

Citation: *R. v. Wheeler*, 2010 YKTC 8

Date: February 10, 2010

Docket: 08-00354

Registry: Whitehorse

**IN THE TERRITORIAL COURT OF YUKON**

Before: His Honour Judge Cozens

REGINA

v.

EDDY JASON WHEELER

Appearances:

Ludovic Gouaillier

Ed Horembala

Counsel for Crown

Counsel for Defence

**REASONS FOR DECISION**

**Overview**

[1] Eddy Wheeler has been charged with having, on or about May 9, 2008, committed the offence of child abduction, contrary to s. 280(1) of the *Criminal Code*. The alleged victim of the abduction is a female, K.S., who was 14 years old at the time.

[2] Mr. Wheeler, who was 31 years of age, gave K.S., D.C. (also female and aged 15 at the time), and Kayla Mintz, a 21 year old aunt of K.S., a ride to Whitehorse on May 9, 2008. They all stayed together overnight in the same hotel room, before returning to Carmacks the following day. By road travel, Carmacks is approximately 200 km from Whitehorse. There is no evidence pointing to Mr. Wheeler having provided K.S. or D.C. any liquor, or his being engaged in any sexually inappropriate behaviour with either of them at any time during the trip.

[3] K.S. was in the care of Yukon Family and Children's Services ("F&CS") at the time of the alleged abduction, pursuant to a permanent care and custody order. K.S. was, however, residing with her mother, M.J., with the informal approval of F&CS, on May 9, 2008. There were ongoing discussions between F&CS and M.J. regarding a possible application by M.J. to have the permanent care and custody order overturned.

[4] K.S. did not have the permission of either F&CS or M.J. to travel to Whitehorse with Mr. Wheeler that day. Mr. Wheeler did not check with either F&CS or M.J. to ensure that K.S. had permission to travel to Whitehorse, either with him or otherwise, prior to taking her there.

[5] M.J. was in Whitehorse on Friday, May 9, 2008, having traveled there sometime earlier in the morning with her partner. M.J. returned to Carmacks later Friday night, after Mr. Wheeler and the others had already left Carmacks for Whitehorse.

[6] K.S. and M.J. had a strained relationship, in which K.S. was generally uncooperative with her mother's attempts to institute rules. It is clear that K.S. was difficult to exercise control over and to a large extent did what she wanted to, including drinking alcohol and staying overnight at various friends' residences without first obtaining permission to do so, despite M.J.'s efforts to restrict such activities. K.S. also had not been compliant with the efforts of F&CS to exercise control over her placements with foster parents and her activities, and had a similarly strained relationship with them.

[7] M.J. was responsible for making certain decisions in respect of K.S., in particular the routine day-to-day activities, while F&CS retained responsibility for other significant decisions. Just where the line would be drawn was not clear on the evidence and appears to be somewhat flexible, in a manner consistent with the informal agreement between the parties. For the purposes of this decision, I am satisfied that either of M.J. or F&CS was in a position to provide consent for a

trip to Whitehorse by K.S. I am also satisfied that, absent any such consent being provided, both M.J. and F&CS were in a position to be deprived of the care and control over K.S.; F&CS as the legally responsible guardian of K.S., and M.J. as their designate.

[8] Other than RCMP witnesses, the witnesses called by the Crown at the trial were K.S., D.C., Kayla Mintz, M.J. and Janis Wick, the social worker directly responsible for supervising K.S. Mr. Wheeler testified in his own defence.

[9] At the conclusion of the trial in Carmacks, Yukon, Mr. Wheeler was acquitted, with reasons to follow. These are my reasons.

### **Evidence**

[10] There were some differences between the evidence of Ms. Mintz, K.S., D.C. and Mr. Wheeler in several areas, as to time, place and events. I find, however, that these differences do not give rise to any significant concerns about their evidence such as would effect my findings in regard to the occurrence of events on May 9 and 10, 2008.

[11] I find that events generally unfolded as follows: on May 9, 2008, in the early evening around 5:30 to 6:00 p.m., Mr. Wheeler was approached by D.C. and K.S. who had been unsuccessfully attempting to hitch a ride to Whitehorse. Mr. Wheeler was already planning to go to Whitehorse.

[12] As a result of this conversation, arrangements were made for Mr. Wheeler to provide D.C. and K.S. a ride to Whitehorse. Mr. Wheeler picked up Ms. Mintz at her residence and gave her a ride to Whitehorse as well. There was some evidence that the ride for Ms. Mintz may have been arranged or otherwise discussed the night before, including travel with two other friends.

