

# Conviction set aside due to ineffective assistance of trial counsel

Canadian Charter of Rights and Freedoms | Litigation | Litigation & Dispute Resolution | Ontario Court of Appeal

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In *R. v. Trought*, 2021 ONCA 379 the Court of Appeal for Ontario ordered a new trial for a man convicted of possession of cocaine for the purposes of trafficking on the basis that he had received ineffective assistance from his trial counsel.

The case against the appellant arose from a search of his apartment, where the police found a large amount of cocaine and drug paraphernalia. The search was conducted pursuant to a warrant that was based on information supplied by a confidential informant. The appellant challenged the validity of the warrant under section 8 of the *Canadian Charter of Rights and Freedoms* by attacking the information said to have come from the informant.

Trial counsel initially challenged the validity of the search warrant by alleging that the police fabricated the information said to have come from the confidential informant. He later changed position, maintaining that if the information did originate with the confidential informant, one part about the appellant showing off bricks of cocaine from the trunk of the car was so ridiculous that it must be false.

The appellant testified in the “*voir dire*” hearing for the *Charter* challenge. In cross-examination, the appellant admitted to trafficking in cocaine. He acknowledged that half a kilogram of the cocaine seized from his apartment belonged to him but the rest belonged to a friend (who was also his supplier). The appellant allowed his friend to leave drugs in the apartment on the day of the seizure.

After the appellant testified, during a colloquy with the judge, trial counsel agreed that the trial could proceed in a blended fashion, meaning that the appellant’s *voir dire* evidence would be applied to the main trial if the *Charter* application failed. It did. The trial judge was then invited to find the appellant guilty, which he did. The appellant was sentenced to 5.5 years’ imprisonment.

On appeal, the appellant argued that he had received ineffective assistance from his trial counsel. Specifically, the appellant submitted that trial counsel agreed to the “blended procedure” during the *Charter* application, and after he had testified, without obtaining his instructions to do so.

The appellant claimed that he was blindsided by his counsel’s decision, and that he thought that his evidence would only be used for the *Charter* hearing. The appellant said that he never intended to confess under oath to possessing all of the cocaine seized from his apartment. Had he been properly advised about the legal effect of his evidence, and had he known about the use to which it would ultimately be put, he said that he would not have testified at all. While the appellant understood that if the *Charter* challenge failed, the case against him was formidable, he claimed on appeal that as a result of the ineffective legal advice he had received he was deprived of his right to stay silent at trial, or at least the ability to make a meaningful and informed choice on this fundamental issue.

In accordance with the court’s protocol for appealing on the basis of ineffective assistance of counsel, the appellant filed an affidavit in support of his allegations and trial counsel filed an affidavit in response. Both were cross-examined. The affidavits and cross-examination transcripts were filed for the panel hearing the appeal.

The appeal panel noted that the framework for assessing claims of ineffective assistance of counsel is well-established. An appellant must establish: (1) the facts material to the claim of ineffective assistance on the balance of probabilities; (2) that the representation provided by counsel fell below the standard of reasonable professional assistance in the circumstances; and (3) the ineffective representation resulted in a miscarriage of justice: *R. v. G.D.B.*, 2000 SCC 22,

[2000] 1 S.C.R. 520, at paras. 26-27.

A “miscarriage of justice” may take various forms. Some may impact the outcome of the trial; others may disclose unfairness in the proceedings: *R. v. K.K.M.*, 2020 ONCA 736, at paras. 55, 91. In some instances, as discussed by the Supreme Court of Canada in *R. v. G.D.B.* trial counsel’s performance may have resulted in procedural unfairness. In others, the reliability of the trial’s result may have been compromised.

In the matter at hand, the appellant claimed that he was led to believe by his trial counsel that if he testified on the section 8 *Charter* motion, that evidence would not be part of the substantive trial. Significantly, the appellant swore that trial counsel did not confer with him before agreeing to the “blended trial” procedure, pursuant to which his *Charter* evidence could be used at the main trial, and that this was in direct contradiction to how trial counsel had explained how his evidence could be used. The appellant claimed that had he known that his evidence would be admissible at trial, he would not have testified.

Previous decisions have found grounds for ineffective assistance when trial counsel decides upon the mode of trial without consulting their client. An accused should be allowed to make an informed election and the failure of counsel to advise a client about the potential options is a miscarriage of justice without the need to establish further prejudice: *R. v. Stark*, 2017 ONCA 148. As determined by the Court of Appeal in the latter case, what the accused might or might not have done had he been aware of his options is not relevant if he was not advised of the options in the first place.

For his part, trial counsel swore an affidavit stating that he had been in frequent communication with the appellant about the conduct of the trial, and that the appellant was fully engaged with each decision. He characterized the appellant’s evidence regarding their discussion of the blended procedure as “nonsense” and claimed that they had discussed the procedure in order to maximize their chance of success. The *Charter* application was, in trial counsel’s view, all or nothing. If it failed then conviction at trial was sure to follow.

One part of trial counsel’s affidavit evidence which did not help his cause was a passage in which he stated that his client was “a career drug dealer” and that although he had lawful employment from time to time, it was always clear to him that his client’s primary vocation was the sale of drugs. The Court of Appeal noted that these allegations were at odds with the fact that the appellant does not have a criminal record and had not previously been charged with a criminal offence. Further, gratuitous comments about a former client are unhelpful and unnecessary to respond to the allegations of ineffective assistance of counsel.

As to the main allegation, the Court of Appeal reviewed the evidence and determined that the first time trial counsel turned his mind to the possibility of a blended procedure was mid-trial, when the trial judge raised the issue. It was also clear from the record that, after the trial judge raised the issue, trial counsel did not consult with the appellant before answering the trial judge’s question and agreeing to a blended procedure. Accordingly, the appeal panel was satisfied that the appellant did not receive proper legal advice about his right to decide whether to testify, nor did he authorize the expanded use of his testimony at trial. His decision to testify was therefore not an informed one.

In the Court of Appeal’s view, it was incumbent on trial counsel to discuss the issue with the appellant and the lack of proper professional advice, coupled with a failure to consult and obtain instructions, meant that the appellant chose to testify on the *voir dire*, not knowing that his evidence would become the functional equivalent of a guilty plea, or a sworn confession.

Even though the evidence against the appellant was considerable, the conviction was unfair due to the inadequate legal advice he received. The Court of Appeal set aside the conviction and ordered a new trial as a result of the miscarriage of justice.

The decision demonstrates the importance of consulting with a client before agreeing to procedures that will significantly impact the use of evidence that a client chooses to provide. In criminal matters, the accused has a right to decide not to testify at all. The important task for counsel is to adequately explain the ramifications before the client makes a decision either way. The Court of Appeal noted that trial counsel had failed to obtain written instructions from the appellant as to whether to testify. This was an issue of professional prudence rather than incompetence and did not indicate ineffectiveness in and of itself. However, all trial counsel should take note of the Court’s statement that written instructions may resolve competing allegations on future appeals without the need for dueling affidavits and cross-examinations. A PDF version is available to download [here](#).

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