

CANADA / JUDGMENT

R. v. E.T.

2026 ONCA 314

COURT

Court of Appeal for Ontario

DECIDED

4 May 2026

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Collection

Decisions of the Court of Appeal

Date

2026-05-04

Neutral citation

2026 ONCA 314

Docket numbers

COA-24-CR-0231

Judges

Gillese, Eileen E.; Dawe, Jonathan; Madsen, Lene

Subject

Criminal

Decision Content

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. E.T., 2026 ONCA 314[1]

DATE: 20260504

DOCKET: COA-24-CR-0231

Gillese, Dawe and Madsen JJ.A.

BETWEEN

His Majesty the King

Respondent

and

E.T.

Appellant

Geoff Haskell, for the appellant

Akshay Aurora, for the respondent

Heard: March 2, 2026

On appeal from the convictions entered by Justice J. Peter Wright of the Ontario Court of Justice on May 19, 2023, and from the sentence imposed on November 24, 2023.

Gillese J.A.:

I. Overview [1] After a two-day judge-alone trial, the appellant was convicted of sexual assault of a 12-year-old girl in the summer of 2021. He was 42 years of age at that time. During the trial in 2023, two witnesses gave evidence the appellant had breached his release condition prohibiting unsupervised access to children under the age of 16 by driving young children to school without his surety present. After his conviction for sexual assault, the appellant was charged with failing to comply with a condition of his release order. He later pleaded guilty to that charge.

[2] The appellant was sentenced to two years in jail less a day for the sexual assault[2] and 60 days consecutive for the breach of bail, followed by three years' probation. His appeal against the sexual assault conviction is based on a claim of ineffective assistance of trial counsel ("IAC"). The appellant filed fresh evidence in support of the IAC claim, including his affidavit.

[3] The appellant also seeks leave to appeal against sentence on the basis that the sentencing judge was given insufficient and incorrect information regarding his pretrial custody.

[4] The Crown concedes that the sentence appeal should be allowed due to an arithmetical error and that the appellant should be given an additional 13 days' credit.[3]

[5] I would dismiss the conviction appeal. I would grant leave to appeal sentence and allow that appeal by granting the appellant 13 days of additional Summers' credit[4].

II. Background [6] At the time of the incident, the complainant, I.U., was 12 years old. Her family came from Nigeria. She lived with her mother and siblings in Ottawa but her father was in still in Nigeria at the time. He now resides with the family here in Canada.

- [7] The appellant was a friend of the complainant's family and lived in their neighbourhood. The complainant's mother trusted the appellant to look after her children, including the complainant. Before the incident, the appellant was frequently with the complainant and her family. He took the children to sports events and made sure they did chores around the house.
- [8] On July 7, 2021, the appellant was at the complainant's home. Her parents were not present in the apartment. The complainant cut her foot while cleaning the apartment. There was no first aid kit or disinfectant in the home, so the appellant suggested they go to his apartment to use his first aid kit. Once in his own home, the appellant dressed the complainant's wound but, according to the complainant, the appellant then began to kiss and hug her, put his tongue in her mouth, and offered to buy her a phone for her birthday before lifting up her bra, saying he wanted to feel her breasts. Later that day, the complainant told her siblings and mother what had happened.
- [9] Shortly after the incident, two of the appellant's longtime friends spoke to the complainant about the incident. Both people were defence witnesses at trial. The first person who spoke to the complainant was a neighbour named J.E. In answer to questions posed by J.E., the complainant said the appellant had kissed her but had not touched her breasts. At trial, the complainant was asked during re-examination why she told J.E. the appellant had not touched her breasts and she explained it was because she "wasn't comfortable" discussing such things with her neighbour in a "very tense situation".
- [10] The second person who spoke to the complainant about the incident was A.A., a person she had not previously met. At trial, the complainant agreed she had spoken with A.A. She was then asked whether it was correct that A.A. asked her "the question" and "you told him nothing happened". There was no indication of what "the question" was. The complainant answered "I don't remember what question he asked me, but I remember him saying it was a serious offence and that it was my choice if I wanted to go to the police or not, but he would like to keep it between us".
- [11] In the days following the incident, the appellant visited the complainant's home and apologized to the complainant and her mother for his actions. He also sent text messages to the complainant's father who was still in Nigeria at that time. The text messages were admitted at trial. In them, the appellant apologized for his actions and agreed to report himself to the police.
- [12] The complainant and her parents testified at trial. The complainant's older brother also testified. After describing the appellant's involvement with the family, he testified about what he saw on the day of the incident. He was home that day, studying for a summer school test. The appellant came to the apartment and took the complainant to his apartment after she injured her foot. When he later went looking for the complainant he found her, alone in a park close to their home. She was crying.

