

COURT OF APPEAL OF YUKON

Citation: *R. v. R.W.R.*,
2026 YKCA 10

Date: 20260806
Docket: 19-YU851

Between:

Rex

Respondent

And

R.W.R.

Appellant

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Before: The Honourable Justice Griffin
The Honourable Justice Manocchio
The Honourable Justice MacNaughton

On appeal from: Orders of the Territorial Court of Yukon, dated February 8, 2019 (conviction) and September 12, 2019 (sentence) (*R. v. R.W.R.*, 2019 YKTC 6 and 2019 YKTC 33, Whitehorse Docket 17-00806).

The Appellant, appearing in person: R.W.R.

Counsel for the Respondent: L. Lane

Place and Date of Hearing: Whitehorse, Yukon
June 24, 2026

Place and Date of Judgment: Whitehorse, Yukon
August 6, 2026

Written Reasons by:

The Honourable Justice Griffin

Concurred in by:

The Honourable Justice Manocchio

The Honourable Justice MacNaughton

Summary:

In early 2019, the appellant was convicted of sexual assault and assault in relation to his former intimate partner. In 2021, he abandoned his appeals from conviction and sentence. He now applies for reinstatement of his appeals. Held: Application for reinstatement dismissed. While the appellant's difficult circumstances explain his delay and earlier decision to abandon, it is not in the interests of justice to reinstate his appeals because they lack merit.

Reasons for Judgment of Honourable Justice Griffin:**Overview**

[1] R.W.R. applies for reinstatement of his conviction and sentence appeals after they were abandoned and dismissed on May 10, 2021. The appeals relate to a 2019 conviction for sexual assault contrary to s. 271 of the *Criminal Code*, respectively.

[2] For the reasons that follow, it is my view that it is not in the interests of justice to reinstate R.W.R.'s appeals principally because they lack merit.

Background

[3] On February 8, 2019, R.W.R. was convicted of the assault and sexual assault of his former intimate partner after a judge-alone trial: *R. v. R.W.R.*, 2019 YKTC 6 ("reasons for conviction").

[4] The offences occurred on or about April 12, 2017. The judge found the complainant, who was staying overnight at R.W.R.'s residence, awoke to find herself undressed with R.W.R. having sexual intercourse with her. Later, R.W.R. assaulted the complainant in the course of expelling her from his home.

[5] On September 12, 2019, R.W.R. was sentenced to 20 months imprisonment and 12 months probation, along with ancillary orders, for the sexual assault. He was sentenced to 60 days concurrent for the assault: *R. v. R.W.R.*, 2019 YKTC 33 ("reasons for sentence"). R.W.R. advises that he has served his sentence.

[6] On November 28, 2019, R.W.R. filed an amended notice of appeal challenging his conviction and sentence for the sexual assault conviction only. The Yukon Legal Services Society declined to fund counsel for his appeals.

[7] R.W.R. brought a motion under s. 684 of the *Criminal Code* seeking appointment of counsel to assist with his appeals. A judge of this Court, in chambers, appointed counsel for the limited purpose of assisting R.W.R. with the continuation of his s. 684 application and for an application for bail pending appeal. On August 27, 2020, another chambers judge granted R.W.R.'s application for full appointment of counsel under s. 684 for the purpose of assisting him with the conduct of both his conviction and sentence appeals. The Court also released R.W.R. on bail pending his appeals.

[8] The Yukon Legal Services Society retained a lawyer to advanced R.W.R.'s appeals ("appointed counsel"). R.W.R.'s appeals were set to be heard on May 17, 2021. While appointed counsel filed R.W.R.'s statement on sentence on March 15, 2021, on May 10, 2021, she filed a notice of abandonment for both the conviction and sentence appeals.

[9] R.W.R. served his full sentence.

[10] R.W.R. filed his application for reinstatement with two supporting affidavits on October 21, 2025. R.W.R. affirmed one of the affidavits. His fiancée affirmed the other. Both speak to R.W.R.'s personal circumstances in the years since his conviction and his ultimate decision to seek reinstatement of his appeals. I note that the affidavits contain some opinion evidence that is not admissible and therefore I have given it no weight, such as his fiancée's views about the police, the conviction, his former counsel, and the legal merits of his appeal.

Legal Principles – Reinstatement of Criminal Appeals

[11] This Court has discretion to reinstate an appeal that has been dismissed as abandoned, rather than dismissed on the merits, where doing so is in the interests of justice. However, the applicant bears a heavy onus to show reinstatement is in the

interests of justice: *R. v. T.L.C.*, 2012 BCCA 131 at para. 26, citing *R. v. Blaker*, 46 B.C.L.R. 344 (C.A.), 1983 CanLII 308.

