

VANCOUVER
OCT 31 2022
COURT OF APPEAL
REGISTRY

COURT OF APPEAL

REX

v.

PATRICK HENRY FOX

AFFIDAVIT #2 OF CHRIS JOHNSON, K.C.

I, Chris Johnson, K.C., of the City of Vancouver, Province of British Columbia,
MAKE OATH AND SAY THAT:

1. I have personal knowledge of the matters deposed to in this affidavit, except where they are said to be based on information and belief, in which case I believe them to be true.
2. I am a lawyer with the Vancouver law firm of Johnson Doyle. My practice is largely devoted to criminal defence work, but on occasion I conduct special prosecutions or act as ad hoc Crown counsel.
3. On May 19, 2022, I affirmed my Affidavit #1 in this matter, which Crown counsel David Layton informs me, and I believe, was filed on May 20, 2022. This second affidavit responds to new points raised by Mr. Fox in his Affidavit #3, which was affirmed on July 29 and filed on August 11, 2022.

Not impossible for me to speak to Mr. Fox off-the-record at a video appearance

4. In his Affidavit #3, at p. 2, paragraph 4.1, Mr. Fox claims it would be impossible for me to have spoken to him off-the-record at any appearance for which he appeared by video. He says the judge was always present in the

courtroom before he was connected by video, and that the video connection was always terminated as soon as the court appearance concluded, unless he or the Crown made an on-the-record request that this not happen.

5. In my experience, it is possible for counsel who is present in the courtroom at 222 Main Street, Vancouver, to speak to an accused person who appears by video prior to a matter being called, or after the matter has been dealt with by the judge. In relation to the prosecution in issue on this appeal, I recall speaking to Mr. Fox while he was appearing by video prior to the judge coming into the courtroom.

No confusion regarding my discussing DC Dent being a witness with Mr. Fox

6. In his Affidavit #3, at p. 3, paragraph 5, Mr. Fox claims that when, in my Affidavit #1, at paragraphs 18 and 19, I state that I spoke to Mr. Fox about DC Dent being a witness prior to the trial in this matter, and about admissions, I am mistakenly referring to a conversation or conversations that happened following and/or before pretrial appearances that occurred in relation to one of his subsequent breach of probation charges.

7. I disagree with Mr. Fox's claim, and am confident that, as stated in paragraphs 18-19 of my Affidavit #1, I spoke to him about DC Dent being a witness and admissions prior to November 26, 2020 (i.e., prior to the trial date).

My comments at trial regarding DC Dent being called as a witness

8. In his Affidavit #3, at p. 2, paragraph 4.3, Mr. Fox states that my not informing the trial judge that I had previously told Mr. Fox that DC Dent would be a witness, in response to his assertion that he was learning of this for the first time at trial, shows that there was no previous discussion of this matter.

9. In hindsight, I should have provided a more complete answer to Mr. Fox's assertion, given that I knew that this assertion was not correct. However, my practice is not to contest every assertion made by a self-represented accused that I believe to be incorrect. In this instance, I provided a brief response that at the

time I felt was sufficient to respond to Mr. Fox's submission that the Crown should not be allowed to call DC Dent as a witness.¹

My understanding of Mr. Fox's October 31, 2020 letter

10. In his Affidavit #3, at p. 4, paragraph 7.4, Mr. Fox appears to suggest that my understanding of his October 31, 2020 letter, as set out in paragraphs 20-21 of my Affidavit #1, is inconsistent with my subsequent communications with Crown legal assistant Kelsea Goodwillie, in which I expressed a continued intention to provide Mr. Fox with disclosure.

11. To be clear, after reading Mr. Fox's October 31 letter I did not conclude that there was no need to provide him with any further disclosure. Rather, I concluded that, given the nature of the Crown's case, I did not need to provide him with a witness list. It was always my intention to provide Mr. Fox with disclosure, as reflected in my statements on the record,² and in my communications with Ms. Goodwillie.³

12. In his Affidavit #3, at p. 4, paragraph 7.5, Mr. Fox contends that at paragraph 21 of my affidavit I misquoted his October 31 letter by referencing, "the evidence of one or two VPD officers", when in fact his letter stated, "the testimony of one or two VPD officers" (Mr. Fox's emphasis).

13. However, at paragraph 21 of my affidavit I did not use quotation marks in referring to the contents of his letter, which was accurately quoted at paragraph 20 of my affidavit. Furthermore, in this context I draw no distinction between the terms, "testimony" and "evidence", and in particular I do not adopt the distinction between the terms that Mr. Fox advances at paragraph 7.5 of his Affidavit #3.

Mr. Fox's request for a bail hearing and PTC

14. In his Affidavit #3, at p. 5, paragraph 9, Mr. Fox makes a number of points regarding his request for a bail hearing and pretrial conference. Some of these

¹ See Transcript, p. 4, lines 5-32.

² See my Affidavit #1, at paragraphs 9 and 17.

³ See my Affidavit #1, at paragraphs 9-15, 24-27, 29-32.

points have already been addressed in my Affidavit #1, for example at paragraph 23, where I discuss his request for a bail hearing in his October 31 letter.

