Walker v Davis [2003] NTSC 7

PARTIES:	WALTER MICHAEL PAUL WALKER v STUART AXTELL DAVIS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NOS:	JA 37/02, 38/02, 39/02, 40/02, 41/02 (20102117, 20106064, 20103577, 20107148, 20118154)
DELIVERED:	25 February 2003
HEARING DATES:	23 November 2002
JUDGMENT OF:	THOMAS J

CATCHWORDS:

APPEAL - JUSTICES appeal against sentence - breach of conditions of suspended sentence - whether magistrate failed to give appropriate weight to the time the appellant subsequently spent in custody - whether the magistrate failed to give adequate weight to the reasons given by the appellant for his non-compliance - whether the magistrate failed to give adequate weight to the fact that the breach was conditional and not occasioned by further offending - Justices Act 1928 (NT).

Sentencing Act 2002 (NT), s 43(5)(a), (b), (c) and s 43(7)

REPRESENTATION:

Counsel:

Appellant:	H. Spowart
Respondent:	G. Dooley

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	C
Judgment ID Number:	tho200305
Number of pages:	13

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Walker v Davis & Peach [2003] NTSC 7
Nos. JA37/02, JA38/02, JA39/02, JA40/02, JA41/02

BETWEEN:

WALTER MICHAEL PAUL WALKER
Appellant

AND:

STUART AXTELL DAVIS
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 25 February 2003)

[1] This is an appeal from a decision of the Chief Magistrate who on 15 April 2002 restored six weeks of a five month suspended sentence and ordered the appellant to serve an actual period of six weeks imprisonment.

[2] There are five files before this Court. A history of these matters was prepared by Mr Dooley, counsel for the respondent. I repeat that summary hereunder:

> "**20102117**
>
> 3. The appellant was charged with 11 counts on information, comprising 2 unlawful entries, 4 criminal deceptions, 2 criminal damages and 3 thefts, all said to have been committed in January 2001. It is noted that counts 5 (criminal deception),

9 (stealing) and 11 (criminal deception) were ultimately withdrawn and dismissed.

4. The appellant failed to appear on 22 February 2001. A warrant was issued for his arrest and bail was forfeited in the amount of $1000, or 20 days imprisonment in default of payment. The appellant was arrested on 24 April 2001 and appeared in custody later that day. He was granted bail, and the order for bail forfeiture was suspended until the charges were dealt with.

5. The appellant failed to appear on 22 May 2001 and a warrant was issued. He was arrested on 3 August 2001 and remanded in custody as he did not make an application for bail.

6. On 27 September 2001 the appellant pleaded guilty to 8 counts on information and was sentenced to 8 months imprisonment in aggregate, suspended after serving 3 months, with an 'operational period' of two years, 12 months of that period to be supervised by Correctional Services, with the sentence to commence on 3 August 2001. Further, once released from prison, it was ordered that the appellant reside in the Territory until the suspended period had elapsed. He was also ordered to pay $100 restitution, with 6 months to pay and 7 days imprisonment in default of such payment.

7. On 15 April 2002 the appellant admitted he had breached the suspended sentence on this file and the four files set out below. On 23 April 2002 he was ordered to serve a further 6 weeks imprisonment of the suspended portion of the sentence, which was a concurrent order upon all files. This meant he was to be released with 3 and a half months imprisonment still suspended.

20103577

8. The appellant was charged with 8 counts on information, comprising of 2 unlawful entries, 1 criminal deception, 2 criminal damages and 3 thefts, committed in January and February of 2001. One of the criminal damage charges was ultimately withdrawn.

9. The appellant failed to appear on 23 May 2001, and a warrant was issued. The appellant then appeared in custody on 3 August 2001. On 27 September 2001 he pleaded guilty to 7 counts on information and was sentenced to a total of 8 months imprisonment concurrent upon file 20102117 to be released in accordance with the others on file 20102117.

10. An order for restitution was made for $40, with 6 months in which to finalise payment, in default 5 days imprisonment.

11. On 15 April 2002 the appellant admitted breaching the conditions of the suspended sentence. On 23 April 2002 he was ordered to serve 6 weeks of the suspended period of imprisonment.

20106064

11.(sic) The appellant was charged with 1 count of stealing upon information, which was committed on 22-23 April 2001.

12. The appellant first appeared in custody on 21 September 2001, and pleaded guilty on 27 September 2001. He was sentenced to imprisonment concurrent with the 8 months imposed on file 20103577.

13. The appellant was then served with documents from Community Corrections and alleging various breaches of the suspended sentence. He failed to appear in court on 6 March 2002, and a warrant of arrest was issued. The appellant was brought before the court on 11 April 2002, and granted bail with a surety, reporting conditions, and a residential condition. On 15 April 2002 the appellant admitted the alleged breaches of the suspended sentence. On 23 April 2002 6 weeks of the suspended part of the sentence was restored, to be served concurrently with file 20103577.

