

November 3, 2023

Patrick Fox
555 Homer Street
Vancouver, B.C. V6B 1K8

Patrick Fox:

Re: Your applications for legal aid to appeal your conviction and sentence.
Our File Number SR003383923

You were charged with three counts of breach of probation. The Crown proceeded by indictment. On May 15, 2023, the judge acquitted you of Count #1. The judge found you guilty of Counts #2 and #3 but entered a conditional stay on Count #2. The judge convicted you of Count #3. On May 15, 2023, the judge imposed an effective sentence of 15 months imprisonment and, after credit for pre-sentence custody, an actual sentence of one day. The judge also imposed a three-year probation order. You applied to our Section for legal aid to appeal your conviction and sentence.

I regret to inform you that your applications for legal aid are denied. I will first provide the reasons for denying your applications for legal aid and then I will outline your options for appealing without the assistance of legal aid.

Legal aid is not provided for every conviction or sentence appeal. Legal aid is only provided where our Section is of the opinion there is a reasonable prospect of success on appeal.

I have read with care the judge's *Rulings* #1-4. In my opinion, there is no reasonable prospect of demonstrating the trial judge erred in those *Rulings*. I have also read your filed *Notice of Appeal* and, in my opinion, there is no reasonable prospect of success on the issues you identified. In particular, in my opinion there is no reasonable prospect of demonstrating the judge erred in allowing the Crown to call the expert witness in all the circumstances of your case, where the trial was continued allowing you to respond to that evidence.

I paid particular attention to Ruling #2, which addressed the search of your phone. I requested that Mr. Christopher Nowlin provide an opinion on the merits of your proposed appeals. I have enclosed Mr. Nowlin's opinion. Mr. Nowlin suggests the judge may have erred in finding no violation of your right to be secure from unreasonable search and seizure. Mr. Nowlin suggests the judge may have misinterpreted the scope of the warrant. In particular the judge may have erred in finding the specified dates for the seizure of the phone did not extend to the search of the

phone, as you suggested on your application to exclude the evidence from that search. Mr. Nowlin correctly notes that a finding of a violation of s.8 does not necessarily result in the exclusion of evidence, as the next step is a weighing of the factors under s.24(2) of the *Charter*.

In my opinion, the Court of Appeal is unlikely to find that the judge erred in interpreting the warrant and finding no violation of your rights under s.8. The case law generally supports a search of an electronic device after the time given for the seizure of that device. In addition to being authorized by law, all searches must also be carried out in a reasonable manner. In my opinion, that would include a requirement that the search of an electronic device be carried out in a reasonable time after the authorized seizure. In my opinion, there is no reasonable prospect of demonstrating the delay in this case was unreasonable.

Furthermore, even if the Court of Appeal were to find that trial judge erred on that issue, that would be insufficient to support an order for a new trial in all the circumstances of your case. First, in my opinion it is unlikely that the Court of Appeal would find that the evidence should have been excluded under s.24(2) or that a new trial is required to resolve the s.24(2) issue. Second, I agree with Mr. Nowlin that the Court of Appeal is unlikely to allow your appeal in the circumstances of your case, where the eyewitness evidence, on its own, reasonably supported the conviction. From my reading of the trial judge's *Reasons for Judgment*, the evidence from the search of your phone was not essential to the trial judge's guilty verdict.

I also reviewed with care the judge's *Reasons for Judgment*. In my opinion, there is no reasonable prospect of demonstrating the judge made any errors in law in the *Reasons for Judgment*. In my opinion, there is no reasonable prospect of demonstrating the trial judge erred in assessing the evidence or making the findings of fact. In my opinion, there is also no reasonable prospect of demonstrating the guilty verdicts were unreasonable or unsupported by the evidence.

For the reasons given above, in my opinion there is no reasonable prospect of success on an appeal of your conviction and therefore your application for legal aid to appeal your conviction is denied.

I also reviewed with care the judge's *Reasons for Sentence*. In my opinion there is no reasonable prospect of demonstrating the judge erred in principle in sentencing you for that offence. In my opinion, there is no reasonable prospect of demonstrating the sentence is demonstrably unfit. In particular, in my opinion there is no reasonable prospect of demonstrating the length of the probation order is demonstrably unfit or the conditions are unreasonable.

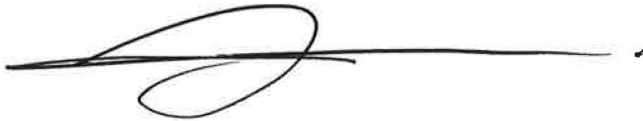
In further particular, in my opinion there is no need for the qualification you sought to the non-publication and dissemination condition for the condition to be reasonable. The question of whether you have done so is for a trial on a charge of breach of that condition. Contrary to your suggestion that there must be direct evidence of you doing so, a trier of fact may draw that inference from circumstantial evidence, including the content of the publication and the prior context of you having been found to have done so.

For those reasons, in my opinion there is no reasonable prospect of success on an appeal of your sentence and therefore your application for legal aid to appeal your sentence is also denied.

You may decide to appeal your conviction, sentence or both without the assistance of legal aid. I have enclosed our booklets which explain how to appeal without the assistance of legal aid. The booklets also explain how to apply to the Court of Appeal for a court-appointed lawyer under section 684 of the *Criminal Code*.

I have enclosed a copy of the *Rulings* and *Reasons* our Section reviewed in assessing your applications for legal aid. They are provided so you can better understand our decision. I note there is a publication ban under s.486.5(1) of the *Criminal Code* on identifying the victim. That order is subject to the limited exception in s.486.5(3). I have enclosed a copy of the section for your reference.

Yours truly,



Garth Barriere
Barrister and Solicitor
Appeals Section

Enclosures