Date: 20080619

Docket: CMAC-514

Citation: 2008 CMAC 5

Ottawa, Ontario, June 19, 2008

Present: THE HONOURABLE CHIEF JUSTICE BLANCHARD

BETWEEN:

EX-CPL STEVENS, B.M.

Applicant/Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Ex-Cpl Stevens, brought this motion "… for an order permitting the filing of his Notice of Appeal and his application for leave to appeal on May 9, 2008, despite the expiration of the period prescribed in section 232(3) of the *National Defence Act.*"

I. Background

[2] The Applicant pleaded guilty to three charges of trafficking in cocaine and one charge of trafficking in ecstasy before a Standing Court Martial on January 17, 2008. Before accepting the

guilty pleas, the presiding Military Judge explained to the accused the elements of the offence to each charge, the effect of entering a guilty plea to the charges and the maximum punishment for each charge. The parties submitted a joint submission on the appropriate sentence, which was accepted by the Court. The Applicant was sentenced to 16 months of imprisonment whereupon he was transferred to the Canadian Forces Service Prison and Detention Barracks (the Detention Barracks) in Edmonton where he is currently serving his sentence. Prior to the termination of the proceedings, the Military Judge stated, "[T]he proceedings in respect of ex-Corporal Stevens are terminated subject to an application for release pending appeal pursuant to QR&O article 118.03." The Respondent's evidence, which is not disputed, is to the effect that the Military Judge asked the Applicant if he wished to make a motion for release pending appeal. The Applicant, through his counsel, stated he was not.

II. Grounds in Support of the Motion

[3] The Applicant advances the following two grounds in support of his motion: first, that he was not properly represented by his civilian lawyer and second, that as a new prisoner at the Detention Barracks, he was unable to make a phone call until he earned the privilege to do so. He claims it took 30 days before he earned the privilege of making one phone call a week. In respect to the allegations against his counsel, the Applicant states that his counsel failed to properly advise him on the following matters:

a) He did not explain the possible defences that were available to the applicant in his case;

b) He did not explain the consequences of a guilty plea to the applicant;

c) He did not obtain the applicant's consent prior to presenting a joint submission to the court for a sentence of sixteen (16) months in a military prison. He told the applicant that if he was found guilty he *could* be sentenced to "*as much as sixteen months in jail*," or words to that effect;

d) He told the applicant that he might serve his sentence in a drug treatment facility, which is impossible since this type of sentence is not available in the Military Justice system; and

e) He never informed the applicant that the applicant could appeal the decision of the Standing Court Martial as to the finding of guilt, and that he could apply for leave to appeal the severity of his sentence.

III. Legal Test on Motion for an Extension of Time

[4] Subsection 232(3) of the Act provides that an appeal or application for leave to appeal must be filed within 30 days after the date on which the Standing Court Martial's proceedings termination. In this case, the Applicant's appeal period expired on February 18, 2008. Pursuant to subsection 232(4) of the Act, this Court may, at any time, extend the time within which a Notice of Appeal must be delivered.

[5] In the exercise of the discretion whether or not to grant an extension of time, the Court will usually consider the following three factors: (1) whether the Applicant has shown a *bona fide* intention to appeal within the appeal period; (2) whether the Applicant has accounted for or explained the delay; and (3) whether there is merit to the proposed appeal. The above noted factors are not an exhaustive list. In the appropriate case, other factors may be considered such as whether unintended and disproportionate consequences flow from the sentence imposed, whether

the Crown will be prejudiced, or whether the applicant has taken the benefit of the judgment, for instance where the Crown accepts a guilty plea to a lesser offence.

IV. Application of the Factors

[6] The Applicant has not demonstrated that he had a *bona fide* intention to appeal within the appeal period. The Applicant was well aware of a right to appeal when he declined the offer by the Military Judge to move for his release pending an appeal at the termination of his Court Martial. Regarding the Applicant's alleged inability to make a phone call, he states it took him over 30 days to earn the privilege of making one phone call per week and that when he finally was allowed to make a phone call he called his wife who informed him of a possible appeal process. The Applicant does not clearly indicate when this call was made. However, the Respondent's evidence, which is not disputed by the Applicant, is that he "…phoned his next of kin on 20 January 2008 from 1830 to 1835 hours." Further in his submission, at no time does the Applicant state that he intended to appeal his convictions or his sentence within the appeal period.