20107148

14. The appellant was charged with 2 counts on this file, namely unlawful entry at night with intent to commit a crime (on information), and criminal damage (on complaint) which were committed on 13 May 2001.

15. On 14 May 2001 the appellant was bailed to appear on 22 May 2001, when he did not appear. A warrant was issued and he was apprehended on 3 August 2001 and remained in custody until 27 September 2001 when he pleaded guilty to the charges and was sentenced to imprisonment, as part of the aggregate of 8 months imposed on file 20103577. The appellant was ordered to pay $200 restitution within 6 months, 14 days imprisonment in default of payment.

16. The appellant was brought before the court on 11 April 2002, and granted bail with a surety, reporting conditions, and a residential condition. On 15 April 2002 the appellant admitted the alleged breaches of the suspended sentence. On 23 April 2002 6 weeks of the suspended part of the sentence was restored, to be served concurrently with file 20103577.

20118154

17. On 21 November 2001 the appellant was charged with possessing cannabis. He pleaded guilty to that charge on 4 December 2001. He was assessed as suitable for a Community Work Order (CWO). The appellant was convicted and ordered to complete 100 hours of community work, within 10 weeks. A victim's assistance levy of $20 was also ordered to be paid, with 1 days' imprisonment in default of payment.

18. On 15 April 2002 the appellant admitted breaching the order, as he had not completed a single hour of the order and he had not complied with the orders of Community Corrections. On 23 April 2002 he was granted further time to complete the CWO. Time was extended to 1 October 2002."

[3] Under the terms of the suspended sentence imposed on 27 September 2001, the appellant was required:

> "(i) To be subject to supervision by the Director of Correctional Services for a period of 12 months.
>
> (ii) To reside in the Northern Territory until he completes such programs of drug and alcohol counselling or treatment, if any, as the Director of Correctional Services considers to be necessary or desirable."

[4] The grounds of appeal on the Notice of Appeal are:

- That the learned Sentencing Magistrate erred in exercise of his sentencing discretion in relation to the imposition of the community work order.
- The learned Sentencing Magistrate erred in the application of section 43(7) of the Sentencing Act.

[5] At the commencement of the hearing of this appeal, Ms Spowart for the appellant, informed the Court the first ground of appeal relating to the community work order was withdrawn. Accordingly, the appeal under that ground is dismissed.

[6] With respect to the second ground:

[7] The appellant reported to Correctional Services upon his release from Darwin Prison on 10 December 2001 and was given a direction to report on 18 December 2001. He failed to report on that date. Despite warnings given to him he failed to report since that date. The appellant did not contact the Department of Correctional Services to explain his non reporting.

[8] The appellant says the learned Chief Magistrate erred in restoring the sentence in the following ways:

1. The learned magistrate failed to give appropriate weight to the time the appellant subsequently spent in custody.

[9] The appellant was released from prison after serving three months of his sentence on 3 November 2001. The appellant was then re-arrested one week after his release to serve a default period of 20 days for bail forfeiture in relation to the same matter. Counsel for the appellant submitted to the learned Chief Magistrate (tp 7, 15 April 2002):

> "… That was understandably a disillusioning process. It also meant, of course, that he'd served a greater term of imprisonment, effectively, than that which was imposed by the court originally.
>
> It meant of course that he was getting off to a bad start, as it were, so far as complying with the conditions of the Corrections order."

[10] The transcript of the proceedings shows there was further discussion between the learned Chief Magistrate and counsel for the appellant at the end of which his Worship said (tp 8, 15 April 2002):

> "But anyway, we've got - I understand what you're putting to me now is he served an extra three weeks for that default time."

[11] The appellant submits the learned Chief Magistrate failed to give any weight to the fact that the appellant spent an additional three weeks in custody on this matter. The appellant submits that this is relevant in consideration of the matters set out in s 43(7) of the Sentencing Act, the fact that he has spent additional time in custody should have been given greater weight in considering whether it was "unjust" to restore any period of the sentence. The appellant also submits the learned Chief Magistrate also failed to give adequate weight to the disruption caused to the appellant's living and financial circumstances by this subsequent imprisonment and its nexus with his non-compliance with the terms of his sentence.

[12] In his reasons for sentence the learned Chief Magistrate said (tp 2, 23 April 2002):

> "Today you come before the court in relation to two issues. One is in relation to your failure to carry out a community work order imposed by another magistrate on 4 December when you were sentenced to a period of 100 hours of community work for being in possession of a significant amount of drugs, being namely the 24-25 packets. There's no question of you selling, or anything like that, and I don't take that into account. Indeed, I don't need to with regard to the order I'm going to impose.
>
> That's one matter where you've failed to do something which you undertook to do, namely to do the work.

