted to its fulfilment, and manifests the person's intention by some overt act, but does not fulfil the person's intention to such an extent as to commit the offence, the person is said to attempt to commit the offence.
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> (2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on the offender's part for completing the commission of the offence, or whether the complete fulfilment of the offender's intention is prevented by circumstances independent of his or her will, or whether the offender desists of his or her own motion from the further prosecution of the offender's intention.
>
> (3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.
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> ..."

In addition, the applicant seems to have seized on a sentence in the relevant draft direction in the Supreme and District Court Benchbook on attempt; it appears italicised in the quote below in order to identify it:

> "The act relied upon as constituting the attempt must be an act immediately, not merely remotely, connected with the contemplated offence. *What is done must go beyond mere preparation to commit the crime and must amount really to the beginning of the commission of the crime*. But it is not necessary that the defendant should have done his best or taken the last steps towards the intended offence."[3] (citation omitted)

[11] The applicant's thesis was that the commission of the crime of recording in breach of privacy began with the recording or viewing of film illicitly taken, and since he had not got that far, having desisted through fear of the male tenant, he could not have committed an attempt. Mr Byrne disagreed with that view and declined to argue it. The applicant makes particular complaint of the fact that, in the conference, Mr Byrne told him that if he wanted to run the case, he could run it; he, Mr Byrne, would not run it in the way the applicant proposed. He told the applicant he did not know what he was doing and should talk to his parents; for that purpose he left the applicant alone with his parents for a period. The applicant's parents urged him to continue to retain Mr Byrne.

[12] On his return to the conference, Mr Byrne reiterated that he would not be bound by the applicant's ideas of how the case should be run. He advised him that the positioning of the camera was sufficient to amount to an attempt and that if the applicant gave evidence according to his instructions he would be found guilty. The alternative was to put the Crown to proof; Mr Byrne thought the prospects of success, taking that course, were five per cent or less. The chances were that if the trial were to run for the proposed three days it would attract media attention.

[13] Mr Byrne told the applicant that on a plea of guilty he could explain to the court that the applicant was under psychiatric care and suffered from a delusional belief in a conspiracy which had led him to set up the surveillance system. (It should be mentioned that the applicant does not seek here to ascribe his plea of guilty to any mental illness.) That was likely to result in a probation order with a condition that the applicant receive treatment. Mr Byrne at no stage told the applicant that he had to plead guilty, and he made it clear that there was no assurance that a conviction would not be recorded. The applicant agreed that he would plead guilty although, he said, he was not happy about it. Mr Byrne informed him that if he wished to change his plea he would need to sign a document, which the solicitor provided, acknowledging his change of instructions. He left the applicant alone with his parents once more.

[14] The applicant signed the document, headed "Authority to Plead", in which he gave his instructions that he wanted to plead guilty. In it, he acknowledged that he understood the charges, and that he had a right to go to trial; and that by pleading guilty he accepted that he would be sentenced on the basis of the facts the Crown presented to the court. Among other matters, the document which the applicant signed says:

> "I give the instructions to plead GUILTY of my own free will and no threat, promise, or inducement has been held out to me by any person to give these instructions."

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3 Queensland Supreme and District Courts Benchbook Direction 68.1.

The applicant's prospects of having his plea set aside

[15] The significance of a plea of guilty was discussed by the High Court majority (Brennan, Toohey and McHugh JJ) in *Meissner v The Queen*:[4]

> "A court will act on a plea of guilty when it is entered in open court by a person who is of full age and apparently of sound mind and understanding, provided the plea is entered in exercise of a free choice in the interests of the person entering the plea. There is no miscarriage of justice if a court does act on such a plea, even if the person entering it is not in truth guilty of the offence." (citation omitted).

