

Citation: *R. v. Schultz*, 2009 YKTC 72

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Docket: 08-00208
08-00208A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: Her Honour Chief Judge Ruddy

REGINA

v.

THEODORE ALLEN SCHULTZ

Publication of information that could disclose the identity of the complainant, witness or justice system participant has been prohibited by court order pursuant to section 486.4 or 486.5 of the *Criminal Code*.

Appearances:
David McWhinnie
Nils Clarke

Counsel for Crown
Counsel for Defence

REASONS FOR SENTENCING

[1] RUDDY C.J.T.C. (Oral): Teddy Shultz is before me in relation to two counts to which he has entered pleas of guilty. These include a sexual assault on June 24, 2008, and a breach of the abstain condition of his release terms on February 17, 2009.

[2] The facts of the substantive offence are that Mr. Schultz and the complainant were known to each other and had been friendly. He appears to have arrived at her residence on the date in question in a very intoxicated state. He made overtures towards her which she declined. He persisted, which resulted in her slapping him. He then proceeded to expose himself to her, invited her to touch him, touched her in the

breast and hip area, attempted to push her to the floor and rubbed his penis against her. Ultimately, she was able to escape from him and make her way into the bathroom. It appears that Mr. Schultz apologized for his behaviour.

[3] I believe he spent some three days in remand, and was ultimately released on conditions; those included a term that he abstain absolutely from the possession or consumption of alcohol. He was noted on the 17th of February 2009, to be purchasing beer, and was later located with beer in his possession, under the influence. He provided a breath sample of 133 milligrams percent.

[4] There is no criminal record alleged before me with respect to this disposition and I have had the benefit of some reports. We are actually at the second half of this disposition, having adjourned to obtain a previous report completed by Dr. Brodie, a neuropsychology assessment completed by Dr. Brodie in 2002. I have also had the benefit of a pre-sentence report completed for the purposes of this disposition.

[5] Crown is suggesting that a custodial term of 12 months plus a probationary term of one to two years is appropriate in all of the circumstances. Defence does not take issue with the length suggested. The primary issue for this disposition is whether or not a conditional sentence is appropriate.

[6] In terms of that particular issue there are a number of factors which I have considered; those include Mr. Schulz's background and current circumstances. He is now 28 years of age.

[7] Mr. Schultz, are you a member of the Carcross/Tagish First Nation?

[8] THE ACCUSED: Yeah, that's my home.

[9] THE COURT: Okay. So he is a CTFN member. There is a great deal of information with respect to his background that I have considered. Much of it relates to the very difficult circumstances of his upbringing, the early exposure to substance abuse as well as both physical and sexual abuse. It is what can only be described as an extremely traumatic upbringing. One that has had, no doubt, significant impacts on him. It is not my intention for the purposes of this disposition to go into more detail than that, but it is a factor that I have considered in terms of the appropriate disposition.

[10] In terms of his current circumstances, when the pre-sentence report was written he was residing with his father. There were some concerns and strain in that relationship, and some concern as to whether it was an appropriate placement for him and whether or not it might increase his risk factors to be in a more high-conflict environment. It appears since then he has been residing with his grandparents, who are quite elderly, they are 87 and 97, but it seems to be a fairly stable placement for him.

[11] In addition, he appears to have taken some positive steps. The information that I have before me, from him as well as community sources, is that, with the exception of the breach in February of this year, he has been maintaining sobriety. He has been abstaining, in compliance with his conditions, at all times other than the particular breach date. This is significant to me when I consider the reports that are before me, particularly the report of Dr. Brodie, which speaks to the serious risk factor that is

presented by Mr. Schultz's consumption of alcohol; and he does make a number of strong recommendations which relate to the importance of Mr. Schulz maintaining sobriety if his risk factors are to be managed.

[12] In addition, the reports clearly indicate that Mr. Schultz is an individual who suffers from some cognitive impairments. As noted by Dr. Brodie on page 4, he indicates:

This brief neuropsychological screening evaluation strongly suggests the presence of underlying brain damage or dysfunction, most likely of a bilateral nature affecting both sides of the brain in a somewhat diffuse or generalized fashion that impacts higher level thinking skills and critical reasoning abilities to a very significant degree.

