COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Gordon, 2025 ONCA 201
DATE: 20250314
DOCKET: COA-23-CR-0269

Simmons, Trotter and Favreau JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Dwayne Gordon

Appellant

Dwayne Gordon, acting in person[1]

Chris Rudnicki, appearing as duty counsel

Erica Whitford, for the respondent

Heard: February 3, 2025

On appeal from the conviction entered by Justice Robert F. Goldstein of the Superior Court of Justice on November 22, 2022.

Favreau J.A.:

A. INTRODUCTION

[1] The appellant, Dwayne Gordon, pleaded guilty to five offences related to human trafficking: a) pointing a firearm (s. 87(1) of the *Criminal Code*); b) unlawful

[1] Mr. Gordon appeared by videoconference.

confinement (s. 279(2)); c) receiving a financial benefit from trafficking a person for the purpose of facilitating their exploitation (s. 279.02(1)); d) assault causing bodily harm (s. 267(b)); and e) trafficking a person (s. 279.01(1)). The plea judge imposed a sentence of two-and-a-half years in addition to the time Mr. Gordon had already served while awaiting trial.

[2] Mr. Gordon seeks to set aside his guilty plea on the basis that it was uninformed.[2] He claims that his lawyer assured him that the plea judge would only impose six months in custody in addition to the time he had already served.

[3] Based on the evidence filed on appeal, I am satisfied that the guilty plea should be set aside. Mr. Gordon's evidence and his trial counsel's evidence show that Mr. Gordon agreed to plead guilty because he understood that he would only have to serve an additional six months. Mr. Gordon's evidence also demonstrates that he would not have pleaded guilty if he understood that he could serve an additional two-and-a-half years.

B. BACKGROUND

[4] The charges against Mr. Gordon arise from allegations involving G.L. In the summer of 2019, Mr. Gordon, who was 26 years old at the time, started a relationship with G.L., who was 20 years old and worked as a dancer at an adult

---

[2] At the hearing, Mr. Gordon advised that he was abandoning his sentence appeal.

entertainment club. The charges involved allegations that, over the course of three months, Mr. Gordon coerced G.L. into giving him all her earnings. The coercion included physical assaults and threats with a gun. In January 2020, G.L. was found on the street with injuries to her head. She then gave a statement to the police regarding what Mr. Gordon had done to her.

[5] Mr. Gordon was arrested and charged on February 12, 2020. He elected to be tried in the Superior Court by a jury. The trial was scheduled to start on November 21, 2022.

[6] Mr. Gordon was denied bail and was detained at the Toronto South and Toronto East Detention Centres while awaiting trial.

[7] Before the trial was set to start, in the period between January 2022 and October 2022, Mr. Gordon's trial counsel made several overtures to the Crown to resolve the charges on the basis of the time Mr. Gordon had already spent in custody. The Crown rejected this position.

[8] Prior to trial, defence and Crown counsel attended a judicial pre-trial with Justice Bonnie L. Croll of the Superior Court of Justice. In that context, Mr. Gordon's trial counsel shared information about lockdown days and conditions of incarceration, and continued to advocate for a guilty plea based on time served. The Crown rejected this position. Mr. Gordon was tentatively scheduled to plead

guilty before Justice Croll, but he decided not to do so given that the Crown did not agree that time served would be an appropriate sentence.

[9] On November 21, 2022, the day the trial was scheduled to begin, counsel attended another judicial pre-trial, this time before the plea judge. The Crown's position at that appearance was that a sentence in the range of 8 to 10 years would be appropriate. The evidence from Mr. Gordon's trial counsel is that the plea judge said that "he may sentence Mr. Gordon to between six months and a year in custody beyond the time he already served in pre-trial custody". Mr. Gordon's trial counsel asked that the trial be put off for a day so that he could get instructions.

[10] Mr. Gordon did not agree to a plea deal that would involve additional time in custody of 6 to 12 months. He told his counsel that he would agree to plead guilty if he could be released from custody within three months.

[11] The following day, at the request of Mr. Gordon's trial counsel, the plea judge held another judicial pre-trial. The evidence from Mr. Gordon's trial counsel is that the plea judge rejected the suggestion of only an additional three months in custody but said that if Mr. Gordon pleaded guilty, he would sentence him to no more than a further six months in custody. Mr. Gordon's trial counsel made a contemporaneous note of this discussion, in which he recorded the following:

> The Crown and I had a further JPT with Justice Goldstein.
>
> Per [Mr. Gordon], I pitched the three months further custody, instead of six, which he said he would take in a heartbeat.
>
> Justice Goldstein was not having it, saying he is happy to resolve and give deals, but he was worried he'd be going too low so that it would be an unfit sentence.
>
> I was told by Justice Goldstein, who had reviewed Justice Code's decision[3] that he thought six months was a good deal.
>
> [The Crown] thought it was a really good deal too – in fact, she wasn't really content with it, but she'd live with it.
>
> Justice Goldstein said I could tell [Mr. Gordon] the reason he was getting such a good deal is he was sparing the complainant being subjected to lengthy cross-examination by counsel. [Emphasis added.]