[7] The Respondent's motion record contains a copy of Standing Order CFSPDB SO 306 which provides that, "4. Official telephone communication concerning ongoing appeal matters related to the sentence being served is normally approved at public expense. …" The undisputed evidence shows that the Applicant was informed of this Standing Order on January 24, 2008. He could therefore have acted earlier and taken steps to file his appeal or at least demonstrate that he had intended to do so within the appeal period. There is simply no persuasive evidence before me to indicate that the Applicant had a *bona fide* intention to appeal within the appeal period.

[8] The Applicant's appeal period expired on February 18, 2008. The evidence indicates that the Applicant first expressed the intention to appeal the severity of his sentence on April 4, 2008, in a conversation with Defence Counsel Services duty counsel, Capt. Benoît Tremblay (Applicant's affidavit at paragraph 10). This represents a delay of more than six weeks after the expiration of the appeal period. The only explanation offered to explain the delay relates to the difficulties encountered with telephone communications discussed above. This is not a satisfactory explanation. I am of the view that, had the Applicant wished to make a phone call to give instructions on an appeal, he would have been able to do so. I therefore find that the Applicant has failed to explain the significant delay.

[9] I will now turn to the third factor; consideration of the merits of the proposed appeal. The exercise here is not to make a definitive finding on the merits. A preliminary assessment of the merits based on the motion record is important and useful when an extension of time is being sought. This is particularly so when, as in the instant case, consideration of the two first factors do not mitigate in favour of granting the extension of time. A preliminary finding of a strong case on the merits will mitigate in favour of granting the extension of time.

[10] With regard to the Applicant's appeal of his convictions, he appears to be arguing that his pleas to the four charges of trafficking were invalid. The Applicant has the onus of establishing that his guilty pleas were invalid.

[11] It is settled law that a guilty plea to be valid must be voluntary, unequivocal, and informed in the sense the accused is aware of the nature of the allegations, the effect of his plea, and the

consequence of his plea. A plea entered in open court is presumed to be voluntary. See *R. v. Staples,* 2007 BCCA 616, [2007] B.C.J. No 2655 (Lexis) at para. 38. A guilty plea made in these circumstances is an admission of proof of all the material and legal ingredients of the offence. It constitutes a waiver of trial and of the right to a trial. Under the Military Rules of Evidence, C.R.C. 1978. c. 1049, subsection 38(1), it is conclusive proof of guilt. *R. v. Lachance,* 2002 CMAC 7 at para. 10.

[12] The jurisprudence has also established that guilty pleas should only be set aside in "exceptional circumstances" *R.v. Staples*, above, at para. 39 and *R. v. Hoang,* 2003 ABCA 251, (2003), 339 A.R. 291 at paras. 24-27.

[13] On the record before me, the Applicant has failed to establish that his guilty pleas are invalid. He was informed by the Military Judge of the elements of the offences for which he was charged and the maximum sentences for each offence. He acknowledged before the Judge his understanding and acceptance of the explanations. In his own affidavit he attested that he was made aware by his counsel that if he was found guilty he could be sentenced to "as much as sixteen months in jail." He therefore understood the effect and consequences of entering guilty pleas. The Applicant further provided a joint statement of circumstances and joint recommendation on sentence. In these circumstances, I see very little merit to the Applicant's appeal of his convictions.

[14] With regard to the appeals on sentence, this Court has adopted the following standard of review: "… absent an error in principle, failure to consider a relevant factor, or an over-emphasis of

the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit." *R. v. Lui*, 2005 CMAC 3, at para. 14.

[15] I have considered that the Applicant agreed to a joint submission on sentence and have considered the Military Judge's reasons on sentence. In his reasons, the Military Judge considered and applied the proper sentencing principles and objectives. He also reviewed mitigating and aggravating factors he considered in determining a fair and appropriate sentence. I also considered whether the sentence is proportionate having regard to the maximum punishment for the offences at issue. The Applicant did not produce any authorities or argument to indicate that the sentence imposed is disproportionate or inappropriate in the circumstances.

[16] Based on the record before me, I see little merit to the Applicant's appeal of his sentence.

V. Conclusion

[17] In the exercise of my discretion, based on the written record before me, after assessing the above noted factors to be considered on a motion for an order extending time to file a Notice of Appeal, I conclude that the Applicant has not met the onus of demonstrating that an extension of time should be granted in the circumstances.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the motion is dismissed.

"Edmond P. Blanchard"
C. J.

COURT MARTIAL APPEAL COURT

SOLICITORS OF RECORD

DOCKET: CMAC-514

STYLE OF CAUSE: EX-CPL STEVENS, B.M. v. HER MAJESTY THE QUEEN

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR JUDGMENT AND JUDGMENT BY: Blanchard C.J.

DATED: June 19, 2008

WRITTEN REPRESENTATIONS BY:

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