

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

HER MAJESTY THE QUEEN

AND:

WENDY REID

David McWhinnie

For the Crown

Malcolm Campbell

For the Defence

**MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH**

Introduction:

[1] VEALE J. (Oral): This is an application by Wendy Reid for *certiorari* to set aside her conviction for stealing monies exceeding \$5,000 contrary to s. 334(a) of the *Criminal Code*.

[2] Ms. Reid is alleging that procedures followed to record her guilty plea in front of a Justice of the Peace and a Territorial Court judge did not comply with the *Criminal Code*. Thus, she seeks an order that the Territorial Court judge has lost jurisdiction in the matter and that the conviction should be set aside.

[3] As the matter is set for sentencing in Territorial Court on September 8, 2003, at 9:00 a.m., she also seeks a prohibition order prohibiting the Territorial Court from proceeding to sentence, and a *habeas corpus* order to quash her warrant of committal and reinstating her previous undertaking.

[4] There are two issues:

- (i) Did Justice of the Peace Cameron have jurisdiction to enter and record the guilty plea of Ms. Reid, by counsel, without her being present?
- (ii) Did Judge Lilles have jurisdiction to proceed to sentence Ms. Reid?

The Facts:

[5] The facts are as follows:

- (i) On May 14, 2003, Mr. Dick, counsel for Ms. Reid, appeared before Justice of the Peace Cameron without Ms. Reid being present. The Crown agreed to proceed to a guilty plea entered by Mr. Dick, as agent for Ms. Reid. Justice of the Peace Cameron was advised that Mr. Dick was appearing as agent on consent, but he did not specifically order the procedure under s. 650(1.1). The guilty plea was entered by Mr. Dick on behalf of Ms. Reid. The bare facts of the charge were read-in for information purposes only.
- (ii) On June 20, 2003, Ms. Reid appeared with Mr. Dick before Judge Lilles. The Crown informed Judge Lilles that a formal guilty plea was entered and basic facts were admitted on the last occasion, referring to the appearance before Justice of the Peace Cameron on May 14, 2003. The Crown attorney was incorrect about the basic facts being admitted

but, in any event, Judge Lilles asked for the facts to be read in. There was no objection taken by either Mr. Dick or Ms. Reid, who were present at that time.

- (iii) The facts were read in with both Mr. Dick and Ms. Reid present. Mr. Dick said that the facts were substantially admitted. Judge Lilles proceeded to hear submissions for sentencing. The Crown submitted that incarceration in a penitentiary was appropriate.
- (iv) During submissions from Mr. Dick, the initial not guilty plea of Ms. Reid was addressed as well as the change of plea to a guilty plea on May 14, 2003. Mr. Dick specifically stated that there was a guilty plea, although it was raised in the sentencing context. When asked by Judge Lilles if she would fully cooperate with the probation officer preparing a pre-sentence report, Ms. Reid said yes.
- (v) At a later date, Ms. Reid applied to set aside her guilty plea. Judge Lilles rejected that application and made certain findings of fact, which I am accepting for the purposes of this hearing.
- (vi) The specific matter that was raised in the application before Judge Lilles was whether Ms. Reid was pleading guilty on the understanding that there would be a deal struck on a conditional sentence. Judge Lilles said the following, at paragraphs 25 and 26 of his decision:

I also accept the evidence of Mr. Dick that he did not tell Ms. Reid that he had reached a deal with Crown for a conditional sentence. I think it much more likely that Mr. Dick informed Ms. Reid of the possibility of a conditional

sentence that he was trying to negotiate a deal with the Crown. I am satisfied that Ms. Reid knew that there was no deal, and that any potential deal was contingent on restitution being made. Ms. Reid attempted to gather funds for restitution and advised the court that she had only been able to raise \$20,000 from family members, but she said that together with her husband, she would pay \$1,000 a month during the period of her conditional sentence probation.

I find that the reason that Ms. Reid now seeks a withdrawal of her guilty plea is due to the position taken by Crown at the hearing for sentencing. This is perhaps surprising as incarceration in a penitentiary was not a novel concept for Ms. Reid. Mr. Dick testified that he had discussed the possibility of a penitentiary term with her. In any event, the fact that the Crown sought a harsher sentence than Ms. Reid may have anticipated does not, in itself, render her plea involuntary. I therefore reject Ms. Reid's application on this ground.

[6] My interpretation of that finding is that Ms. Reid pled guilty with the knowledge that there was no deal.

[7] I should also indicate, for the record, that Ms. Reid initially elected trial in Supreme Court, but re-elected to trial before a Territorial Court judge. That matter is not raised in this application.