[12] Crown counsel's evidence is that the plea judge did not make a commitment to six months beyond the time Mr. Gordon had already served and that she maintained her position that a sentence of 8 to 10 years would be appropriate. Crown counsel did not make contemporaneous notes of this second judicial pre-trial with the plea judge.

[13] Mr. Gordon agreed to plead guilty after his trial counsel reported back on this second pre-trial. Mr. Gordon is adamant that he agreed to plead guilty because

---

[3] The decision of Justice Michael Code referred to in this passage concerned one of Mr. Gordon's bail review applications: *R. v. Gordon*, 2020 ONSC 4071.

his trial counsel told him that the plea judge had said that he would impose no more than an additional six months in custody.

[14] At that meeting with his counsel following the second pre-trial, Mr. Gordon signed a document titled “INSTRUCTIONS TO COUNSEL FOR A GUILTY PLEA”, which included the following acknowledgment:

> I understand the Crown Attorney will be seeking an 8 to 10 year custodial sentence.
>
> I understand that this will be a contested sentencing and the Defence will be asking for a sentence of time served.
>
> I understand that the Judge will not be bound by either my counsel or the Crown’s position and the Judge has discretion to impose a more severe penalty if they find it appropriate to do so.
>
> I understand that: … I cannot withdraw my plea because I do not like the sentence the judge imposes. [Emphasis added.]

[15] Mr. Gordon then pleaded guilty. Before accepting the guilty plea, the plea judge conducted a plea inquiry, during which Mr. Gordon indicated that he understood that the plea judge could impose a sentence higher than any joint submission made by his lawyer and the Crown:

> [The plea judge:] There may be a joint submission before the Court, right? A joint submission means that the Crown and the Defence have agreed on what the penalty is; there might be one. But just so you know, I’m not bound by that. Okay? Like I can give a higher sentence or a lower sentence if I think it is appropriate. So are you aware of that?

[Mr. Gordon:] Yes.

[16] Mr. Gordon's sentencing hearing was held on February 2, 2023. The Crown sought a sentence in the range of 8 to 10 years. Mr. Gordon's trial counsel submitted that Mr. Gordon should get time served based on the harsh conditions of his pre-trial confinement.

[17] The plea judge pronounced his sentence on February 10, 2023. He imposed a global sentence of seven years. Deducting *Summers* credit at a rate of 1.5 days for each day in pre-trial custody, this left a sentence of two-and-a-half years to serve.

[18] Mr. Gordon's evidence is that he was "shocked" by the sentence because the time remaining to serve was five times higher than what he believed the plea judge had "promised". After the plea judge read out his reasons, Mr. Gordon stood up and asked if he could speak. His trial counsel then asked to meet with Mr. Gordon privately. In that meeting, trial counsel told Mr. Gordon that nothing could be done about the sentence at that time and that he would have to raise the issue on appeal.

C. PRINCIPLES APPLICABLE TO SETTING ASIDE A GUILTY PLEA

[19] The Supreme Court has emphasized that the plea resolution process is central to the criminal justice system, and that maintaining the finality of guilty pleas is "important to ensuring the stability, integrity, and efficiency of the administration

of justice": *R. v. Wong*, 2018 SCC 25, [2018] 1 S.C.R. 696, at para. 3. At the same time, "the finality of a guilty plea also requires that such a plea be voluntary, unequivocal and informed": *Wong*, at para. 3 (emphasis added).

[20] In order to strike a guilty plea on the basis that it was uninformed, the court must be satisfied that (1) the appellant was misinformed about or unaware of information that he needed to have in order to give an informed plea (the "information" component), and (2) he suffered prejudice amounting to a miscarriage of justice (the "prejudice" component): *R. v. Espinoza-Ortega*, 2019 ONCA 545, 146 O.R. (3d) 529, at para. 35.

[21] The appellant bears the burden of demonstrating that the plea was uninformed and that he suffered prejudice as a result: *Wong*, at paras. 6 and 65.

D. ANALYSIS

[22] Mr. Gordon submits that he meets both branches of the inquiry for setting aside a guilty plea on the basis that it was uninformed: 1) his plea was uninformed because he understood that he would only serve six months beyond pre-trial custody; and 2) he suffered prejudice because he would not have pleaded guilty if he had known that he faced the possibility of serving any time beyond an additional six months. Based on the record before the court, I am satisfied that Mr. Gordon has established both criteria.