15. However, my Affidavit #1 does not address Mr. Fox's statement at p. 5, paragraph 9.3 of his Affidavit #3, that at the October 20, 2020 court appearance I said that, while I was not aware of any outstanding issues requiring a pretrial conference, if any such issues arose Mr. Fox could contact me and I would schedule a pretrial conference if necessary.

16. While I made a comment to this general effect at the October 20 court appearance,⁴ by late October and early November there was no need to schedule a pretrial conference to discuss disclosure issues. As explained in my Affidavit #1, including at paragraph 17, by that point I had expressly agreed to provide the outstanding disclosure to Mr. Fox, and I was in the process of doing so.

Reason for delay in providing disclosure prior to trial

17. In his Affidavit #3, at p. 6, paragraph 11, Mr. Fox indicates that he does not believe the statement in my Affidavit #1, at paragraph 32, that the delay in providing him with the disclosure was the result of my heavy schedule and personal obligations.

18. While I stand by the statement made at paragraph 32 of my Affidavit #1, it is unclear to me whether Mr. Fox is disputing that I had a heavy workload and personal obligations during the period in question. If he is disputing this assertion, I wish to add that I have not specified the nature of my personal obligations because they are very personal and also because Mr. Layton has informed me, and I believe, that materials provided to Mr. Fox in relation to his court cases have ended up being accessible to the public on the website that is the subject of the prosecutions underlying this and other appeals launched by Mr. Fox.⁵

19. In his affidavit #3, p. 9, paragraph 20, Mr. Fox claims that I have provided no explanation for why: (i) the Crown had the disclosure material in its possession as

⁴ See Supplementary transcript, p. 24, lines 3-12.

⁵ I also have some personal knowledge of this possibility, as noted at paragraphs 42 and 44 of my Affidavit #1.

early as October 9, 2020, yet did not provide that disclosure to him until November 23, 2020; or (ii) I received the disclosure on October 15, 2020, yet did not approve it to be sent to Mr. Fox at NFPTC until November 20, 2020.

20. I disagree with Mr. Fox's claim. My Affidavit #1 directly addresses these very issues, including at paragraphs 9-15, 17, 20-21, and 24-32.

Disclosure not made prior to sentencing hearing

21. In his Affidavit #3, at p. 8, paragraph 17.1, Mr. Fox claims that at the February 2, 2021 court appearance I "feigned" surprise at the disclosure having been retrieved from him. This claim appears to be based on Ms. Goodwillie having sent me an email on December 10, 2020, in which she stated that the hard drive containing the disclosure had been retrieved from Mr. Fox shortly after the trial.⁶

22. I did not "feign" surprise in making the comment that I did at the February 2 court appearance. While I no longer recall exactly what was in my mind when I made that comment,⁷ and it is possible that I had at that time forgotten about what Ms. Goodwillie had told me in her December 10 email, I am confident that I would not have intentionally misled the court as to my knowledge regarding whether Mr. Fox still had all of the disclosure.

23. In his Affidavit #3, at pp. 8-9, paragraphs 17.4 and 18, Mr. Fox complains that I did not provide him with disclosure prior to the sentencing hearing despite indicating on the record that I would do so.

24. It is true that, while I indicated on the record that I would provide Mr. Fox with disclosure prior to sentencing, this did not occur.⁸ However, this was an inadvertent oversight. Moreover, although I should have ensured that Mr. Fox received this disclosure, because I said I would do so, in my view the disclosure

⁶ See paragraph 38 of my Affidavit #1.

⁷ The relevant exchange is in the Supplementary transcript, p. 31, line 13 to p. 32, line 9. The impugned comment is at p. 31, lines 34-37.

⁸ See my Affidavit #1, at paragraphs 37-45.

had no real relevance to the sentencing hearing, because by that point the trial judge had already determined that Mr. Fox had breached the probation order.

25. In his Affidavit #3, at pp. 8-9, paragraph 18, Mr. Fox takes issue with my statement, at paragraph 46 of my Affidavit #1, that at the sentencing hearing Judge Rideout did not grant his request for disclosure. He says that, to the contrary, Judge Rideout had agreed that this disclosure should be made at the earlier appearances on February 2 and 3, 2021.

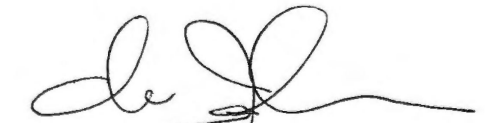
26. In fact, in my Affidavit #1, at paragraphs 42-43, I expressly indicated that at the February 2 appearance I agreed to provide Mr. Fox with the disclosure at the trial judge's request, and that at the February 3 appearance I confirmed that I would provide him with the video of the interview conducted by DC Dent. It was only with respect to the April 12, 2021 sentencing hearing that I stated that the trial judge denied Mr. Fox's request for disclosure.⁹

AFFIRMED BEFORE ME at the
City of Vancouver in the Province
of British Columbia, this 31st
day of October, 2022



A Commissioner for taking
Affidavits for British Columbia

Andrew Nelson - Lawyer
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Chris Johnson, KC

⁹ See paragraph 46 of my Affidavit #1.