The Law:

[8] The sections of the *Criminal Code* that are applicable, are as follows:

s. 650(1) Subject to subsections (1.1) and (2), and section 650.01, an accused, other than a corporation, shall be present in court during the whole of the his or her trial.

s. 650(1.1) Where the court so orders, and where the prosecutor and the accused so agree, the accused may

appear by counsel or by closed-circuit television or any other means that allow the court and the accused to engage in simultaneous visual and oral communication, for any part of the trial other than a part in which the evidence of a witness is taken.

s. 606(1.1) A court may accept a plea of guilty only if it is satisfied that the accused

- (a) is making the plea voluntarily; and
- (b) understands
 - (i) that the plea is an admission of the essential elements of the offence,
 - (ii) the nature and consequences of the plea, and
 - (iii) that the court is not bound by any agreement made between the accused and the prosecutor.

s. 606(1.2) The failure of the court to fully inquire whether the conditions set out in subsection (1.1) are met does not affect the validity of the plea.

s. 485(1) Jurisdiction over an offence is not lost by reason of the failure of any court, judge, provincial court judge or justice to act in the exercise of that jurisdiction at any particular time, or by reason of a failure to comply with any of the provisions of this Act respecting adjournments or remands.

s. 485 (4) Where, in the opinion of the court, judge, provincial court judge or justice, an accused or a defendant who appears at a proceedings has been misled or prejudiced by reason of any matter referred to in subsection (1), the court, judge, provincial court judge or justice may adjourn the proceeding and may make such order as it or he considers appropriate.

[9] **Issue (1)** Did Justice of the Peace Cameron have jurisdiction to enter and record the plea of Ms. Reid, by counsel, without her being present?

[10] I am satisfied that Justice of the Peace Cameron was informed of the fact that Mr. Dick was appearing as agent and he was permitting the matter to proceed.

[11] In my view, the order under s. 650(1.1) may be inferred in these circumstances. In other words, regularity may be presumed when the Justice of the Peace is informed of the Crown and defence consent to defence counsel appearing as agent without the presence of the accused, and the Justice of the Peace proceeds.

[12] The issue of whether or not a Justice of the Peace may take a plea on an indictable offence was referred to by counsel, but the matter was not argued. Although, I have my doubts about the jurisdiction of the Justice of the Peace, I am not prepared to make a ruling without a full hearing on that issue, which neither defence nor the Crown pursued in this application.

[13] I find, at the very least, that the guilty plea was tendered or proffered to the Court.

[14] **Issue (2)** Did Judge Lilles have jurisdiction to proceed to sentence Ms. Reid?

[15] Counsel for Ms. Reid submits that there was no guilty plea before Judge Lilles and no acceptance of the plea. However, I am persuaded that the decision of the British Columbia Court of Appeal, in *R. v. Sommerfeldt*, 14 C.C.C. (3d) 445, applies here.

[16] In that case, the accused made elections and pleas, but it was not done in the formal way of reading the election section and requesting a plea and the plea being made. There was instead a conversation between counsel for the accused person and the judge. At the end of the discussion, the judge said, "do you confirm those elections and pleas Mr. Sommerfeldt?" He replied yes. When it came to trial, his

counsel confirmed again that his client pleaded guilty. On appeal, the accused said that he did not plead guilty. The British Columbia Court of Appeal found that there was an informal plea although a lack of formality or lack of employing the traditional methods of pleading. The court found that there was a plea.

[17] This is a similar case albeit close to the line. Although there was not a formal plea of guilty, counsel for the accused said Ms. Reid was pleading guilty in her presence. She participated in the proceeding and was not misled or prejudiced.

[18] The s. 606(1.1) procedure was not followed, but she appeared with counsel and s. 606(1.2) indicates that the failure to fully inquire as to the 606(1.1) factors or conditions does not affect the validity of the plea.

[19] In my view, in the event that it were found there was a lack or loss of jurisdiction before Justice of the Peace Cameron, such jurisdiction was regained before Judge Lilles. Ms. Reid was present and heard the Crown and her counsel indicate a guilty plea on her behalf. Ms. Reid heard the submissions as to sentence by the Crown and Mr. Dick. When asked directly by Judge Lilles whether she would cooperate fully with the probation officer, she replied yes.

[20] In my view, she fully understood that she had pled guilty and was participating in the sentencing process. I therefore dismiss the application for *certiorari*, prohibition and *habeas corpus*.

[21] Although I have dismissed this application, it would be advisable for the Territorial Court to consider its procedures on taking guilty pleas to ensure that guilty pleas are expressly made by the accused person. In my view, the best way to enter

a guilty plea on an indictable offence is to ensure that the accused personally pleads guilty before a Territorial Court judge. This may avoid allegations of irregularity such as those that arose in this application.

[22] Is there anything further, counsel?

[23] MR. MCWHINNIE: Nothing further, sir. Although, for a matter of convenience, if Madam Clerk would be prepared to issue a removal order; Ms. Reid is scheduled to be in court Monday. I think she is before the Territorial Court at 9:00 a.m.

[24] THE COURT: So ordered.

VEALE J.