- [13] The appellant testified at trial. He confirmed the complainant's account up to the point of what occurred after he dressed her foot wound. He said that he then put his hand around the complainant's shoulder and was going to give her "a peck", but she pushed him away saying she thought he was going to kiss her. He denied hugging her, kissing her, and touching her breasts. He said "I did nothing". The appellant testified that he only apologized to the complainant and her parents because the complainant's father had threatened him.
- [14] J.E. and A.A. each testified that the complainant's trial testimony was different from what she recounted on the day the incident took place. J.E. said that, at that time, the complainant told her the appellant had kissed her but had not touched her breasts. A.A. testified that the complainant's trial testimony was different from what she told him shortly after the incident, which was that nothing had happened between the appellant and her.

III. The Trial Judge's Credibility Determinations [15] The trial judge rejected the appellant's evidence, stating it was "not believed and certainly not capable of belief". He found the appellant "a very poor witness", whose evidence "frankly, [made] no sense", whose answers were "non-responsive", and who was "desperately trying to make up a story but he is caught out by his own words".

- [16] The trial judge flatly rejected the appellant's denial he had done anything wrong to the complainant, pointing to the appellant's own words in his texts to the complainant's father. As the trial judge found, those texts "put the lie" to the appellant's testimony and also "fly in the face" of his allegation that he was being threatened by the complainant's father. The trial judge pointed to one such text where the appellant begins his message to the complainant's father with the words "Good morning, bro". In the text, the appellant went on to say that he had gone to apologize to the complainant the day before and had spoken to her mother who agreed he should report himself to the police. The appellant ended the text by thanking the complainant's father for his "help and support".
- [17] The trial judge expressly found that none of the text messages were consistent with the appellant's testimony, but they were all consistent with the evidence of the complainant and that of her parents.
- [18] The trial judge found the evidence of J.E. and A.A. "odd". He observed that they had taken no notes of their meetings with the complainant but each maintained their memories had "improved over time". In dealing with their testimony that the complainant made statements to them shortly after the incident that were inconsistent with her trial testimony, the trial judge observed: "most people would be reluctant to talk to complete strangers, approaching them with such subject matter out of the blue", noting that the complainant was only 12 years old when they spoke with her. He found the complainant's explanation for why she did not tell J.E. about the touching of her breasts was reasonable. He stated that the same applied in respect of A.A., "a total stranger approaching this 12-year-old girl", adding that, in any event, any inconsistencies were undermined by non-compliance with the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.). As he explained, A.A. gave a narrative that he

attributed to the complainant, but which was not put to her in cross-examination.

- [19] The trial judge concluded by finding that the testimony of these two witnesses in no way “undermines the credibility or reliability of the complainant”.
- [20] In finding the complainant both credible and reliable, the trial judge began by simply stating that he believed her. He found that she testified in a straightforward fashion and that her testimony was internally consistent, logical, and “had the ring of truth”. He further observed that the complainant was completely unshaken in her testimony adding that she was “not challenged, really, in cross”.
- [21] The trial judge similarly found the complainant’s parents credible and reliable. He described them both as: responsive in-chief and in cross-examination; internally consistent; and unshaken in their testimony. He accepted their testimony that the appellant had apologized for his conduct and expressed his remorse for it.

IV. The Grounds of Appeal [22] The appellant submits that his trial counsel provided ineffective assistance which resulted in a miscarriage of justice. In support of his IAC claim, he alleges that trial counsel failed to: take notes; adduce evidence crucial to his defence; advise him of his right to elect his mode of trial; adduce sentencing materials relating to pretrial credit, including lockdown and triple-bunking records; correct a miscalculation on pretrial credit; and, properly advise him on the fail to comply charge.

- [23] The appellant contends that these acts and omissions, whether viewed individually or as a whole, led to a miscarriage of justice.
- [24] In terms of the sentence appeal, the appellant submits that the sentencing judge was given incorrect information and that he is entitled to some additional days of pretrial credit.