(1) The guilty plea was uninformed

[23] For a guilty plea to be informed, the accused must be aware of the allegations made by the Crown and the effect and consequences of the plea: *R. v. Girn*, 2019 ONCA 202, 145 O.R. (3d) 420, at para. 51; *R. v. T. (R.)* (1992), 10 O.R. (3d) 514 (C.A.), at p. 519. If the accused establishes that he was unaware of the consequences of the plea, the court will consider the gravity of those consequences objectively: as held in *Wong*, at para. 34, "this step objectively assesses the seriousness of the unknown legal consequence" (emphasis added).

[24] I accept that the plea was uninformed in this case because Mr. Gordon did not understand that he could be sentenced to more than an additional six months in custody. I further accept that, viewed objectively, this was a serious unknown consequence.

[25] I recognize that the appellant provided signed instructions to his lawyer in which he affirmed that he understood: (1) that by pleading guilty, he acknowledged that he had committed the offences; (2) that the Crown would be seeking an 8- to 10-year custodial sentence; (3) that the plea judge was not bound by the positions of Mr. Gordon's trial counsel or Crown counsel; and (4) that he could not withdraw his guilty plea if he disliked the sentence imposed. I also recognize that the plea judge conducted a full guilty plea inquiry.

[26] However, I am satisfied that the appellant pleaded guilty because he believed the plea judge had provided an assurance at the second judicial pre-trial that he would not impose a sentence exceeding six additional months in custody. Whether the plea judge provided such an assurance is very much in dispute. But I do not have to resolve that issue. What matters is whether Mr. Gordon has demonstrated that this is the information he received from his trial counsel and that he believed it. He has. Mr. Gordon has provided an affidavit and repeatedly confirmed during cross-examination that, while he signed the written instructions to his lawyer acknowledging the risk of a higher sentence and while he went through the plea inquiry, he understood that these were necessary formalities but that the plea judge would live up to the assurance he gave at the second judicial pre-trial that he would only impose an additional six months.

[27] This evidence may be hard to believe on its own, especially given that it contradicts Mr. Gordon's signed instructions. However, it was confirmed by Mr. Gordon's trial counsel, who swore an affidavit stating that the plea judge provided this assurance and that he shared this information with Mr. Gordon. The contemporaneous note prepared by Mr. Gordon's trial counsel, quoted above, supports this recollection. Moreover, when cross-examined on his affidavit, Mr. Gordon's trial counsel again confirmed that he assured Mr. Gordon "[t]his was going to happen":

> Q. [W]hat was the degree of certainty you communicated to Mr. Gordon that Justice Goldstein would impose no more than a further six months in exchange for his guilty plea?
>
> A. This was going to happen. That Justice Goldstein was going to do this, is what Mr. Gordon understood, and that's what I communicated to him … [Emphasis added.]

[28] The Crown argues that the length of a sentence is not the type of serious unknown consequence that warrants setting aside a guilty plea; only consequences such as the difference between a custodial and a non-custodial sentence (as in *R. v. Al-Diasty* (2003), 64 O.R. (3d) 618 (C.A.)), or legally relevant collateral consequences such as deportation (as in *Wong*) are serious enough to fall within the scope of what the courts have viewed as an uninformed plea. However, there is no principled reason to distinguish between the seriousness of these types of consequences and the length of a custodial sentence. Certainly, a trivial difference between the length of a sentence an accused expects to receive based on his lawyer's representations and the actual sentence imposed may not amount to a serious legal consequence. But, here, Mr. Gordon understood that he would only spend another six months in custody, whereas the sentence imposed was another two-and-a-half years or five times longer than he expected. Objectively, this rises to the level of a serious unknown legal consequence.

[29] The Crown relies on this court's decision in *R. v. O'Shea*, 2016 ONCA 53, in support of the position that the length of a sentence cannot be characterized as misinformation about a serious consequence for the purpose of striking a guilty

plea. In that case, the appellant claimed that his trial counsel had told him that the pre-trial judge would only impose a 45-day sentence, whereas the sentence imposed by the trial judge was ultimately much longer. In rejecting the appellant's attempt to withdraw his guilty plea, this court observed as follows:

> The problem here is that the appellant's counsel may well have been overly optimistic about the potential sentence after the first pre-trial and may not have properly communicated to the appellant and his mother that a 45 day sentence was being opposed by the Crown and was not a certainty with the trial judge who ultimately took the plea. However, absent an allegation of ineffective assistance of counsel, which the appellant fairly does not make, this is not enough to clear the "informed" hurdle in the "voluntary, unequivocal and informed" test for the validity of a guilty plea: see *R. v. R.T.*, (1992), 1992 CanLII 2834 (ON CA), 10 O.R. (3d) 514 (C.A.). Through the advice of his counsel, the appellant knew that he would not face a trial and would receive a custodial sentence if he pleaded guilty. Through the advice of his counsel, he may have expected a lower sentence than the one he received. This dichotomy is not sufficient to call into question the validity of his guilty plea. As LaForest J. said in *R. v. Lyons*, 1987 CanLII 25 (SCC), [1987] 2 S.C.R. 309, at para. 107:
>
> > Subsequent dissatisfaction with "the way things turned out" or with the sentence received is not, in my view, a sufficient reason to move this Court to inquire into the reasons behind the election or plea of an offender, particularly where there is nothing to suggest that these were anything other than informed and voluntary acts. [Emphasis added.]