[13] There also is a significant amount of information with respect to intellectual impairments that he suffers from, which have in the past and will continue to make it difficult for him in terms of securing and maintaining employment and also pursuing additional education.

[14] So it is clear to me that there are a number of struggles that Mr. Schultz has in terms of managing his behaviour.

[15] On the other hand, I have before me what is a very serious offence. I have also had the benefit of a victim impact statement, in which the victim very clearly sets out the fear that she experienced and the ongoing problems with nightmares and flashbacks. So the impact on the victim of the substantive offence ought not to be in any way minimized. It is clearly something that she will continue to struggle with down the road.

[16] In determining whether or not the suggested sentence ought to be served

conditionally within the community, at our first sitting, my primary struggle, really, was with respect to the lack of clear information and the lack of a clear and defined plan and clear structure, in terms of ensuring that the risk factors that Mr. Schultz has are well-managed. Crown rightly points out that the primary concern with respect to a conditional sentence is whether or not in so doing I would be placing the public at risk and points to the fact that the actuarial risk assessments that have been employed with respect to Mr. Schultz do place him at the high risk to reoffend generally, and the very high risk to reoffend sexually; clearly something I must be concerned about.

[17] Because one of the questions is can those risk factors be managed within the community, an added concern that I had in particular at our last sitting was an apparent reluctance that Mr. Schultz had expressed, on the record and in the pre-sentence report, with engaging in any programming or treatment. We did break last time to get the Brodie report. I have now had the opportunity to review it and it does more clearly set out his cognitive and intellectual limitations and the need for sobriety and structure if he is to be managed within the community.

[18] In addition to that, there is some further information that I have before me which I think is positive in nature. Mr. Schultz has been attending AA for a considerable period of time and, as I said, he appears to have, other than in February, been maintaining sobriety, which is a positive step, and I understand today that he is continuing with those AA meetings. I also understand from Mr. Stevens, who took the time to be here today, that he has heard no reports within the community to suggest that he is not compliant.

[19] In addition, one of our concerns at the last sitting was that Mr. Schultz appeared to have very little to do with his time as he was not engaging actively in educational or employment pursuits. It is my understanding that he is now -- is the work for the First Nation?

[20] THE ACCUSED: No, no. It's basically for one of the employees. He has a lot of demolition work that I'll be doing.

[21] THE COURT: Okay. So you are working for a particular person --

[22] THE ACCUSED: Yeah.

[23] THE COURT: -- not for the First Nation?

[24] THE ACCUSED: It's one-on-one. It's not -- it's not with 15 other people, where it is, like, a jeopardy, as people say, for the community. Which, you know, like, I ain't going go out and do something to anybody in the community.

[25] THE COURT: Okay. So I do --

[26] THE ACCUSED: In which everybody knows me in the community, so.

[27] THE COURT: I do find it --

[28] THE ACCUSED: All these communities know me, that's the thing.

[29] THE COURT: I understand that.

[30] THE ACCUSED: I have volunteered work for every community in the Yukon, I'll tell you that, except Old Crow and a few others up there, so.

[31] THE COURT: Okay. But it is a positive step, in my mind, that he now is engaged in employment, which involves slashing, some gardening and demolition work, with the expectation that the demolition work would last through the summer. So that does provide him with some activity to keep him occupied, to assist him with maintaining sobriety. I also understood from our last appearance that he provides assistance to his grandparents.

[32] Another positive step, in my mind, is that, in the interim between our two appearances on this disposition hearing, he has contacted Cameron Grandy of Offender Programs, that he has met with him and he has his next appointment with him June 24th in Carcross, with the expectation that he will engage in one-to-one programming every two weeks in Carcross, which I believe is a positive step as well.

