IN THE DISTRICT COURT
AT LEVIN

CRI-2015-031-000618
[2016] NZDC 4807

MINISTRY OF SOCIAL DEVELOPMENT
Informant

v

MELISSA PACKER
Defendant

Hearing: 15 March 2016

Appearances: C Bridgman for Informant
M O'Sullivan for Defendant

Judgment: 31 March 2016

RESERVED DECISION OF JUDGE G M ROSS

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[1] Melissa Packer faces a total of nine charges brought against her by the Ministry of Social Development. Three of these charges are laid as wilful omission charges pursuant to the provisions of s 127 Social Security Act 1964. The remaining six charges are charges of dishonestly using a document without claim of right and with intent to obtain a pecuniary advantage.

[2] To these nine charges on or about 3 June 2015 Ms Love-Hudson was assigned to act for her. This was instead of Ms Michelle Lander who had been originally assigned under the Legal Services scheme, but had ceased appearing in Levin District Court. On 1 July 2015 pleas of not guilty were entered to all charges. Matters were remanded to a case review hearing for 25 August 2015. I gave a sentence indication in respect of the nine charges on 11 September 2015. This was

accepted by the defendant, and she was further remanded to 13 January 2016 for a pre-sentence report and for sentence.

[3] On 13 January 2016, her counsel having changed by this stage, Ms O'Sullivan now appeared. She indicated to the Court that an application to vacate the pleas of guilty was being considered. The Court made directions that any such application to vacate the pleas was to be filed and served no later than 5 February 2016. The matter was adjourned from 2 March 2016 and oral argument was heard from counsel on 15 March 2016. The application was opposed by the informant.

[4] The application is brought pursuant to the provisions of s 115(1) Criminal Procedure Act 2011 which provides as follows:

> **115 Plea of guilty may be withdrawn by leave of court**
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> (1) A plea of guilty may, by leave of the court, be withdrawn at any time before the defendant has been sentenced or otherwise dealt with.
>
> (2) The court must grant leave to a defendant to withdraw a plea of guilty referred to in section 116(1) if—
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> (a) the court, presided over by the judicial officer that gave the relevant sentence indication, indicates that the circumstances described in section 116(2) apply and it proposes to impose a sentence of a different type or types, or of the same type or types but a greater quantum, than that specified in the sentence indication; or
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> (b) the court, presided over by a judicial officer other than the one that gave the relevant sentence indication, indicates that it proposes to impose a sentence of a different type or types, or of the same type or types but a greater quantum, than that specified in the sentence indication.

[5] Of the three grounds or principles for assessing whether a guilty plea may be withdrawn, see Westlaw/Brookers On Line CPA 115.02 citing Adams on Criminal Law. The operative principle in the present case, robbed of some of the emotion in which the application is couched by the defendant herself, is:

> If there is a possible defence to the charge of which the defendant was unaware when he or she pleaded guilty, whether because of incompetent legal advice or otherwise.

[6] Ms O'Sullivan acknowledges that the threshold is high. The discretion of the Court to vacate the guilty pleas, in particular after competent legal advice has been given, is relatively rarely exercised, and should only be exercised (see Court of Appeal in *R v C* CA 59/02) when it is in the interests of justice to do so.

[7] The principal ground advanced for leave to vacate the plea is the claim that there is the possible defence of mistake to one of the nine counts in particular, but of which defendant was not advised when she pleaded guilty. This is in charging document CRN 15031500129, (hereafter 00129) which alleges that the defendant omitted to tell MSD that she received money from Swann Insurance Ltd (for the purposes of misleading an officer) which resulted in her continuing to receive benefits under the Social Security Act. However, the defendant's claim was that if leave was granted to defend this charge (00129) then it would be in the interests of justice for leave to be granted to vacate pleas to all nine counts, to enable not guilty pleas to be entered to them all.

[8] Presumably, the same argument applies to the others (though not extrapolated before me). That is, that previous counsel advising the applicant failed to advise of a possible defence in respect of 00129 and ipso facto this followed for the others. As I understood the argument, it went like this: That defendant had been advised by a MSD case manager that compensation payments from Swann Insurance Ltd were *not* income, and that the completion of the relevant form at the appropriate time need not reflect the receipt of monies from this source for that reason. It is claimed that a case manager for MSD advised the defendant that payments from Swann Insurance Ltd were not income. That would be a surprise, and in fact it is set out in a statement of the relevant case manager at the time, he having left the MSD to take up another position in 2012, but giving a statement of 8 May 2015, as to his discussions with the defendant as to benefit entitlements on several occasions. He did not recall the defendant advising him of a payment for a personal grievance from an employer, and Ms O'Sullivan considers that his statement demonstrates a lack of knowledge when he states that the personal grievance compensation is "income received".

[9] That however, I think is the very point that Mr Bridgman was trying to make that there was no defence to this claim on this basis: that it is income for the

purposes of s 2 Social Security Act 1964. It is income to hand and must be disclosed for assessment. The source of this income goes to its quality, but if MSD are unknowing about its receipt, how then can continuing entitlement to a benefit be properly measured? As Mr Shaw states, he would have checked the effect on entitlement with another officer in the Levin office, or, at the least, would have completed an income assessment for the week the defendant received the money and established an overpayment of her benefit payments in that week. But he did not recall the defendant advising him of a payment she received for a personal grievance from an ex employer; nor did he recall the defendant advising that they were receiving the insurance payments. Again, if the latter had been so, the questioning as to entitlement to benefit payments would take place again. The point is made by the informant, though, that if MSD does not know about them, it does not know whether to include or to exclude them in the benefit entitlement assessment. The issue is disclosure of the monies received, that is, the fact of receipt or not, in the first instance at least, as opposed to the quality or any other statutory qualification or protection which those monies received might enjoy.