V. The Relevant Legal Principles [25] An appellant seeking a new trial on the basis they received ineffective assistance of counsel has the onus to establish three elements: (i) the facts underlying the assertion of ineffective assistance (the “Factual Component”); (ii) that a miscarriage of justice resulted because the ineffective assistance rendered the trial unfair or the verdict unreliable (the “Prejudice Component”); and, if (i) and (ii) are established, (iii) that counsel’s conduct fell below the required standard (the “Performance Component”): *R. v. Zock*, 2025 ONCA 483, 450 C.C.C. (3d) 459, at paras. 40-41; *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520, at paras. 25-29.

- [26] Allegations of ineffective assistance must be closely scrutinized: *R. v. Fiorilli*, 2021 ONCA 461, 156 O.R. (3d) 582, at para. 51, leave to appeal refused, [2015] S.C.C.A. No. 261; *R. v. Archer* (2005), 202 C.C.C. (3d) 60 (Ont. C.A.), at paras. 119, 141-42. Where a miscarriage of justice is not established, the competence of counsel is not a question for the appellate courts: *G.D.B.*, at para. 5; *Archer*, at para. 121.

[27] Performance competence is measured against a reasonableness standard. It is made having regard to the circumstances as they existed when the impugned acts or omissions occurred. The reasonableness analysis must proceed upon a “strong presumption that counsel’s conduct fell within the wide range of reasonable professional assistance”: *Archer*, at para. 119, citing *G.D.B.*, at para. 27.

VI. Analysis A. The Conviction Appeal (i) The Factual Component of the IAC claim is not made out [28] The appellant’s fresh evidence provides the basis for the Factual Component of his IAC. To determine whether the appellant has satisfied his burden on this component, I must first determine whether that evidence is credible. After explaining why it is not, I consider each of the alleged failings on the part of trial counsel.

a. The appellant’s fresh evidence lacks credibility

[29] Recall that the trial judge rejected the appellant’s testimony about the incident and alleged threatening by the complainant’s father. He described the appellant’s testimony as “non-responsive”, “rambling”, “made no sense” and amounted to a desperate attempt “to make up a story”.

[30] I would make the same comments about the appellant’s fresh evidence on this appeal and more. A review of the transcripts shows that during examinations, the appellant: was combative; routinely supplemented, modified or changed his sworn affidavit evidence; acknowledged he had provided inaccurate information in his sworn affidavit; made claims that strain credulity; refused to make reasonable concessions; and was internally inconsistent on various issues. Below I set out a very few of the many examples that support this assessment.

- In his affidavit, the appellant said he was displeased with trial counsel’s work mere months after his arrest. However, at various points during this proceeding, he sent counsel emails in which he applauded counsel’s work. When questioned on this inconsistency, the appellant said his laudatory comments were a “cultural thing”.
- At times, the appellant claimed trial counsel did not know what the minimum sentence was for a sexual assault but, at other times, he acknowledged that trial counsel had given him that information several times.
- The appellant claimed he had never heard the word “jury” before preparing materials for this appeal. This is simply incredible in light of trial counsel’s evidence on his invariable practice in such situations, evidence that I accept.
- The appellant claimed he did not understand he was pleading guilty to the breach charge despite the fact that he entered the plea in the same court where his sexual assault trial had just concluded. Again, this claim is simply incredible.

