

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *R. v. O'Brien*, 2011 NSCA 112

**Date:** 20111206

**Docket:** CAC 310964

**Registry:** Halifax

**Between:**

Marty David O'Brien (No. 2)

Appellant

v.

Her Majesty the Queen

Respondent

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- Judges:** The Honourable Justice Joel E. Fichaud with Farrar, J.A. concurring; and Beveridge, J.A. dissenting.
- Appeal Heard:** April 8, 2010
- Subject:** Sentencing - Robbery - Totality Principle
- Summary:** Mr. O'Brien robbed a convenience store at night by threatening a solitary clerk with a large knife while wearing a mask. He was convicted of robbery, disguise with intent and possession of a weapon contrary to ss. 344, 351(2) and 88 of the *Criminal Code*. The trial judge sentenced him to six years, six months incarceration for the robbery, two years concurrent for the disguise, and three years concurrent for the weapon. He had a record of approximately 70 convictions over many years. These included previous convictions for break and enter and a robbery. At the time of the sentencing under appeal, he was serving time for other offences. Mr. O'Brien applied to the Court of Appeal for leave to appeal his sentence. He submitted that the sentencing judge failed to apply the totality principle.
- Issue:** Did the sentencing judge commit an appealable error, in particular respecting the totality principle?
- Result:** The Court of Appeal granted leave to appeal, but dismissed the

appeal. The majority concluded that Mr. O'Brien's sentence was within the range, given the circumstances and his record, was not unfit, and did not offend the totality principle under s. 718.2(c) of the *Criminal Code*.

Beveridge J.A. (dissenting) would grant leave and allow the appeal, substituting a sentence of four years for the robbery consecutive to the sentences the appellant was serving. The trial judge did not discuss the principle of totality, nor show any appreciation that the offences the offender was being sentenced for were committed in the same time period, and that a sentence of 6.5 years would amount to an effective sentence of 12.5 years.

**This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 15 pages.**