

How to Withdraw a Guilty Plea

R v Wilkinson (No 4) [2009] NSWSC 323
s207 Criminal Procedure Act 1986

I am often approached by clients who wish to withdraw a plea of guilty. This is usually because they were unrepresented at their first court appearance. They subsequently take legal advice and realize that they have a defence or have pleaded to a more serious offence than they had realized. Fortunately, courts have a discretion to allow an accused person to withdraw their plea. This article seeks to assist legal practitioners appearing in the Local Court of NSW.

The Application

Section 207 Criminal Procedure Act allows an accused person to apply to change their plea from guilty to not guilty at any time before the summary proceedings are finally disposed of. However, it is a matter of the court's discretion and the accused must demonstrate that a miscarriage of justice has occurred.¹ The authorities emphasise that the issue is one of the integrity of the plea by reference to the circumstances in which it was entered.²

The leading case is *R v Wilkinson (No 4)*³ in which Johnson J summarised the principles at [41]–[48]:

- Each case must be looked at in regard to its own facts and a decision made as to whether justice requires that such a course be taken [42],
- The onus lies upon the Applicant to demonstrate that leave should be granted [43],
- On an application for leave to withdraw a plea of guilty, the question is not guilt or innocence as such, but the integrity of the plea of guilty [45],
- A miscarriage of justice will normally only arise where the accused person did not understand the nature of the charge, or did not intend by his plea to admit his guilt of it [46],
- Evidence ought be adduced from the accused person as to the circumstances in which he or she came to plead guilty [47].

Common Circumstances

Johnson J also approved of the judgment in *R v Hura*⁴ where Spigelman CJ proposed seven circumstances in which leave should be granted to withdraw a plea of guilty:

¹ *R v Boag* (unrep, 1/6/94, NSWCCA)

² *Mao v DPP* [2016] NSWSC 946 at [60] citing *R v Sagiv* (unrep, 30/5/96, NSWCCA); *R v Van* [2002] NSWCCA 148 at [48]–[50] and *Wong v DPP* [2005] NSWSC 129 at [16]; *Brown Brothers v Pittwater Council* (2015) 90 NSWLR 717 at [156]–[163]

³ *R v Wilkinson (No 4)* [2009] NSWSC 323

⁴ *R v Hura* (2001) 121 A Crim R 472 at 478

1. Where the Appellant “did not appreciate the nature of the charge to which the plea was entered”.
2. Where the plea was not “a free and voluntary confession”.
3. The “plea was not really attributable to a genuine consciousness of guilt”.
4. Where there was “mistake or other circumstances affecting the integrity of the plea as an admission of guilt”.
5. Where the “plea was induced by threats or other impropriety when the applicant would not otherwise have pleaded guilty ... some circumstance which indicates that the plea of guilty was not really attributable to a genuine consciousness of guilt”.
6. The “plea of guilty must be unequivocal and not made in circumstances suggesting that it is not a true admission of guilt”.
7. If “the person who entered the plea was not in possession of all of the facts and did not entertain a genuine consciousness of guilt”.

Submissions

The test is whether a miscarriage of justice will occur because the accused person did not understand the nature of the charge or did not intend by his plea to admit his guilt of it. So, the submission would go like this:

The Defendant applies under s207 Criminal Procedure Act for leave to withdraw the plea of guilty she entered on the last occasion. This is a discretionary power of the court and every application turns on its own particular facts.

The test is whether a miscarriage of justice will occur because the Defendant did not understand the nature of the charge or did not intend to admit her guilt of it. The burden falls on the Defendant to demonstrate this.

The Defendant has given evidence that she was unrepresented when the plea was entered and did not have the opportunity to obtain legal advice. Furthermore, that she did not read, much less sign, the police Facts Sheet. I submit that she did not understand the nature of charge against her and certainly not the particulars proffered in the police Facts Sheet.

The Defendant entered a plea of guilty to finalize the matter as quickly and cheaply as possible. She has since obtained legal advice and realized that the offence is far more serious than she understood and that she has an arguable defence.

In the circumstances, I submit that a miscarriage of justice would occur should the court proceed to pass sentence. The interests of justice require the court to grant leave to withdraw her plea and have the matter heard in court as is her right under the law.

If you have any interesting issues, I'm available everyday.

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