[12] There are several non-exhaustive factors the Court considers in determining the ultimate question of whether it is in the interests of justice to reinstate an appeal (*R. v. Penner*, 2023 YKCA 3 at para. 23, citing *T.L.C.* at para. 26):

- (a) the length of delay between the dismissal and the application for reinstatement, and the adequacy of the explanation offered for that delay;
- (b) whether the appellant contributed to the delay;
- (c) whether the appellant had a *bona fide* intention to pursue the appeal throughout the proceedings;
- (d) whether the initial order was made in error, or the court was operating under some misunderstanding of the material facts;
- (e) the effect reinstatement would have on public confidence in the administration of justice;
- (f) the seriousness of the charges; and
- (g) the merit of the appeal.

[13] The interests of justice include “not simply the interests of the accused” but also the state’s interest in seeing “that people who commit offences are duly convicted and punished” and its interest in bringing “finality to a proceeding”: *Blaker* at para. 18.

Analysis

[14] R.W.R. emphasizes his personal circumstances, as an Indigenous man with several vulnerabilities, and as someone who allegedly received ineffective assistance of court-appointed counsel, as establishing that it is in the interests of justice to grant his reinstatement application.

Indigenous Background Factors and Delay

[15] I have reviewed carefully the Indigenous sentencing report prepared for R.W.R.’s sentencing hearing, but I will not include all of the details here in the interests of privacy. R.W.R. is a member of a First Nation based in the Yukon Territory. He has been affected by intergenerational trauma throughout his life. His

mother is a residential school survivor, who also spent time in foster homes. His father physically abused his mother. A family member sexually abused R.W.R. when he was a child. R.W.R. struggled with alcohol use from a young age. He left school in Grade 11.

[16] R.W.R. affirms he experienced a significant decline in his mental health following his convictions and release on bail. He was deeply affected by the stigma associated with the sexual assault conviction. He began drinking heavily and no longer cared if he lived or died. He was arrested more than once for breaching release conditions. Despite his struggles, he maintains he was committed to his appeal.

[17] During this time, appointed counsel told R.W.R.: (1) his conviction appeal lacked merit; and (2) his sentence appeal “was no longer feasible” after his return to custody following an alleged breach of his bail order. He affirms it was in these vulnerable circumstances he agreed to abandon his appeals.

[18] R.W.R.’s mental health further deteriorated and he attempted suicide. In July 2021, R.W.R. stopped drinking alcohol. He affirms he has been sober since. However, even after R.W.R. stopped drinking, he says he “remained socially isolated, depressed, anxious, and hopeless about the future”.

[19] In determining whether reinstatement is in the interests of justice, the Court considers the length of delay between the dismissal and application for reinstatement, the adequacy of the explanation offered for the delay, and whether the applicant contributed to the delay: *Penner* at para. 23; *T.L.C.* at para. 26.

[20] Almost four and a half years passed between the dismissal of R.W.R.’s appeals for abandonment and his application for reinstatement. This is a significant delay.

[21] Nevertheless, R.W.R.’s personal circumstances as an Indigenous person, negatively affected by the legacy of residential schools and intergenerational trauma,

created significant hurdles for him. This history contributed to his feeling of hopelessness and so the delay should be considered in this context.

Alleged Ineffective Assistance of Appointed Counsel

[22] After legal counsel was appointed pursuant to a s. 684 court order, she assessed the merits and advised R.W.R. that his appeal from conviction had no merit. He believes now that this was ineffective assistance and contrary to her obligations to represent him and pursue the appeal.

[23] Later, after R.W.R. allegedly breached terms of bail, his court-appointed counsel told him his sentence appeal was “no longer feasible”.

[24] It was advice from this court-appointed counsel that led him to agree to abandon the appeal.

[25] Respectfully, R.W.R.’s position seems in part to be based on a misunderstanding of the role of legal counsel appointed by the Court.

[26] A s. 684 order simply provides that counsel be assigned to provide legal assistance to an accused where the accused does not have sufficient means to obtain that assistance. The order does not dictate what that legal assistance should be. The court order does not interfere with a lawyer’s professional obligations to assess the matter and form an independent view on the merits.

[27] In other words, even where a court appoints counsel pursuant to s. 684 and does so considering that there might be some merit to the appeal, it could be that the appointed lawyer’s close look at the evidence and issues will result in the lawyer forming the opinion the appeal has no merit.

[28] As I discuss below, it is my view that the appeal has no merit. For this reason, R.W.R.’s argument that his counsel was ineffective does not need to be examined further.

Intention to Pursue Appeals Throughout the Proceedings

[29] One of the factors to consider on a reinstatement application is whether the applicant had a continuing intention to appeal.

