

Citation: *R. v. Dewhurst*, 2009 YKTC 10

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Registry: Whitehorse

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

REGINA

v.

TIMOTHY DOUGLAS DEWHURST

Appearances:
Ludovic Gouaillier
Fia Jampolsky

Counsel for Crown
Counsel for Defence

REASONS FOR JUDGMENT

[1] RUDDY C.T.C.J (Oral): Timothy Dewhurst is before me in relation to a significant number of charges. In the course of addressing these matters, Mr. Dewhurst has been assessed with respect to his fitness to stand trial in relation to the charges that he faces.

[2] The fitness assessment is now before me, and based on that assessment, as well as a previously completed neuropsychological assessment, defence is before me today seeking a finding that Mr. Dewhurst is not fit to stand trial at the present time.

[3] Crown has indicated in their submissions today that, based on Mr. Dewhurst's circumstances and the reports before me, they support the finding that he is unfit to stand trial.

[4] The test in determining the issue of fitness is set out in s. 2 of the *Criminal Code* and reads as follows:

"unfit to stand trial" means unable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to

- (a) understand the nature or object of the proceedings,
- (b) understand the possible consequences of the proceedings, or
- (c) communicate with counsel;

[5] The two reports before me, that being the psychiatric assessment with respect to fitness and the neuropsychological assessment which was conducted in 2005, both clearly indicate to me that Mr. Dewhurst suffers from Fetal Alcohol Spectrum Disorder. There is also past history indicated in both reports of other psychiatric problems, including some significant issues with both depression and some psychotic episodes connected to the depression. Fortunately for Mr. Dewhurst, he is not currently suffering from depression or any major psychiatric condition at this particular time. He, however, does, and likely, indeed, always will, suffer from significant cognitive deficits as a result of his having the fetal alcohol disorder.

[6] In assessing FASD and its impact on Mr. Dewhurst's ability to actively participate in his own defence, Dr. Heredia noted the following:

... it is my opinion Mr. Timothy Douglas Dewhurst does not possess sufficient knowledge and understanding of the technical aspects of court proceedings. He appears to have some base knowledge more than likely due to past experiences in court but I do not believe he is able to effectively use this knowledge to aid in his defense. It is more than likely that the severity of his cognitive deficits will impair his ability to effectively communicate with his attorney and his defense. He will need further assessment to determine if he is capable of becoming competent to stand trial and if so he will require training at a specialized facility due to his intellectual deficits.

It is my overall opinion that Mr. Timothy Douglas Dewhurst is unfit to stand trial.

[7] I am satisfied, based on Dr. Heredia's opinion and the information contained in the report, that Mr. Dewhurst is unable to fully understand the nature or object of the proceedings as required by s. 2. I am also satisfied that he is not fully able to understand the possible consequences of the proceedings. It appears the only potential consequence he understands is jail, and I am satisfied that may well be as much a result of his historical involvement with the system as anything else. I am also satisfied, based on the information, that he is not in a position to adequately communicate with counsel in a way that would be meaningful in terms of his participation in his own defence.

[8] The only issue in determining whether or not the test with respect to fitness is fully met relates to the issue of whether or not FASD can be considered a disease of the mind, which is the definition of mental disorder also set out in s. 2 of the *Code*. I think it is fair to say that FASD is an area that is only now becoming understood and it is clear that the particular wording of our legislation, as it relates to the issues of fitness and criminal responsibility, is not always a good fit when we are looking at individuals with

FASD, even though the impact of the disorder, of FASD, can equally, if not more so, impact on an individual's fitness to stand trial as would a psychiatric condition.

[9] In considering, notwithstanding the issues with respect to particular wording, whether or not I am satisfied in this particular case that Mr. Dewhurst is suffering from a mental disorder such that it impacts on his ability to participate in his own defence, I have considered the following: Firstly, there has been precedent, specifically in the Yukon but in other jurisdictions as well, which have found FASD to be a mental disorder such that an individual can be found to be legally unfit to stand trial. I would also note, as pointed out by defence counsel, that both Dr. Heredia and Dr. Nanson, who performed the neuropsychological assessment, indicate that Mr. Dewhurst suffers from Fetal Alcohol Syndrome, which they define as falling within Axis III of the DSM-IV.

[10] Based on their findings, as well as past precedent that I have referred to, I am satisfied that I can, and I do so, conclude that Mr. Dewhurst meets the test with respect to fitness. I am prepared to make that finding today, and I hereby find Mr. Dewhurst unfit to stand trial.

[11] I am satisfied, as well, based on the information before me, that further assessment is necessary to determine more accurately Mr. Dewhurst's specific deficits and to gain some insight into how they may most effectively be managed. For that reason, I would decline to make a disposition at this point in time, and would refer the matter to the Yukon Review Board within 45 days for there to be a disposition hearing before them to assess and determine an appropriate disposition for Mr. Dewhurst.

