

# In the Court of Appeal of the Northwest Territories

Citation: *Albert v R*, 2017 NWTCA 2

Date: 2017 05 12  
Docket: A-1-AP-2016-000006  
Registry: Yellowknife

Between:

Her Majesty the Queen

Respondent

- and -

Edward Frank Albert

Appellant

## Restriction on Publication

**Identification Ban** – See the *Criminal Code*, section 486.4.

By Court Order, information that may identify the complainants must not be published, broadcast, or transmitted in any way.

**NOTE:** This judgment is intended to comply with the restriction so that it may be published.

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The Court:

**The Honourable Madam Justice Patricia Rowbotham**  
**The Honourable Mr. Justice Brian O’Ferrall**  
**The Honourable Madam Justice Shannon Smallwood**

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## Memorandum of Judgment

Appeal from the Conviction by  
The Honourable Judge G.E. Malakoe  
Convicted on the 17th day of February, 2016  
(Docket: T1CR2015000892)

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## Memorandum of Judgment

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### The Court:

[1] The self-represented appellant, Edward Albert, seeks to have his guilty pleas to two sexual assaults on different women vacated. The first assault was on March 3, 2015. The second occurred on May 31, 2015.

[2] Mr. Albert argues ineffective assistance of counsel. He says the advice he received from the lawyer who represented him in connection with his guilty pleas, namely that he would likely be convicted of both counts, was inappropriate. And he says the advice he received from another lawyer who represented him at his sentencing hearing, namely that he refrain from making an application to vacate his guilty pleas, was also inappropriate.

[3] On appeal there was a paucity of evidence on the issue of the competency of the appellant's counsel. The only direct evidence on the issue was the appellant's assertion that he should not have been advised to plead guilty and, having done so, he should have been advised to seek to have his guilty plea vacated.

[4] In order to dispose of this appeal, given the absence of any evidence with respect to the advice of counsel and the reasons for that advice, we found ourselves in the position of having to consider the fresh evidence which the Crown applied to have put before this court.

[5] The basis for the Crown's motion was that the tendered materials were necessary to understand and assess the arguments of the appellant, as well as those of the Crown. The proposed evidence included statements given to the RCMP by both the appellant and the complainants shortly after the alleged sexual assaults. It also included certain DNA evidence which only became available after the appellant had pled guilty, evidence which the appellant argues should have led to a withdrawal of his guilty plea to the second sexual assault.

[6] This Court may, when it is in the interests of justice to do so, receive fresh evidence proffered by the parties. Such fresh evidence may be considered in assessing the validity of a guilty plea: *R v T(R)*(1992), 10 OR (3d) 514, [1992] OJ No 1914 at para 12 (CA). We are satisfied that this is an appropriate case in which to permit fresh evidence. We recognize that the evidence tendered by the Crown is problematic for the reason given below, however, it provides useful context to help explain the circumstances leading to Mr. Albert's guilty pleas and to assist us in assessing Mr. Albert's legal representation. The problem with the fresh evidence is that the statements the appellant and the complainants gave to the RCMP, which form part of the fresh evidence, were never subjected to the scrutiny of a trial process. For example, no *voir dire* has been conducted with respect to the admissibility of the appellant's statement.

[7] What the fresh evidence discloses is that the accused, in his statement to the RCMP, admitted battering the two complainants when they refused to have sex with him. The interrogation techniques employed to obtain the statement may have been questioned on a *voir dire* had there been a trial and had the Crown relied upon the appellant's statement at trial. However, we are comforted by the fact that incriminating aspects of the statement were consistent with the statement given by one of the complainants. Armed with the admissions in the appellant's statement given to RCMP and the statements of the two complainants, which were corroborated in part by what the appellant admitted and by what others observed, the Crown offered a plea bargain to the appellant. In return for pleading guilty and admitting certain facts without the necessity of calling evidence pursuant to section 655 of the *Criminal Code*, the Crown was prepared to recommend a certain period of incarceration to the sentencing court with the appellant being permitted to serve his time in the North.

[8] Having received the advice of counsel, the appellant accepted the Crown's offer. He changed his plea to guilty to the first sexual assault on October 1, 2015 and to the second assault on October 23, 2015. On the guilty plea to the second charge, the appellant's counsel indicated he had canvassed section 606(1.1) of the *Criminal Code* with the appellant and was satisfied that his plea of guilty was compliant with that section.

[9] Sentencing was then postponed in order that a pre-sentence report could be prepared.

[10] Prior to sentencing, the results of a medical examination of the victim of the second sexual assault became available. Those results indicated the presence of another man's DNA in the vagina of the complainant, but not the DNA of the appellant.

[11] Upon learning of the DNA test results, the appellant sought to withdraw his guilty plea to the second sexual assault. At this point the appellant was represented by another lawyer. After receiving the lawyer's advice, the appellant proceeded to the sentencing hearing at which time the pre-sentence report and the agreed statement of facts were entered into evidence. The sentencing court questioned the parties as to whether there were any issues regarding the agreed statement of fact and was advised that there were none.

[12] When asked whether he had anything to say with respect to sentence, the accused advised the court that he had apologized to the victim of the second sexual assault "for what I did".

[13] With respect to the guilty pleas, a plea of guilty does not deprive this Court of jurisdiction to entertain a conviction appeal, but the appellant has the onus of establishing the plea of guilty was invalid: *R v Hoang*, 2003 ABCA 251 at para 14, 25 Alta LR (4th) 206. Examples of "valid grounds" to establish the invalidity of a guilty plea are where "it appears that the appellant did not appreciate the nature of the charge, or the appellant did not intend to admit that he was guilty of it; or where upon the admitted facts, the appellant could not...have been convicted of the offence

charged”: *Hoang* at para 30. This Court has indicated that a guilty plea should be vacated only in “exceptional” circumstances: *Hoang* at para 25.