[30] The evidence on this application suggests a recently renewed intention to appeal rather than an ongoing one.

[31] R.W.R. affirms he agreed to abandon his appeals following advice from appointed counsel at a moment of extreme vulnerability in his life. He believed, because of counsel's advice, that he "no longer had a real opportunity to appeal".

[32] It was only after R.W.R. became sober for several years, and developed a relationship with his fiancée, a justice coordinator and court worker, and achieved sufficient stability in his life, that he began to consider reinstatement. In 2025, he decided to file an application.

[33] In my view, it is understandable R.W.R.'s intention to pursue his appeals wavered. His views on his ability to appeal were affected by his personal circumstances and challenges. Given R.W.R.'s personal circumstances, I consider this factor to be neutral in the interests of justice analysis.

Seriousness of the Charge

[34] There is no doubt a sexual assault conviction is serious. This factor weighs in favour of reinstatement.

Merits of the Appeals

[35] Whether the proposed appeal has merit is the most significant factor in this case, and it weighs heavily against reinstatement. In my view, R.W.R.'s appeal from both conviction and sentence lacks merit.

Merits of the Conviction Appeal

[36] The conviction largely turned on the trial judge's credibility and reliability findings, which are entitled to deference unless there is palpable and overriding error or a recognized error of law: *R. v. Kruk*, 2024 SCC 7 at para. 82.

[37] The judge instructed himself on the applicable principles, including the burden and standard of proof, the *W.(D.)* test, and the elements of the offence for sexual assault: reasons for conviction at paras. 65–66, 77–78, 80–82.

[38] There was undisputed evidence that sexual activity occurred between R.W.R. and the complainant. The issue was whether R.W.R. touched her without her consent. On the sexual assault charge, the judge carefully considered whether R.W.R. had an honest but mistaken belief in consent: reasons for conviction at paras. 93–108. He rightly found evidence of prior sexual activity between R.W.R. and the complainant, adduced inadvertently, to be inadmissible in the absence of a successful s. 276 application: reasons for conviction at para. 102. He also considered whether the complainant had a motive to fabricate: reasons for conviction at paras. 69, 71.

[39] The trial judge accepted the testimony of both the accused and the complainant as credible and reliable: reasons for conviction at paras. 67, 76. He found their versions of events were “not markedly different”: reasons for conviction at para. 67. Importantly, and undermining the strength of any appeal, there was little contradiction between the trial testimony of R.W.R. and the complainant about the sexual activity: reasons for conviction at para. 83.

[40] The judge accepted the complainant's testimony that she was not consenting: reasons for conviction at para. 86.

[41] Importantly, R.W.R.'s own evidence supported a conviction on the basis he was reckless or wilfully blind to whether the complainant was consenting: reasons for conviction at paras. 92, 100, 111. He testified that he “... assumed if she didn't want it she would have tried to push me off or tell me ‘no’ or anything. If that was the

case then I would have stopped there on the spot”: reasons for conviction at para. 48.

[42] It is not a defence to sexual assault to believe the person would protest if the sexual activity was unwanted. Consent cannot be assumed. There is no defence of implied consent to sexual assault in Canadian law: *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at para. 31, 1999 CanLII 711. Rather, in cases where the Crown has proven the *actus reus*, by establishing beyond a reasonable doubt that the complainant did not consent in her mind to the sexual touching, the accused may raise a reasonable doubt about whether they had the *mens rea* for sexual assault, by relying on the defence of honest but mistaken belief in communicated consent. For there to be an honest but mistaken belief in communicated consent, the accused must have honestly believed the complainant was saying “yes” to the sexual activity through her words or conduct: *R. v. Barton*, 2019 SCC 33 at paras. 90–91.

[43] Ultimately, the judge found the Crown had proven sexual assault beyond a reasonable doubt: reasons for conviction at para. 109. The judge accepted the complainant’s evidence that she did not consent, and there was simply no evidence of consent or an honest but mistaken belief in communicated consent.

[44] Again, it is important to recognize R.W.R.’s own evidence establishes he took no steps to ensure the complainant was consenting. He assumed her lack of protest equalled consent, but the law is clear that it does not. Because of this, R.W.R.’s appeal from the sexual assault conviction has no prospect of success.

Merits of the Sentence Appeal

[45] With respect to the sentence appeal, the standard of review is deferential. Appellate courts “cannot interfere with sentencing decisions lightly”: *R. v. Parranto*, 2021 SCC 46 at para. 29. Sentencing is a discretionary exercise, where the judge balances all relevant factors to meet the objectives of sentencing and arrive at a fit and proportionate sentence: *R. v. Lacasse*, 2015 SCC 64 at para. 1. This Court will only interfere with a sentence if there is an error of law or an error in principle that affects the sentence or the sentence is demonstrably unfit: *Lacasse* at para. 11.