[13] The four drove to Whitehorse with Mr. Wheeler driving, Ms. Mintz in the front passenger seat and K.S. and D.C. in the back.

[14] Once in Whitehorse, they went to the 202 Motor Inn and Mr. Wheeler paid for a room for all four of them. He testified that this was not planned but was his response to the fact that the others did not have a place to stay.

[15] They ate some take out food in the room, being joined by some of Ms. Mintz's friends. Ms. Mintz purchased some off sales beer for herself and Mr. Wheeler. K.S. consumed some of the alcohol brought by Ms. Mintz's friends. K.S. and D.C. were trying to telephone some of their friends. At some point Mr. Wheeler and the others drove around for a while, looking for friends and, to some extent, for M.J. While this may have occurred either prior to, or after initially going to the 202 Motor Inn, I consider it to most likely have occurred immediately after arriving in Whitehorse.

[16] Mr. Wheeler, Ms. Mintz, and her friends subsequently went out to the bar, although the evidence is contradictory as to whether they went together or separately. K.S. and D.C. left the room and walked around Main Street and the riverfront area. K.S. and D.C. were consuming alcohol.

[17] K.S. and D.C. returned to the room and slept in one of the two beds. Mr. Wheeler returned to the room alone and later, at some point Ms. Mintz also returned. Ms. Mintz joined K.S. and D.C. in one bed and Mr. Wheeler slept in the other bed.

[18] In the late morning, Mr. Wheeler drove them all back to Carmacks. They stopped for gas at the Trails North gas station and Ms. Mintz phoned a friend. She learned at that time that the RCMP were looking for K.S. She communicated this information to Mr. Wheeler.

## **Law**

[19] Section 280 reads as follows:

- (1) Every person who, without lawful authority, takes or causes to be taken an unmarried person under the age of 16 years

out of the possession of and against the will of the parent or guardian of that person or any other person who has the lawful care or charge of that person is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

(2) In this section and sections 281 to 283, “guardian” includes any person who has in law or in fact the custody or control of another person.

[20] Section 286 reads:

In proceedings in respect of an offence under sections 280 to 283, it is not a defence to any charge that a young person consented to or suggested any conduct of the accused.

[21] The essential elements of the offence in section 280(1) were considered in the cases of *R. v. Flick* 2005 BCCA 299, and *R. v. Vokey* 2005 BCCA 498, both of which were heard together.

[22] In *Vokey*, the youth had been removed from her mother’s care and placed by the Director of Child and Family Services in the home of K.K, pursuant to a voluntary care agreement. K.K. also operated an emergency home for teens in which the youth had been placed on two earlier occasions. The youth ran away from K.K.’s residence and traveled in two separate automobiles with the accused Vokey and Defouw to Calgary, along with K.K.’s boyfriend. Vokey and Defouw had invited the youth, her boyfriend and another 16 year old youth, B.L., to travel with them. K.K. then continued to travel without her boyfriend, but with Vokey and Defouw and B.L., to Ontario to visit friends. The Crown appeal of the acquittals of Vokey and Defouw was dismissed on the basis that a youth could not be abducted from a parent who had agreed to give up guardianship and from a person without guardianship status.

[23] In *Flick*, the youth had a history of running away from her grandparents who were her guardians, and staying with and/or traveling to the United States with Flick. Ultimately Flick was convicted in California with having sexual relations with the underage youth and sentenced to two years in prison. Flick

was subsequently charged in British Columbia with three counts of child abduction under s. 280(1). The appeal from conviction was dismissed.

[24] In these cases, the Court of Appeal reaffirmed that in prosecuting an offence under s. 280(1) "...the Crown does not need to show some element of coercion or control over the person that compelled them to accompany the accused" (**Vokey** at para. 26 citing from **R. v. Chartrand**, [1994] 2S.C.R. 864).

[25] The consent or participation of the youth is not a defence as a youth under the age of 16 is unable to take him or herself out of the lawful care of a parent or guardian, or otherwise extinguish the right of possession of the parent or guardian. (**Vokey** at para. 27, **Flick** at para. 38).

[26] "Possession" is a broader concept than mere physical possession and encompasses:

...the ability of the parent or guardian to exercise his or her right of control over the child, rather than having mere physical control....The requisite intent may be made out even if the offender has an innocent motive or intends only to deprive the guardian of control temporarily, so long as the offender knows or foresees that his actions would be substantially certain to deprive the guardian of the ability to exercise control over the child" (**Flick** at paras. 34 and 39).