- The appellant omitted, from his affidavit, information on his preparatory meeting with trial counsel a week before trial. Instead, he stated in his affidavit that he was unprepared for trial because the last meeting he had with counsel was long before the trial at which the only topic of conversation was retainer payments.
 - The appellant described his trial counsel as non-responsive. This, too, is incredible: his own affidavit evidence shows several calls and meetings between his counsel and himself, at least four of which were in the first month after he retained counsel.
- b. The alleged failings on the part of trial counsel
- [31] My view of trial counsel's credibility on the IAC claim stands in stark contrast with my credibility determination of the appellant's evidence. Trial counsel's evidence was clear, detailed, credible, and generally unshaken. He is an experienced defence counsel with an invariable practice on a number of matters that underlie the appellant's factual allegations. In light of my credibility determinations, the alleged failings of trial counsel can be dealt with summarily and lead inexorably to the conclusion that the appellant has failed to meet his burden to make out the Factual Component of his IAC claim.
- [32] Failure of trial counsel to take notes – it would have been preferable had trial counsel kept notes of his interactions with his client. Having said that, I do not accept that the failure to keep notes necessarily amounts to ineffective assistance or requires this court to discount trial counsel's testimony as to what transpired in this proceeding.
- [33] As I note above, I accept trial counsel's evidence on the IAC claim and see no basis on which to disbelieve his testimony simply because he failed to make notes of his various dealings with the appellant.
- [34] Alleged failure to adduce evidence crucial to the appellant's defence – the appellant's argument on this matter is based on trial counsel's alleged failure to adduce recordings of a phone conversation between the complainant's father and the appellant's cousin. The appellant was not party to the conversation. These recordings purportedly contained threats made by the complainant's father against the appellant and would explain why the appellant apologized to the complainant's father.
- [35] The appellant has adduced neither the recordings nor a translation thereof before this court. It is the appellant's burden to adduce probative evidence of sufficient persuasive weight to dislodge a verdict's foundation: *R. v. Sagos*, 2022 ONCA 603, at para. 27. As the court has not been provided with the recordings, it has no basis on which to assess its authenticity and relevance. Accordingly, the appellant has failed to establish this factual allegation.
- [36] Alleged failure to advise the appellant on his right to elect his mode of trial – I find that the appellant failed to establish this bald assertion. I accept trial counsel's testimony that he advised the appellant of his options for two reasons. First, trial counsel has been practicing criminal law for over 30 years and gave evidence of his standard, invariable practice of

advising clients of this right. Second, trial counsel had a detailed, independent recollection of informing the appellant of this matter, a point on which he did not resile in cross-examination.

- [37] Alleged failure to adduce sentencing materials and correct a miscalculation of pretrial credit – the appellant’s arguments on this are addressed below when analyzing his appeal against sentence.
- [38] Alleged improper advice to the appellant on the fail to comply charge – on this matter, the appellant alleges his counsel advised him to plead guilty, regardless of him having an arguable mistake of fact defence. That defence rests on the appellant’s assertion that the parent of the children he drove to school while unaccompanied by his surety had consented to this.
- [39] In my view, the appellant has failed to establish that he was advised to plead guilty. Trial counsel testified that it is his invariable practice to refrain from advising clients to plead guilty and that he recalled the appellant stating he wanted to plead guilty. For the reasons already given, I find his evidence credible and I accept it.
- [40] Further and in any event, the context in which the appellant entered his guilty plea is inconsistent with the appellant’s assertion that trial counsel told him to plead guilty because it was a mere technicality. After the facts underlying the charge were read in, the trial judge directly asked the appellant if he accepted the facts and he answered “yes”. The appellant is a well-educated journalist, with two university degrees, who was very involved throughout the proceeding. He had no difficulty in pushing back against suggestions made in court and, later, on cross-examination on the fresh evidence. It defies credulity that he would simply plead guilty when told to.
- [41] The appellant’s assertion that trial counsel told him that the breach charge was “just a technicality” is similarly incredible. On trial counsel’s evidence, which I accept, he spoke with the appellant about the condition because it prevented the appellant from reuniting with his son. This is underlined by the fact that the appellant and trial counsel undertook the lengthy process of obtaining Children’s Aid Society approval to vary his release order so he could reunite with his son.
- [42] In conclusion, the appellant has failed to establish the Factual Component of his IAC claim.
- (ii) The Prejudice Component of the IAC claim is not made out [43] On the prejudice component of the IAC claim, the appellant has the burden to establish a miscarriage of justice. To do that, the appellant must establish that there is a reasonable probability the result at trial would have been different, but for the actions of trial counsel, because the verdict was unfair or unreliable.
- [44] Even if the appellant had established one or more of his factual allegations, it is difficult to conceive of how he could have met the miscarriage of justice onus. The complainant was a strong witness, as the trial judge’s reasons on her credibility and reliability demonstrate, and a conviction could have been grounded on her evidence alone. The trial judge also accepted

the testimony of the complainant's parents, while completely rejecting that of the appellant. He found the appellant's version of events made "no sense whatsoever" and was inconsistent with the appellant's own texts to the complainant's father.

[45] Accordingly, there is no reasonable probability the outcome on the sexual assault charge would have been different.