[46] R.W.R. has not identified any errors in the judge's sentencing analysis. Nor can I say the 20-month sentence is demonstrably unfit.

[47] There was dispute in the evidence as to whether the complainant was asleep or had just woken up at the time of the sexual assault. At the time of sentencing, trial courts in the Yukon frequently considered the review of sexual assault sentencing decisions and the range referred to in *R. v. White*, 2008 YKSC 34 at para. 85, and subsequently endorsed by this Court in *R. v. Rosenthal*, 2015 YKCA 1 at para. 7, which is 12 to 30 months. Even though those cases mostly involve the aggravating factor of a sleeping or unconscious victim, in *White* the victim woke up and protested but the sexual assault continued. The state of the victim is simply one circumstance to consider in the analysis of all the circumstances of the offence. R.W.R.'s sentence fell below the middle of the range identified in *White* and below the 26-month sentence imposed in that case.

[48] It could be fairly observed that the range referred to in *White* is behind the times, as other Canadian courts have increasingly emphasized the appropriateness of a higher range of sentence for sexual assaults with one or more aggravating factors due to the seriousness and harmfulness of these offences and the need for denunciation and deterrence: see, e.g., *R. v. Maslehati*, 2024 BCCA 207 at paras. 56–104, leave to appeal to SCC ref'd, 41413 (19 December 2024). In *Maslehati* at para. 92 the Court said that a sentence of at least two years' imprisonment is generally required in cases of sexual assault with aggravating factors, absent diminished moral blameworthiness or compelling mitigation. This said, sentencing is an individualized process, and sentencing ranges are "not straitjackets": *Parranto* at paras. 36–37.

[49] R.W.R.'s position on his sentence appeal appears to be the sentencing judge did not sufficiently individualize the sentence. His statement on sentence filed on March 15, 2021, set out two grounds of appeal, namely: (1) the judge failed to give adequate weight to his Indigenous sentencing factors; and (2) the judge failed to

give adequate weight to his significant history with alcohol use and prospects for rehabilitation.

[50] In this case the judge did in fact consider R.W.R.'s personal circumstances, including his Indigenous sentencing factors and alcohol use, as mitigating: reasons for sentence at paras. 70–73. He set out those circumstances in detail: see reasons for sentence at paras. 23–24, 26–31, 33–37, 45, 55. He also did not lose sight of R.W.R.'s rehabilitative potential, noting there was “a realistic hope for R.W.R. with respect to his rehabilitative prospects”: reasons for sentence at paras. 71, 73. In the circumstances, it is not open to this Court to simply reweigh those factors.

[51] I am unable to identify any other potential errors affecting the sentence in the judge's analysis. Therefore, R.W.R.'s sentence appeal has very little prospect of success.

Conclusion on Merits

[52] I conclude the lack of merit of both the conviction and sentence appeals weighs significantly against reinstatement.

SOIRA

[53] Having reached the above conclusion, I pause to note that I have not considered whether grounds exist for R.W.R. to apply to set aside the ancillary order made pursuant to s. 490.012 of the *Criminal Code*, which imposed on him 20-years compliance with registration under the *Sex Offender Information Registration Act*, S.C. 2004, c. 10 [SOIRA].

[54] The SOIRA order seems to me to be particularly onerous in the circumstances of this case, where the judge noted on the facts the contributing factor of alcohol and a lack of prior intention to commit the offences: see for e.g., reasons for conviction at paras. 88, 110.

[55] The law has changed since the date of sentencing and there is an ability for someone in R.W.R.'s position to apply to the trial court for an exemption from

SOIRA, pursuant to s. 490.04(1) of the *Criminal Code*. R.W.R. may therefore wish to take steps to make such an application.

Public Confidence in the Administration of Justice

[56] In my view, even recognizing the hardships and challenges faced by R.W.R., it would undermine public confidence in the administration of justice to reinstate appeals with no or almost no prospect of success after many years of delay, particularly where the applicant has already served his sentence. There is a strong interest in finality in fair and error-free criminal proceedings: *Blaker* at para. 18.

Conclusion and Disposition

[57] I commend R.W.R. for his presentation of this appeal and the progress he has made in his recovery. However, considering all of the factors and the “heavy onus” on R.W.R., I am of the view it is not in the interests of justice to reinstate R.W.R.’s conviction and sentence appeals, and I would dismiss the application.

“The Honourable Justice Griffin”

I AGREE:

“The Honourable Justice Manocchio”

I AGREE:

“The Honourable Justice MacNaughton”