### **Application to this case**

[27] K.S. is an unmarried person under the age of 16, a fact that would appear to have been known or should have been known or otherwise enquired into by Mr. Wheeler.

[28] K.S. was in the care of the Director of F&CS who had allowed her to continue to reside with M.J. I accept Mr. Wheeler's evidence that he was unaware of the Director's involvement as the guardian over K.S. As such, he could not have known that he would possibly have required the Director's consent to travel to Whitehorse and back with K.S.

[29] That said, M.J. was the guardian of K.S. through the agreement with F&CS. Mr. Wheeler was, or should have been aware, that he could not take K.S. to Whitehorse without the consent of M.J. He did not attempt to firstly locate M.J. or confirm that K.S. had obtained M.J.'s consent, prior to traveling to Whitehorse with K.S., D.C. and Ms. Mintz.

[30] It is clear that K.S.'s active participation and "consent" to travel to Whitehorse with Mr. Wheeler does not amount to a defense to the offence under s. 280(1).

[31] It is also clear that the Director of F&CS and M.J. were deprived of their ability to exercise their right of control over K.S. as a result of her traveling to Whitehorse with Mr. Wheeler. The fact that M.J. was in Whitehorse at the time, albeit temporarily, and not in Carmacks where K.S. was, does not alter this finding.

[32] In the end, what Mr. Wheeler is left with as a defense is the evidence that he was taking K.S. to Whitehorse where her mother was, and that he drove around Whitehorse with K.S., at least in part to see if they could locate K.S. As such, the question is whether Mr. Wheeler knew or foresaw that his actions would be substantially certain to deprive M.J. (and thus the Director of F&CS) of the ability to, at least temporarily, exercise control over K.S.

[33] There is a basis in the evidence of the witnesses to support Mr. Wheeler's testimony in this regard. Mr. Wheeler testified that K.S. told him her mother was in Whitehorse and she would try to get a hold of her there. Ms. Mintz agreed that it was possible K.S. had stated in the car, in the presence of Mr. Wheeler, that she was going to try to get a hold of her mother in Whitehorse. D.C. further stated that she knew K.S.'s mother was in Whitehorse at the time they traveled there. D.C. testified that Mr. Wheeler initially expressed some reservations about taking them to Whitehorse as he was concerned he could get into trouble. D.C. stated that she had permission to go from her mother, but was unaware of

whether K.S. did. There was no evidence that Mr. Wheeler knew K.S. did not have permission to travel to Whitehorse. Conversely, there is also no evidence that he expressly made enquiries in advance to determine this point.

[34] With respect to the reasonableness of Mr. Wheeler's testimony about trying to locate M.J. in Whitehorse, M.J. was clear in her testimony that she had told Mr. Wheeler to stay away from K.S. on at least one occasion. Mr. Wheeler testified that he had never been told this by M.J., prior to the May 9 incident, and that the only discussion he had with M.J. was regarding a snowmobile ride he had given K.S., in which M.J. simply asked him to phone her if he was ever aware of K.S. being intoxicated.

[35] M.J. testified that she had told K.S. not to hang around with Mr. Wheeler. K.S. denied having been told this, however, she did agree that M.J. had discussed her being around Mr. Wheeler. I prefer the evidence of M.J. on this point.

[36] I find that Mr. Wheeler has minimized to some extent his prior involvement with K.S., and his knowledge of M.J.'s disapproval of there being any form of relationship between him and K.S. I believe that Mr. Wheeler was better acquainted with K.S. than he and K.S. testified to, and that Mr. Wheeler was aware to some extent that M.J. was concerned about the possibility of the two being or becoming involved in a relationship that was more than a passing acquaintance.

[37] I also have some concerns about the extent to which there was a concerted attempt to locate M.J. in Whitehorse, and I expect that locating M.J. played a lesser role in what K.S.'s plans were. I find, however, that in applying the principles of *R. v. W.D.*, [1991] 1 S.C.R. 742, I cannot reject the evidence of Mr. Wheeler in respect of his testimony about trying to locate M.J.

[38] Mr. Wheeler's actions in taking K.S. to Whitehorse in the circumstances were clearly irresponsible and poorly thought out, as he himself, at least to some

extent, was aware. While bordering on the criminal, however, I find that they do not quite cross over that line such as to constitute the commission of a criminal offence. I am left with a reasonable doubt that Mr. Wheeler committed the offence of child abduction. As such he is acquitted of the s. 280(1) charge.

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COZENS T.C.J.