[10] So it appears to me at first blush as if the applicant is conflating the fact of receipt of money, with the quality of the money, which must be disclosed for assessment purposes. The source of the income goes to its quality, and after assessment and confirmation, for determination as to how it is to be treated for benefit/receipt terms. But if the informant is unknowing, how can the applicant's continuing entitlement to benefit be measured? Even allowing the applicant's submission that, on account of what is described as Mr Shaw's "lack of knowledge", he nonetheless has set out in his statement what steps he would have taken, and any error in determining the quality of income received (if it were declared) is a correctable mistake, and the submission is made that the overpayment of benefits received by the applicant has been adjusted downwards to take this into account. This however does not by itself exculpate the applicant in respect of the charge. As I have indicated above, it would appear unlikely to me that Mr Shore would advise her to exclude the Swan insurance payments from her income documents.

[11] This "defence" arises primarily from counsel's submission. Though it is referred to at para 3 of the applicant's affidavit of 14 March, there was no confirming

reference to it in the affidavit of her husband. The applicant deposes that the Case Manager made a mistake, but says that she trusted the advice as to completion of the form, and had no reason to believe it was incorrect. There is an inconsistency in that position. Clearly, this must have been discussed between herself and Ms Love-Hudson, as per para 4 of the applicant's affidavit. Certainly, in light of the probabilities of that advice being given, on which I have some real doubt as I have set out above, and it being down to the strength of the former Case Manager's word against the applicant's word, either way, the issue has been canvassed with and between the previous advising solicitor. Again, the matters which are set out in para 3 of the applicant's affidavit of 9 February 2016 seem to me to be at odds with the matters set out in para 3 of the later affidavit.

[12] Instead, the applicant in her affidavit, supported by her husband's affidavit, stresses the advice of the solicitor to plead guilty, or she would go to jail. It was, she said, as a result of this pressure to plead guilty, but with extreme reluctance, that she did so. This was after the sentence indication was given (nine months' home detention) but this was if home detention was subsequently to be assessed as suitable and available for her. The pre-sentence report of 7 January 2016 cast some doubts about that, and at a time when the applicant was still discussing matters with the probation officer in preparation for the report, she had clearly advised her lawyer that she wished to change her plea. Whether that was linked to the questionable ability of the applicant to comply with a home detention (as the pre sentence report hinted) sentence is unknown. But the avoidance of a term of imprisonment was, from her affidavits, uppermost in Ms Love-Hudson's mind in the advice which she was given about the resolution of these charges. In that, I find more acceptable and credible Ms Love-Hudson's deposition that she advised the applicant that a term of imprisonment could not be ruled out as a sentencing option. Both parties however agree that the plea of guilty was instructed to Ms Love-Hudson after my sentencing indication which, if the applicant is correct about the pressure being put on her to plead guilty by Ms Love-Hudson, might have been more optimistic than she had hoped for. As the indication was for a non-custodial sentence (subject to the usual assessments) sooner acceptance of it by the applicant might point to her relief that it was indicated and thus for Ms Love-Hudson's contention that a plea of guilty to the charges would be less likely to attract a sentence of imprisonment.

[13] In this, it should be remembered that, relatively less common in prosecutions of this kind, that the applicant has some significant and relevant previous convictions, the most recently of which was circa 2005 and was for like or related offending, which attracted a term of imprisonment for a period of nine months. There were other warnings given by the informant on earlier occasions. So the stakes were quite high. A detail of this kind marks out the applicant's position when faced with nine further charges and the responsibility for outcomes advice from advising counsel Ms Love-Hudson will be commensurately higher and is no doubt the reason why the particular details of the applicant's case can be recalled by her with some precision in her affidavit.

[14] The upshot is that I do not consider that the applicant has not received competent legal advice, and, as a result, no miscarriage of justice has occurred here. The defence or a defence to the charge has been canvassed; Ms Swarbrick's affidavit supports the competency and the capability of the representation of the client, vis-à-vis the informant agency; the impression given me by my acceptance of such conflicting matters as exist; my acceptance of Ms Love-Hudson's deposition on issues where there is a conflict in the affidavits is of her being properly across the file; that she obtained written instructions shortly after the sentence indication had been given.

[15] See too *R v Merrilees* [2009] NZCA 59 at para [4]:

> The sole issue in relation to the convictions is whether a miscarriage of justice will result unless the appellant is able to impugn his guilty pleas and have them set aside. This Court has said that it is only in "exceptional circumstances" that an appeal against conviction will be entertained after a plea of guilty, and that an appellant must show that a miscarriage of justice will result if the conviction is not overturned: *R v Le Page* [2005] 2 NZLR 845 at [16] and *R v Proctor* [2007] NZCA 289 at [4].

As I have endeavoured to show in the present case, this is not one of those where the circumstances are by any means exceptional, and neither do they point to a miscarriage of justice resulting unless the applicant has her guilty pleas set aside.

[16] Another factor which I take into account arises *obiter* in *R v Roycroft* CA 312/01, at para [22]:

> Against the background of an accused who made a voluntary admission to the police, was familiar with the Court system, was represented by counsel, and at a late stage makes sworn statements which are inconsistent with the objective facts, we are not persuaded that this is one of those rare cases where a miscarriage of justice can be established by a person who has elected to plead guilty. In these circumstances the appeal against conviction cannot succeed.

[17] This relates to the applicant's previous conviction and experience with the Court system which resulted in a term of imprisonment she was anxious to avoid on this present occasion. The application in the present case cannot succeed. It is dismissed.

G M Ross
District Court Judge