> The second thing is, in relation to a regrettable string of offences of dishonesty, stretching over a period of some months, you started going astray in May last year and then got into deep water in November or December, January, February last year and you were sentenced to a significant period of imprisonment.
>
> I recall, when sentencing you, you said that you wanted to go home, you wanted to sort out your affairs in the Territory and your obligations here first, and I set a series of conditions which were then designed to give you assistance in the form of counselling and other things, as well as to require you to repay monies which people had lost as a result of your offending - or shall I say some of the money which people had lost as a result of your offending.
>
> You've failed to do the community work order. You've failed to report and you've failed to repay. Now your counsel has made a fairly strong plea today for further leniency, but the court must work from the proposition that a sentence initially imposed is a sentence which was justified in the circumstances - namely, a period of eight months' imprisonment - for that offending."

and his Worship also said (tp 4):

> "In relation to the other files, …. effectively what I'm going to do in each of these, I'll indicate separately because some I've extended time for payment. Effectively what I'm going to do is to restore six weeks from today of that sentence. I was going to restore two to three months, but I've reduced that time to give effect to the fact that you've spent some time in remand and *for the fines which you incurred last time*." (my emphasis)

I take the words emphasised to be referring to the default period of imprisonment for non-payment of the bail forfeiture of $1000. There had been no other fines imposed. The other orders for monetary payment were in respect of restitution payments.

[13] On a reading of the learned Chief Magistrate's reasons for sentence, he did take into account and give appropriate weight to the fact the appellant spent

an additional three weeks in custody with respect to the order for forfeiture of bail and the period of 20 days he served in prison on default of payment.

[14] The learned Chief Magistrate was well aware of the requirement of s 43(7) of the Sentencing Act which provides as follows:

> "(7) A court shall make an order under subsection (5)(c) unless it is of the opinion that it would be unjust to do so in view of all the circumstances which have arisen since the suspended sentence was imposed, including the facts of any subsequent offence and, if it is of that opinion, the court shall state its reasons."

[15] His Worship stated (tp 3):

> "The law says that:
>
> > The court shall restore the sentence or part-sentence suspended unless it is of the opinion it would be unjust to do so in view of all the circumstances which have arisen since the suspended sentence was imposed, including the facts of any subsequent offence -
>
> and if the court does not impose the lot, I've got to give reasons. So effectively what the law says is I've got to give reasons why I shouldn't impose the balance of the eight months that you were given last year."

[16] In this context I should also set out the relevant provisions of s 43 of the Sentencing Act which provides as follows:

> "(5) Where –
>
> (a) on the hearing of an application under subsection (1) or on the hearing of its own motion under subsection (4A), a court is satisfied, by evidence on oath or by affidavit or by the admission of the offender, that, during the operational period of the suspended sentence, the offender committed another offence against a law in force in the Territory or elsewhere that is punishable by imprisonment; or

> (b) on the hearing of an application under subsection (2) or on the hearing of its own motion under subsection (4B), a court is satisfied, by evidence on oath or by affidavit or by the admission of the offender, that the offender has breached a condition of the order,
>
> the court may –
>
> (c) subject to subsection (7), restore the sentence or part sentence held in suspense and order the offender to serve it; …
>
> (7) A court shall make an order under subsection (5)(c) unless it is of the opinion that it would be unjust to do so in view of all the circumstances which have arisen since the suspended sentence was imposed, including the facts of any subsequent offence and, if it is of that opinion, the court shall state its reasons."

[17] The learned Chief Magistrate looked at all the circumstances since the appellant was released on a suspended sentence and concluded (tp 3):

> "… I look at those circumstances and there's very little that you've done since the time of your release which would justify a reduction of the period. So I've had a difficult time trying to work through what it is that I should do in the particular circumstances."

[18] I am not able to conclude that the appellant has identified any error on the part of the learned Chief Magistrate.

2. The learned magistrate failed to give adequate weight to the reasons given by the appellant for his non-compliance.

[19] In the Court of Summary Jurisdiction counsel for the appellant submitted the appellant had experienced considerable difficulty since his release from prison; he was not eligible for Social Security payments as he had no identification. The appellant was without income until documents could be

obtained from interstate. Before the learned Chief Magistrate counsel for the appellant had submitted:

> "… there were many times, he says, where he had no clean clothes, that he wasn't eating properly and the place where he was staying was really prevailing upon a friend who was helping him out until he was more financially independent.
>
> He described his whole situation as being a bit embarrassing. … (15 April, p 9)."

