

COURT OF APPEAL FOR ONTARIO

DATE: 20210726
DOCKET: M52658

Simmons J.A. (Motion Judge)

BETWEEN

Her Majesty the Queen

Responding Party

and

Robert Gordon Lepp

Moving Party

Robert Gordon Lepp, acting in person

Samuel Greene, for the responding party

Heard: July 26, 2021 by video conference

REASONS FOR DECISION

[1] The moving party seeks an extension of time to file a notice of application for leave to appeal and notice of appeal from the decision of a summary conviction appeal court judge (“SCACJ”).

[2] On December 9, 2019, the moving party pleaded guilty to one count of breach of probation. On a joint submission, and taking account of time served, the sentencing judge imposed a fine. The moving party’s summary conviction appeal

was dismissed on October 6, 2020. For the reasons that follow, the motion for an extension is dismissed.

Background

[3] After being convicted of one count of breach of recognizance on December 4, 2019, the moving party was placed on probation for three years. One of the terms of his probation order mirrored the term of the recognizance in relation to which he was convicted: the moving party was prohibited from “mentioning” the names of three individuals in his blog.

[4] On December 5, 2019, the moving party posted an image of a letter from opposing civil counsel on his blog. The letter included one of the names the moving party’s probation order prohibited him from mentioning. Police arrested the moving party for breach of probation on December 6, 2019. After spending the weekend in jail (apparently at least part of that time in hospital), on December 9, 2019, the moving party pleaded guilty, with the assistance of counsel, to one count of breach of probation. The sentencing judge accepted a joint submission and, taking account of credit for 6 days pre-sentence custody on a 1.5:1 basis, sentenced the moving party to a \$1000 fine (plus a \$300 victim impact surcharge).

[5] The moving party appealed both his December 4, 2019 conviction for breach of recognizance and his December 9, 2019 conviction for breach of probation to the Summary Conviction Appeal Court (the “SCAC”). In reasons dated October 6,

2020, the SCACJ allowed the appeal for breach of recognizance and ordered a new trial but dismissed the appeal for breach of probation.

[6] The moving party raised two main issues on his breach of probation SCAC appeal. First, he challenged the validity of the term of the probation order on which the conviction was based. Second, he asserted the guilty plea was not voluntary or informed.

[7] The SCACJ found the moving party's arguments about the validity of the term of the probation order were not supported by the record. However, he also concluded that, in any event, the moving party's arguments amounted to a collateral attack on the probation order and therefore could not be accepted. As the moving party had filed no evidence to support his claim that his guilty plea was not voluntary or informed, and as the transcript of the guilty plea proceeding did not support the argument, the SCACJ rejected the moving party's claim that his guilty plea was not valid.

[8] On June 20, 2021, the moving party applied for *certiorari* in the Superior Court to quash the breach of probation conviction. That application was dismissed on July 2, 2021.

Discretion to Grant an Extension

[9] This court has discretion to grant an extension where it is in the interests of justice to do so: *R. v. Ansari*, 2015 ONCA 891, at paras. 22-26. Among the factors

the court will consider in deciding whether to grant an extension include the following, which are most relevant to this motion:

- whether the moving party formed an intention to seek leave within the prescribed period;
- the length of the delay;
- whether the moving party has explained the delay; and
- whether the proposed application for leave to appeal has merit.

[10] Where the extension request relates to filing a notice of application for leave to appeal from a decision of a SCAC, the issue of merit is governed by s. 839 of the *Criminal Code* and the test set out in *R. v. R.R.*, 2008 ONCA 497, 90 O.R. (3d) 641, at paras. 32-34. The moving party's notice of application for leave and notice of appeal must raise an error of law of at least arguable merit that it is of general interest to the administration of justice, or it must demonstrate a strong ground of appeal in relation to an error of law, even if the error has no significance to the administration of justice beyond the specific case.

Discussion

[11] The moving party's motion seeking an extension of time to seek leave to appeal is dated June 23, 2021. Apart from asserting he was busy with other cases and the fact of the June 2021 *certiorari* application, the moving party has not

explained his delay or provided evidence of whether he formed an intention to appeal within the appeal period.

[12] That said, the crucial issue is whether the proposed leave application has merit.

[13] In his factum and oral submissions, the moving party has raised similar concerns to those raised before the SCACJ concerning the validity of the terms of the probation order. He believes they were the result of improper actions by Crown counsel in the court below (not Mr. Greene). The SCACJ rejected the moving party's arguments in this respect on a factual and evidential basis at paras. 60 and 61 of his reasons: *R. v. Lepp*, 2020 ONSC 6061.

[14] Equally important, the SCACJ found that even if the moving party's position was factually accurate, his argument would fail as a matter of law because it amounted to a collateral attack on the probation order. Even if there was an error in imposing a particular term of the probation order, the moving party was obliged to comply with it until that term was set aside or varied: *R. v. Litchfield*, [1993] 4 S.C.R. 333, at p. 348. The moving party has not identified any error of law in this conclusion.

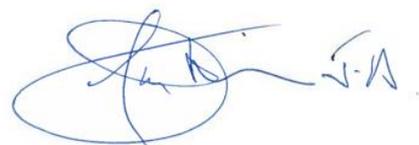
[15] The moving party's additional concern relates to the validity of his guilty plea. As in the SCAC, the moving party failed to file any affidavit material in this court to support his position. In the absence of affidavit evidence, the SCACJ found the

moving party's argument largely undermined by the transcript of the guilty plea proceedings. To the extent that the transcript supported the moving party's position he was suffering health problems at the time of his plea that made him anxious to be released from custody, the SCACJ found the record before him was not sufficient to show that the moving party was left incapable of making a "conscious volitional choice" between his options. Again, the moving party has failed to identify an error of law in the SCACJ's findings.

[16] Given the lack of merit in the proposed leave application, I decline to exercise my discretion to grant an extension.

Disposition

[17] Based on the foregoing reasons, the motion for an extension of time to file a notice of application for leave and notice of appeal is dismissed.

A handwritten signature in blue ink, consisting of a large, stylized initial 'S' followed by a horizontal line and the letters 'J.A.' to the right.