In the context of considering the point at which conduct designed to convince a defendant to plead guilty became improper, the majority said:

> "It will often be difficult to determine whether conduct that falls short of intimidation but which has the tendency to induce an accused to plead guilty is improper conduct that interferes with the accused's free choice to plead guilty or not guilty. Argument or advice that merely seeks to persuade the accused to plead guilty is not improper conduct for this purpose, no matter how strongly the argument or advice is put. Reasoned argument or advice does not involve the use of improper means and does not have the tendency to prevent the accused from making a free and voluntary choice concerning his or her plea to the charge. As long as the argument or advice does not constitute harassment or other improper pressure and leaves the accused free to make the choice, no interference with the administration of justice occurs."[5]

[16] The conduct of the applicant's counsel in this case was entirely proper. He did not threaten the applicant with withdrawal from the case if he did not plead guilty; instead, he refused to advance unmeritorious submissions, while making it clear that he was prepared to run the trial on arguments he thought tenable, although with little hope of success. He gave his client strong advice as to his poor prospects of acquittal, which seems, in the light of what was discovered on the property and the lack of any viable defence in the matters raised by the applicant, to have been well founded. The applicant may regret accepting that advice, but there is nothing to suggest that he was not fully aware of what he was doing or what would result when he entered a plea of guilty. His interchanges with his legal representatives suggest that he was quite capable of asserting himself and standing his ground; there is no hint of intimidation on his part in his repeated challenges to his lawyers.

[17] In summary, the case against the applicant was strong; he was properly advised to that effect; having received that advice, he made a deliberate and thoroughly informed choice to plead guilty. He has no prospect of demonstrating a miscarriage of justice which would warrant setting aside the resulting conviction. Accordingly, I would refuse the application for an extension of time.

The application for leave to appeal against sentence

[18] In his submissions at sentence, defence counsel advised the court that the applicant was suffering from paranoid schizophrenia and at the time of the offence was using

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4 (1995) 184 CLR 132 at 141.

5 At 143.

medication which caused him to have a single and discrete delusion of persecution, suspecting his housemates of plotting against him. His condition, it was submitted, contributed to his offending in the sense that it caused him to set up the surveillance, but it did not deprive him of any of the relevant capacities, for the purposes of s 27 of the *Criminal Code*, in relation to the offence. At the time of his plea and sentence he was on different medication and was not suffering from any form of delusion.

[19] The applicant had a minor and irrelevant criminal history and had not previously had any conviction recorded against him. He had spent 33 days on remand in custody as a result of the offence. He was not employed at the time of sentence but was seeking work. His counsel put on his behalf that a conviction might affect his future employment prospects, while it would assist his mental health if no conviction were recorded.

[20] The learned sentencing judge accepted that while the applicant's behaviour must have been extremely upsetting to the complainant, it was not sexual in nature. The plea of guilty was a late one. Taking into account the fact that the applicant had already served 33 days in jail, the appropriate sentence was one which entailed supervision by way of a probation order. His Honour observed during the course of argument that no evidence was placed before him which would indicate any specific respect in which the recording of a conviction might hamper the applicant's employment prospects. In his sentencing remarks, he said that having regard to the matters identified in s 12 of the *Penalties and Sentences Act* 1992 (Qld), particularly the seriousness of the offence, he would record a conviction.

[21] The applicant argues that in light of the maximum penalty for the offence, of two years imprisonment, two years probation was excessive, and did not adequately recognise his guilty plea. That submission is plainly untenable. The applicant also complained of the recording of a conviction.

[22] The factors identified in s 12(2) of the *Penalties and Sentences Act* are as follows:

> "(2) In considering whether or not to record a conviction, a court must have regard to all circumstances of the case, including—
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> (a) the nature of the offence; and
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> (b) the offender's character and age; and
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> (c) the impact that recording a conviction will have on the offender's—
>
> (i) economic or social wellbeing; or
>
> (ii) chances of finding employment."

[23] The offence was, as the learned judge observed, a serious one. The applicant was a mature man. While it was not essential that any specific employment opportunity lost to him be identified,[6] nothing was put before the sentencing judge as to his past employment or experience to give greater weight to the submission that the conviction would have an impact on his chance of finding employment. No other matter was pointed to which might militate against the recording of a conviction. I do not think there is any basis for a conclusion that the learned sentencing judge erred in the exercise of his discretion.

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6 *R v Cay, Gersch and Schell; ex parte A-G (Qld)* (2005) 158 A Crim R 488 at 495.

Orders

[24] I would refuse the application for an extension of time within which to appeal against conviction, and would also refuse the application for leave to appeal against sentence.

[25] **CHESTERMAN JA:** I agree that both the application for extension of time and the application for leave to appeal against sentence should be refused for the reasons given by Holmes JA.

[26] **ATKINSON J:** I agree with the orders proposed by Holmes JA and with her Honour's reasons.