[12] In the meantime, it is my understanding that Mr. Dewhurst had previously been

released for placement at the Yukon Adult Resource Centre. There was a breach, which has brought him into custody. I believe that is with respect to his having tested positive. Is that correct?

[13] MS. JAMPOLSKY: That's correct.

[14] THE COURT: Counsel are agreed that while awaiting the hearing before the Review Board, it would be appropriate that he be re-released to the YARC on the same terms and conditions which he had been released upon prior to the breach. The only issue at this point in time, as to whether or not that is something that can happen, is whether or not the YARC is both prepared to take him and whether or not they have a bed for him, in the event that they are prepared to take him. I am satisfied, however, that the order can and ought to be made today. It is simply one which will not be perfected unless and until the YARC is prepared to bring him back into their residence.

[15] Are there any submissions with respect to the form of the release? It was previously an undertaking.

[16] MR. GOUAILLIER: That's fine.

[17] THE COURT: So there will be another undertaking. I am going to simply use the pre-existing wording. I note from looking at it that there was some effort made to simplify it, I imagine in the hopes that Mr. Dewhurst would more clearly understand what was expected of him, so I will echo that wording.

[18] So, Mr. Dewhurst, there is going to be another release, but you have to stay

where you are until we figure out if the YARC will let you come back, okay?

[19] THE ACCUSED: Yeah.

[20] THE COURT: So, the conditions you are going to be on, if they take you back:

1. You have to keep the peace and be of good behaviour.

Do not get into trouble.

[21] THE ACCUSED: Yeah.

[22] THE COURT:

2. You have to appear before the Court when required to do so by the Court.
3. You have to notify the bail supervisor in advance of any change of name or address and promptly notify the bail supervisor of any change of employment or occupation.
4. You have to meet with and talk to your bail supervisor when he tells you to.

Do you know who your bail supervisor is?

[23] THE ACCUSED: Yeah.

[24] THE COURT: Who is it?

[25] THE ACCUSED: Shayne King.

[26] THE COURT: Shayne King, okay. So you have got to meet with Shayne King when he tells you to, okay?

[27]

5. You have to report to a bail supervisor immediately upon your release from custody and thereafter when and in the manner directed by the said bail supervisor.
6. You are to be released to and supervised by a staff member of the Yukon Adult Resource Centre. You have to live at the Yukon Adult Resource Centre, abide by the rules of that residence and not change that residence without the prior written permission of your bail supervisor.

We have to wait still to see if they will take you, but you can be released if the YARC will take you, okay?

[28] Are we concerned at this point with respect to the finding and maintaining of employment in the short term?

[29] MR. GOUAILLIER: No.

[30] THE COURT: I am going to leave that condition out.

7. You are to meet with any people your bail supervisor tells you to, including FASSY and Challenge.

[31] THE ACCUSED: Yeah.

[32] THE COURT: Okay?

8. You are not to buy, hold or drink any alcohol or drugs.

[33] THE ACCUSED: Right.

[34] THE COURT:

9. You are not to go into any bar or tavern.

10. You are to tell your bail supervisor if you have any medication from your doctor.

[35] Okay, so do you understand those conditions?

[36] THE ACCUSED: Yes.

[37] THE COURT: Okay. Somebody is going to sit down with you when you sign this and go through them again. If you do not understand something, just ask them to explain it, okay?

[38] THE ACCUSED: Yeah.

[39] THE COURT: Your lawyer can help you as well if there are problems that you have with understanding. So we will wait and see what the YARC has to say, and in the meantime the order is there for his release, provided they will accept him.

[40] MR. GOUAILLIER: Since this matter is going to the Board, Your Honour, just for the sake of completion of the record, if we can mark these two reports as exhibits in the proceedings today.

[41] THE COURT: Yes, sorry, thank you.

[42] MR. GOUAILLIER: And perhaps just to put one thing on the record today that is obvious, but this whole set of proceedings or this application was triggered by

Ms. Jampolsky expressing concerns that she wasn't receiving proper instructions from her client, so that should be noted because it supports, obviously, the legal professional, conclusions of the medical professional.

[43] THE COURT: Thank you. For the purposes of these proceedings, then, I am going to mark the report - Madam Clerk, you have the original of it - from Dr. Heredia as Exhibit 1 and the neuropsychological assessment from Dr. Nanson as Exhibit 2, and here is the original of that one.

EXHIBIT 1: Report of Dr. Heredia.

EXHIBIT 2: Neuropsychological assessment of Dr. Nanson.

[44] Okay, anything further?

[45] MR. GOUAILLIER: Nothing, Your Honour.

[46] THE COURT: Okay.

[47] MS. JAMPOLSKY: Nothing, Your Honour. Thank you.

[48] THE COURT: Thank you all.

RUDDY C.J.T.C.