[33] There also appears to be, clearly from Mr. Stevens' willingness to attend here today, support for Mr. Schultz within the community. There appears to be a recognition that over the years, perhaps, his issues and problems were overlooked and fell through the cracks and were not given the attention that they deserved. But the community is prepared to support him, to have him back, and also to provide a somewhat supervisory function in reporting to the RCMP should he be in breach of any abstain conditions, given their recognition of the importance of his maintaining sobriety if he is not to present a risk to the community.

[34] So there is a fair amount of information before me. There has been discussion of some recent cases here in the Territory which speak to how we address issues like diminished capacity when we are talking about individuals who suffer from FASD and

other cognitive impairments, and many of those decisions, following *R. v. Harper*, 2009 YKTC 18, have resulted in somewhat discounted sentences in recognition of those disabilities. That approach was one which was recommended by defence counsel, with respect to this particular case, in determining whether or not it ought to be a conditional or a straight custodial sentence.

[35] The concerns I expressed at the last sitting were the fact that it was not fully clear to me that there was a clear and comprehensive plan with a great deal of structure for Mr. Schultz. I am still not of the view that it is the clearest of cases, but I am of the view that we do have somewhat more in terms of information, somewhat more in terms of what he is doing and the support that he is receiving and the programming that he is engaging in.

[36] On balance, having considered all of the factors, and in particular the following: the support that he has in the community, including a willingness to provide some supervision; the fact that, with the exception of the February date, he has remained compliant over an extended period of time with conditions; and the fact that the pre-sentence report has indicated that in the past, while there is no criminal record alleged before me, he appears to have had involvement in the past where he was on conditions and engaged in programming and he appears to have benefitted by both the structure of those conditions and has also been able to remain compliant with those conditions, which is a significant factor for me in assessing whether or not his risk factors can be managed through conditions.

[37] I also have considered the fact that there is no prior criminal record, there is no

history of breaches, as I indicated, other than the breach that is before me today, that now there is somewhat more programming in place and somewhat more structure involved; again, not as much as I would like to see but better than we had a month ago.

[38] The other thing which I have considered, which is I think of considerable importance, is that, as noted in the pre-sentence report as well as before me at our last sitting, Mr. Schultz appeared quite resistant to intervention and programming, and that caused me significant concern in terms of whether his risk factors could be managed.

[39] There are two things that have happened in between. One, I spoke with him in court today and he has indicated a willingness to engage in treatment. While that alone would not be enough for me, because we quite frequently hear individuals that are suddenly ready to engage in treatment when they are facing sentencing, more importantly for me is he actually has reached out and has begun some programming with Cameron Grandy which, in my view, is significant.

[40] The other thing is I have letters here from both Maxine Thunderchild and A.J. Johns that talk about the fact that he has engaged actively in AA, that he has also, up until December, engaged in programming with Kevin Barr, and that he had been regularly meeting and attending to see the individuals at the Justice Office for Carcross/Tagish First Nation. It is also clear to me from Mr. Steven's input that he has been regularly meeting with him as well.

[41] So it appears to me that while Mr. Schultz expresses a reluctance to engage in programming, or has in the past, and also clearly has expressed reluctance in fully engaging in the production of reports, he nonetheless actually does appear to follow

through with programming when ordered to do so. So I think that is a positive sign as well.

[42] So again, while I am not satisfied it is the clearest of cases, I am nonetheless satisfied that the preconditions of imposing a conditional sentence in this particular case have been met. The range that we were discussing is well below the two-year range and I am satisfied that the use of conditions can be used to effectively manage his risk factors with the support of the community such that it would not endanger the safety of the community, and also that it can be structured in such a way that the principles of sentencing are adequately met with respect to this disposition.

[43] Again, we are talking about a situation where there has been no prior record alleged before me, which in my mind suggests that, while deterrence and denunciation are clearly factors given the nature of the offence, the lack of a prior record and his young age are such that rehabilitation, in my mind, continues to be a significant and important factor. I have concluded, when all is said and done, that Mr. Schultz perhaps deserves the chance now, that he did not have earlier, to benefit from the support of the community and the assistance of the treatment and programming, provided, Mr. Schultz, that you will take advantage of it. He deserves the chance to demonstrate that he can comply with the conditions and can serve his sentence within the community.