[30] It is important to note that the Supreme Court decided *Wong* after *O'Shea*. In *O'Shea*, this court suggested that miscommunication by trial counsel to the

appellant is not relevant to the issue of whether a plea is misinformed, and that, in such circumstances, absent a claim of ineffective assistance of counsel, the plea could not be withdrawn. However, in *Wong*, at para. 24, the Supreme Court affirmed that the ineffective assistance of counsel framework is irrelevant to the information component because "that framework focuses on the *source* of the misinformation (or incomplete information) rather than the misinformation itself. Assessing whether prejudice arises from misinformation does not depend upon its source" (emphasis in original). Accordingly, in a case such as this one, where there is unequivocal evidence regarding the information trial counsel provided to his client regarding assurances from the plea judge about the length of sentence, the source of Mr. Gordon's information is irrelevant. Moreover, unlike what appears to have occurred in *O'Shea*, this is not a case where Mr. Gordon hoped to get a lower sentence based on conversations with his lawyer, but rather a case where his lawyer provided assurances that the plea judge had said he would give him a specific sentence.

[31] This case is exceptional. It would be rare for counsel to provide an assurance to their client that a plea deal will lead to a specific sentence, especially in circumstances where there is no joint submission. It would also be rare for counsel to give evidence that they provided a verbal assurance regarding a specific sentence despite requesting that their client sign a document acknowledging that the plea judge may impose a different sentence. However, in

this case, given the unequivocal evidence from both Mr. Gordon and his trial counsel, I accept that he understood that the plea judge had provided an assurance that, if he pleaded guilty, his sentence would be no more than an additional six months in custody. I further accept that he therefore misunderstood an objectively serious consequence of his guilty plea. The information component is therefore made out.

(2) Mr. Gordon suffered prejudice

[32] Prejudice is to be assessed subjectively: *Wong*, at para. 6; *Espinoza-Ortega*, at para. 35. To demonstrate prejudice, the appellant must file an affidavit to establish that he would either have (1) pleaded differently, or (2) pleaded guilty but with different conditions: *Wong*, at para. 19; *Espinoza-Ortega*, at para. 36.

[33] In his affidavit and during cross-examination, Mr. Gordon stated unequivocally that he would not have pleaded guilty if he understood that he could spend more than an additional six months in custody. His conduct prior to the guilty plea is entirely consistent with this position. His counsel approached the Crown on several occasions to suggest a guilty plea in exchange for time served. In addition, when the plea judge said at the first pre-trial that he would be open to sentencing Mr. Gordon to an additional 6 to 12 months, Mr. Gordon refused to plead guilty, on the basis that he did not want to serve longer than an additional three more months in custody.

[34] The Crown submits that, in order to assess the issue of prejudice, it is necessary to look at what was occurring at the time of the guilty plea. At that point, Mr. Gordon was on the eve of trial; he would have understood that the Crown had a strong case against him and that the Crown maintained its position that the sentence should be 8 to 10 years. In those circumstances, it was in his interest to plead guilty even if he risked a sentence beyond six additional months. However, as the Supreme Court instructed in *Wong*, at paras. 12 and 25, prejudice is assessed on a subjective basis and not on the basis of what a reasonable person in the accused's position would know or decide. In this case, Mr. Gordon's evidence, including the evidence of his behaviour prior to the guilty plea, show clearly that he would not have pleaded guilty if he had understood that there was a risk of more than a further six months in custody.

[35] Before concluding, I make one last point. In this case, after the plea judge gave his sentence, Mr. Gordon asked to speak. As reviewed above, his trial counsel asked to speak to him and then told him there was nothing he could do other than proceeding with an appeal. I note that it would have been preferable if, at that point, trial counsel brought the matter back before the plea judge. The plea judge could then have considered whether he was *functus* or whether he could entertain an application to strike the plea. Had the matter been raised with the plea judge at that time, at the very least, it would have resulted in the creation of a more

complete record for review on appeal, including the views of the plea judge about what transpired during the judicial pre-trial discussions.

E. DISPOSITION

[36] I would allow the appeal, set aside Mr. Gordon's guilty plea and order a trial.

Released: March 14, 2025 "J.S."

"L. Favreau J.A."
"I agree. Janet Simmons J.A."
"I agree. Gary Trotter J.A."