[14] None of those exceptional circumstances exist here. The appellant did not argue that he did not understand what he was being charged with or that he did not intend to plead guilty. As well, the appellant’s admissions in his police statement and in his agreed statement of facts could have supported a conviction, regardless of the DNA evidence. In the agreed statement of facts, the appellant admitted that he demanded sex of one of the complainants and when she said “No”, he pulled her pants down and attempted to force his penis into her vagina. When he didn’t succeed, the appellant admitted he chased the complainant and wrestled her to the ground.

[15] Tied to his attempt to vacate his pleas of guilty is Mr. Albert’s assertion of inadequate legal assistance. There is a strong presumption that counsel is competent. It is not enough to assert that other counsel might have made different decisions: *R v Meer*, 2015 ABCA 340 at para 23, 607 AR 358; *R v GDB*, 2000 SCC 22 at para 27, [2000] 1 SCR 520. For the appellant to be successful in his claim that counsel was incompetent, he must show that the professional incompetence of counsel resulted in a miscarriage of justice and that he was prejudiced by that incompetence: *Meer* at para 23. A consideration of the performance of counsel is to be conducted on a reasonableness standard: *GDB* at para 27.

[16] There is little on the record to assess Mr. Albert’s legal representation. The submissions made at the trial court by the appellant’s then counsel in connection with the guilty pleas and his counsel at the sentencing hearing suggest that Mr. Albert was dissatisfied with his counsel, but they do not suggest incompetence. It appears from the court transcripts that both counsel had discussions with Mr. Albert with respect to the charges and options available to him. The content and tenor of those discussions is unknown to us because no waiver of privilege was made by the appellant and no proper application was made to put that evidence before the court, but an inference may be drawn that both of the appellant’s counsel viewed an acquittal as unlikely and were of the opinion that a guilty plea would result in less jail time in an institution in the North.

[17] Mr. Albert points to the DNA results from the second assault which became available three months before he was sentenced and argues ineffective assistance of counsel because these results were not used to advance his defence. We do not know what advice was given to Mr. Albert by the lawyer who represented him on his guilty pleas regarding the DNA results, but we have some indication of the advice that his sentencing lawyer gave him. The DNA results were addressed at the sentencing hearing. The appellant’s then counsel informed the court that he had been hired by Mr. Albert to apply to strike his guilty plea, but that the appellant changed his mind when counsel explained to him that the fact of somebody else’s DNA showing up on the test did not mean that the accused would be exonerated.

[18] We do have some concern that the content of the agreed statement of fact for the second sexual assault more closely aligns with the complainant's version of the events on May 31, 2015, than with the admissions pulled from Mr. Albert in his interview with the RCMP on June 3, 2015. However, those admissions would nevertheless support a conviction under section 271. The ordinary rule is that agreed facts bind the accused and are incontrovertible later: *R v Gouthro*, 2010 ABCA 188 at para 8, 27 Alta LR (5th) 207. The Court in *Gouthro* stated at paragraph 9:

An agreement in open court as to the facts of the crime leading to the sentencing cannot be overturned by showing a mere miscommunication about some facts between client and counsel, nor an oversight in reciting some additional facts. Still less can it be overturned by a later, more thorough trawl for more evidence. After all, the Crown must deal with defence counsel; it cannot ethically inquire into their instructions or the accuracy of counsel's information, nor go behind counsel's back and deal directly with an accused who has counsel.

[19] Also important with respect to the agreed statements of fact is that neither now, nor at any time since the parties agreed to the facts, has Mr. Albert challenged their accuracy. Through counsel, the appellant indicated to the court at the sentencing hearing that there was no issue with either of the agreed statements of fact.

[20] Mr. Albert further contends that were it not for the inadequate services of his counsel, he would have fought the charges. He has identified potential witnesses who could have been used in his defence had the sexual assault charges proceeded to trial. But as the Crown rightly points out, the witnesses identified by Mr. Albert would all be of incidental value. None of them actually witnessed either assault. Mr. Albert would still be faced at trial with the testimony of the complainants and possibly his own admissions in the RCMP interview.

[21] Based on what we see before us, it was reasonable for both of the appellant's counsel to discuss with the appellant the benefits of pleading guilty, which he admitted before us included discussions about leniency in sentencing. His sentencing lawyer informed the court that Mr. Albert, who has foetal alcohol syndrome and a number of associated health issues, would be negatively affected if he were required to serve his prison time in a federal penitentiary. He therefore requested that Mr. Albert be permitted to serve his sentence in the north, close to his mother, with whom he was close and with whom he spoke by telephone almost every day. The court accepted this recommendation, which may not have been accepted absent the guilty pleas and corresponding sentences.

[22] We see no evidence that would rebut the presumption of competency of counsel in this matter. From the materials before us, there has been no miscarriage of justice and we see no prejudice having resulted to Mr. Albert. To the contrary, Mr. Albert's arguably lenient sentence, given the seriousness of the combination of the sexual assaults, reflects the fact that he provided

guilty pleas, and provided them early, in the sense that they were made prior to the complainants being required to testify. Mr. Albert has not provided a basis upon which to establish the invalidity of his guilty pleas, and the appeal is accordingly dismissed.

Appeal heard on April 19, 2017

Memorandum filed at Yellowknife, N.W.T.  
this                    day of May, 2017

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Rowbotham J.A.

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O’Ferrall J.A.

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Smallwood J.A.

**Appearances:**

B. MacPherson  
for the Respondent

Appellant Edward Albert in Person

IN THE COURT OF APPEAL  
FOR THE NORTHWEST TERRITORIES

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- and -

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MEMORANDUM OF JUDGMENT

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