[44] That being said, I accept the range, the sentence length presented by counsel, that being a 12-month sentence, that will be served conditionally within the community on the following terms and conditions:

1. That you keep the peace and be of good behaviour;

2. That you appear before the Court when required to do so by the Court;
3. That you report to a supervisor --

And it is probably best that he do that today, so I am going to say:

-- immediately, and thereafter when required by the supervisor and in the manner directed by the supervisor;

4. That you remain within the Yukon Territory unless you have written permission from your supervisor;
5. That you notify the supervisor in advance of any change of name and address, and promptly notify the supervisor of any change of employment or occupation.
6. That you reside as approved by your supervisor, abide by the rules of the residence and not change that residence without the prior written permission of your supervisor;

[45] I have a bit of a question as to how we deal with the punitive aspect, that being the curfew. The starting point is a house arrest, in law, unless there are exceptional circumstances. We provide for various different necessary exceptions through permission being granted. Part of my concern with Mr. Schultz's intellectual impairments and cognitive difficulties is whether or not a house arrest situation with, quite frankly, exceptions to be given for this, that and the other thing might ultimately be more confusing to him, in a way that we might be setting him up. While I would not normally want to deviate, particularly in light of the current state of the law, from a house arrest situation, I am of the view that, given his particular circumstances, his chances of success are better with a curfew than they are with a house arrest with exceptions. So I

am going to require, Mr. Schultz, that you abide by a curfew by remaining within your place of residence between the hours of, for the first six months it will be between the hours of 9:00 p.m. and 7:00 a.m. daily, and for the second six months it will be 10:00 p.m. to 7:00 a.m.

[46] THE ACCUSED: Well, then that means I won't be going to NA, so.

[47] THE COURT: I am still going to allow you the exception, though, so you can.

[48] THE ACCUSED: I don't know about that. It's still a curfew, nine o'clock, so I won't be able to get --

[49] MR. CLARKE: Listen. Ted, just listen. Listen.

[50] THE COURT: I am also going to allow:

7. That you remain within your place of residence for the first six months between 9:00 p.m. and 7:00 a.m. daily, for the second six months, between 10:00 p.m. and 7:00 a.m. daily, except with the prior written permission of your supervisor.

So they can give you permission to do that.

You must present yourself at the door or answer the telephone during reasonable hours for curfew checks. Failure to do so will be a presumptive breach of this condition;

8. That you abstain absolutely from the possession or consumption of alcohol and controlled drugs or substances except in accordance with a

prescription given to you by a qualified medical practitioner;

So no drugs, no drinking.

9. That you not attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;
10. That you take such alcohol and drug assessment, counselling or programming as directed by your supervisor;
11. That you take such psychological assessment, counselling and programming as directed by your supervisor;
12. That you take such other assessment, counselling and programming as directed by your supervisor, including, but not limited to, sex offender programming;
13. That you have no contact, directly or indirectly, or communication in any way with J.C.;
14. That you make reasonable efforts to find and maintain suitable employment and provide your supervisor with all necessary details concerning your efforts;
15. That you provide your supervisor with consents to release information with regard to your participation in any programming, counselling, employment or educational activities that you have been directed to do;

[51] Sorry, on the general counselling provision we will just leave it as a general counselling provision and I will add a separate condition:

16. That you report to the Sex Offender Risk Management Program for assessment, and attend, participate and complete counselling and

programming as directed by your supervisor.

[52] That is probably a little confusing at the moment. Somebody is going to sit down with you and read through the order, and Mr. Clarke can help you if you have any questions about it, and Mr. Stevens as well, I have no doubt, could give you some assistance to make sure that you understand everything.

[53] In addition, there is going to be a probation order for a period of 12 months which will follow the end of the conditional sentence. It will be on the following terms and conditions:

1. That you keep the peace and be of good behaviour;
2. That you appear before the Court when required to do so by the Court;
3. That you notify the probation officer in advance of any change of name or address, and promptly notify the probation officer of any change of employment or occupation;
4. That you report to a probation officer immediately upon completion of your conditional sentence, and thereafter when and in the manner directed by the probation officer;
5. That you reside as approved by your probation officer, abide by the rules of the residence and not change that residence without the prior written permission of your probation officer;

[54] There will not be a curfew on the probation order, but there will be a clause requiring you to abstain, because that is your single biggest risk factor. If you drink, you are not only going to be hurting yourself --

[55] THE ACCUSED: Well, that's the only thing I have a problem with, is alcohol.