[46] Having determined that the appellant did not satisfy either the Factual Component or the Prejudice Component of the test for IAC, there is no need for this court to consider the question of trial counsel's competence: G.D.B., at paras. 5, 29; Archer, at para. 121.

B. The Sentence Appeal [47] The appellant makes two arguments in relation to the sentence appeal which I will deal with in turn.

[48] First, the appellant says he provided trial counsel with information relating to lockdowns and periods of triple-bunking but trial counsel failed to adduce that information. On this matter, the appellant's fresh evidence was ever-changing: in chief he was not sure if he provided the documents to trial counsel but in cross-examination he said he gave them to trial counsel who "didn't accept" them.

[49] Trial counsel's evidence on whether he received the lockdown records was also inconsistent. However, during examinations, trial counsel was unshaken on the following point: he provided all the documents the appellant had given him to the Crown and the court. On this factual point, it is important to consider trial counsel's sentencing submissions in which he urged the court to consider the appellant's progress while in custody and provided the court with several programming certificates he had received from the appellant. The fact he made no submissions on lockdowns or triple-bunking is consistent with trial counsel's narrative. It is not consistent with the appellant's various claims about giving or attempting to give trial counsel these documents. It is also telling that the appellant had no explanation for why he produced those documents for the first time during cross-examinations on his affidavit.

[50] Accordingly, I accept trial counsel's evidence on this matter. He is an experienced criminal lawyer who knew that the appellant could have claimed Duncan credit^[5] for unusually harsh conditions. In the circumstances, if trial counsel had been given the documents on lockdown and triple-bunking, it seems highly unlikely that he would have simply ignored them, if they existed, while pressing the court to consider the other of the appellant's documents.

[51] Accordingly, in my view, the appellant has failed to establish the Factual Component of his allegation relating to lockdown materials.

[52] The appellant's second argument on this ground of appeal relates to a miscalculation of pretrial credit which trial counsel failed to correct. The context for this argument is as follows.

- [53] At one point during sentencing submissions, trial Crown said that the appellant had spent 145 days in pretrial custody. However, the accurate number of days at the time of submission was 154 days, not 145. Despite this misstatement, later in submissions, trial Crown correctly advised the court that the Summers' credit was 231 days.
- [54] Unfortunately, at sentencing, the trial judge calculated credit using the figure of 145 days. As a result, as the Crown acknowledges, the appellant is entitled to 13 days of additional credit.
- [55] The parties are agreed that the appellant's presentence custody was erroneously calculated, although the appellant says 12 days is how it should be corrected whereas the Crown says it should be 13 days. As the court indicated at the oral hearing of the appeal, we accept the Crown's calculation of 13 days.
- [56] I am satisfied that the arithmetical error was made and must be corrected. Accordingly, I would allow the sentence appeal by crediting the appellant with an additional 13 days of pretrial custody.
- [57] In light of the error and the amount of time the appellant has already served, the appellant asks this court to order that the remaining sentence be deemed served. The Crown objected. In my view, the better course of action is to simply correct the error in the sentencing calculation and I would so order.

VII. Disposition [58] For these reasons, I would dismiss the conviction appeal, grant leave to appeal against sentence, and allow the sentence appeal only to the extent of granting 13 days of additional Summers' credit.

Released: May 4, 2026 "E.E.G."

"E.E. Gillese J.A."

"I agree. J. Dawe J.A."

"I agree. L. Madsen J.A."

- [1] This appeal is subject to a publication ban pursuant to ss. 486.4 and 517 of the Criminal Code, R.S.C. 1985, c. C-46, as well as ss. 87(7) and 87(8) of the Child, Youth and Family Services Act, 2017, S.O. 2017, c. 14, Sch. 1.

[2] Ancillary orders were also made: a DNA order, a 10-year weapons prohibition, and a 10-year Sex Offender Information Registration Act, S.C. 2004, c. 10 order.

- [3] At the oral hearing of the appeal, the court heard submissions by counsel for both the appellant and the Crown on whether the error is rectified by granting 12 or 13 days of additional credit. As the court indicated at the time, we accepted the Crown's calculation of 13 additional days' credit.

- [4] R v. Summers, 2014 SCC 26, [2014] 1 S.C.R. 575.

[5] R. v. Duncan, 2016 ONCA 754.

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Prepared on 26 October 2026 · Esheria