[20] The appellant is a young man. He was aged 21 at the time of these proceedings. He was a person whose only prior convictions were the ones for which this sentence was imposed. It was submitted by his counsel in the Court of Summary Jurisdiction that the appellant wasn't "someone who wanted to thumb their nose at an order, but really it was someone who's had little experience of these sorts of things in the past, perhaps didn't apply himself in the way he should have. He was living in this very uncivil environment, without much finance, and he was disrupted, as it were, by having to serve that extra term of imprisonment" (15 April, pp 9-10).

[21] The learned Chief Magistrate had the benefit of a report dated 17 April 2002 from Ms Kate McLay a counsellor at Banyan House. Ms McLay stated (p 5):

> "Mr. Walker appears to lack certain life skills which in my opinion may be due to the absence of parental guidance whilst growing up. Mr. Walker lacks both the skills required to find out about social services within his area, as well as the skills to access the services he is aware of adequately (such as Centrelink).
>
> Mr. Walker's non-compliance with his parole orders seem to be linked to his lack of knowledge of social services that are available

> within the community. Mr. Walker stated that he chose not to attend his appointment because he was hungry and did not have clean clothes. Mr. Walker stated he was embarrassed to present to people in the condition he was in at the time. If Mr. Walker had had the skills to search out and make contact with services such as St. Vincent's, he would have been able to access food and wash his clothes."

[22] It was submitted on behalf of the appellant that the learned Chief Magistrate failed to give adequate weight to these mitigating circumstances surrounding the appellant's non-compliance with the order.

[23] On 23 April 2002 in delivering reasons for sentence, the learned Chief Magistrate said (tp 3):

> "You're still a young man. You've got a reasonably positive report from the drug and alcohol unit, who I hope are not gullible. I think it's in your interests and the interests of the community if we can find a way to get you through what I hope is a temporarily bad period in your life.
>
> So in looking at all of the circumstances, and the difficulties that you've found yourself in from the time that you got out of gaol until now, I'll use those circumstances as justifying some reduction of the amount of the penalty which I'm going to impose. But in doing so, I'm going to leave you responsible still to carry out those things which you were otherwise ordered to do, including the work order."

[24] I am not satisfied the appellant has shown there to be any error on the part of the sentencing magistrate. The learned Chief Magistrate did take account of all of the circumstances including the difficulties the appellant experienced after being released from gaol. His Worship relied on these circumstances to justify his decision not to restore the full five months of the suspended sentence but rather to limit the period of restoration of sentence to six weeks.

[25] I would dismiss this ground of appeal.

3. The learned Magistrate failed to give adequate weight to the fact that the breach was conditional and not occasioned by further offending. The objective of a suspended sentence and is to provide an inducement to reform (*Wilson v Taylor* 113 NTR 1).

[26] It is the submission on behalf of the appellant that the appellant had demonstrated an ability to comply with conditions of bail pending disposal of this matter and a willingness to rehabilitate himself through participation in a drug rehabilitation program.

[27] The appellant submits that the sentence restored is disproportionate to the gravity of the breach in all the circumstances.

[28] Ms Spowart, counsel for the appellant, submits the appellant served a further two weeks in custody following the restoration of the sentence. He was initially refused bail on 23 April 2002 pending his appeal. My perusal of the Supreme Court file indicates the appellant was released on Supreme Court bail on 1 May 2002 having spent nine days in custody.

[29] The appellant asks the Court to consider imposing an order requiring him to serve no further time in custody.

[30] Mr Dooley, counsel for the respondent, refers to the history of this matter, the repeated failure to comply with court orders. Mr Dooley referred to the shortness of time between the suspending of the sentence on 3 November 2001 and the subsequent offence of possess cannabis committed on

21 November 2001 to which he pleaded guilty on 4 December 2001. The appellant failed to report to the Correctional Service office after 18 December 2001 and did not complete any of his community work order of 100 hours. I set out hereunder the written submission made by Mr Dooley on behalf of the respondent:

> "The respondent submits that the learned Chief Magistrate was correct in his application of section 43(7) of the Sentencing Act, and that it was not unjust to restore part of the sentence of imprisonment in view of all the circumstances which had arisen in the period since the suspended sentence was imposed. Given that the learned Chief Magistrate had five months imprisonment available for restoration and given that it appears that the original sentence was in itself lenient, considering the extent of the criminal behaviour involved in the offending, the restoration of 6 weeks of the period outstanding appears to be lenient."

[31] The learned Chief Magistrate restored six weeks of a five months suspended sentence. I do not consider there has been any error shown in the exercise of his sentencing discretion. Nor could I conclude that the restoration of six weeks of a five months suspended sentence has been shown to be manifestly excessive.

[32] For these reasons I dismiss the appeal.

[33] I will raise with counsel the appropriate consequential orders in view of the time the appellant spent in custody after he was refused bail on 23 April 2002 until Supreme Court bail was granted on 1 May 2002.