[56] THE COURT: -- you are going to hurt other people too.

[57] THE ACCUSED: But you know what I'm saying? It doesn't have nothing to do with any drugs or anything, other than, you know, like, alcohol.

[58] THE COURT: Yes.

[59] THE ACCUSED: And which, like I don't know why that anyone's been pushing NA on me, which, you know, like it kind of --

[60] THE COURT: Okay. Well, I am primarily concerned that you -- I do not want you using drugs or alcohol, but I am primarily concerned that you stay away from alcohol.

[61] THE ACCUSED: I know. I understand, yes.

[62] THE COURT: So it is going to be required:

6. That you abstain absolutely from the possession or consumption of alcohol and controlled drugs or substances except in accordance with a prescription given to you by a qualified medical practitioner;
7. That you not attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;
8. That you take such alcohol and drug assessment, counselling or programming as directed by your probation officer;

9. That you take such psychological assessment, counselling and programming as directed by your probation officer;
10. That you take such other assessment, counselling and programming as directed by your probation officer;
11. That you report to the Sex Offender Risk Management Program for assessment, and attend, participate in and complete counselling and programming as directed by your probation officer;
12. That you make reasonable efforts to find and maintain suitable employment and provide your probation officer with all necessary details concerning your efforts;
13. That you provide your probation officer with consents to release information with regard to your participation in any programming, counselling, employment or educational activities that you have been directed to do pursuant to this undertaking;

[63] In addition to those orders, I believe we have some mandatory orders. I am required by law to order that -- you did not make any submissions on DNA. Is it your intention to?

[64] MR. CLARKE: No.

[65] THE COURT: Okay. Because the substantive offence is a primary designated offence, I am required to make the order that you provide such samples of your blood as are necessary for DNA testing and banking.

[66] I am also required to make the order that you comply with the requirements of

the *Sex Offender Information Registration Act* -- for a period of ten years for a first?

[67] MR. MCWHINNIE: Ten years.

[68] THE COURT: For a period of ten years. Are there any issues or things that I have missed, counsel, with respect to conditions or other orders that are necessary? I would waive the victim fine surcharge. I do not think -- he does not appear to have significant financial means.

[69] MR. MCWHINNIE: You are required to consider, but you are not required to make, a firearms order. There were no firearms or weapons implicated in this.

[70] THE COURT: Okay, thank you. Then, having turned my mind to that particular issue, given the lack of a prior record being alleged before me and the fact that there were no weapons or firearms involved in this offence, I would decline to make that order.

[71] MR. MCWHINNIE: Sorry, Your Honour, the length of the probation order?

[72] THE COURT: One year; twelve months.

[73] MR. MCWHINNIE: I misheard.

[74] MR. CLARKE: I believe you'd likely -- I'm not sure if you have that yet, but would you like to -- likely have a no contact in the probation order as well?

[75] THE COURT: Yes, thank you very much. So the probation order should, as well, have an order:

14. That you have no contact, directly or indirectly, or communication with J.C. I think she deserves that peace of mind.

[76] THE CLERK: Is there a remain on the probation order; remains in Yukon Territory?

[77] THE COURT: No, no.

[78] MR. MCWHINNIE: Does this order attach to both matters, Your Honour? There is the s. 145 which we haven't discussed.

[79] THE COURT: I will tell you, for the s. 145, what my intention was. There is three days of remand time. My intention was to credit him for six days and apply that as against the breach. So I will make that sentence one day deemed served by his attendance in court today and ask that the record reflect that he is being credited. We will make it one week, seven days, for the time that he spent in remand. I believe the other orders, really, are more related and should attach to the substantive offence which is of greater concern.

RUDDY C.J.T.C.