

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION
Cite as: R. v. Wilson, 1992 NSCA 1

Clarke, C.J.N.S.; Chipman and Freeman, JJ.A.

BETWEEN:

ROBERT GEORGE WILSON)	The Appellant in Person
)	
Appellant)	
- and -)	
)	Robert E. Lutes for the Respondent
HER MAJESTY THE QUEEN)	
)	
Respondent)	Appeal Heard: November 17, 1992
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)	Judgment Delivered: December 23, 1992
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THE COURT: Appeal allowed, sentence varied and probation order struck, per reasons for judgment of Clarke, C.J.N.S.; Chipman and Freeman, JJ.A. concurring.

CLARKE, C.J.N.S.:

The issue in this appeal relates to the effect of a probation order in circumstances where, before it was imposed, the appellant was serving consecutive sentences for a lengthy period of imprisonment arising from other convictions.

The appellant began his incarceration in a federal institution on September 9, 1986. On February 18, 1992, after pleading guilty to theft under \$1,000.00 contrary to s. 334(b) of the **Criminal Code**, he was sentenced to three months imprisonment to be followed by a probation order of eighteen months. This was to be served concurrently with sentences of imprisonment for other offences of which he was convicted on and after September 9, 1986.

The result is that his total aggregate sentence is six years, nine months and fourteen days. His earliest probable release date is December 26, 1992 and his warrant expiry date is June 28, 1993.

The appellant seeks leave to appeal and if granted appeals against the order of probation issued on February 18, 1992 on the ground that his total period of incarceration in a federal institution exceeds two years.

The Crown contends that since the warrant expiry date is June 28, 1993 and the combined time of the sentence and order of probation for the theft under offence is twenty-one months which would end November 18, 1993, the unexpired portion of the probation order (ten days short of five months) could have some practical effect.

Section 737(1)(b) of the **Criminal Code** is the authority for the imposition of a probation order. It provides:

- (1) Where an accused is convicted of an offence, the court may, having regard to the age and character of the accused, the nature of the offence and the circumstances surrounding its commission,
- (b) in addition to fining the accused or sentencing him to imprisonment, whether in default of payment of a fine or otherwise, for a term not exceeding two years, direct that the accused comply with the conditions prescribed in a

probation order; or

...

Section 738(1) prescribes the date upon which a probation order comes into force. It reads:

- (1) A probation order comes into force
 - (a) on the date on which the order is made; or
 - (b) where the accused is sentenced to imprisonment under paragraph 737(1)(b) otherwise than in default of payment of a fine, on the expiration of that sentence.

This situation was considered by this Court in **R. v. Hennigar** (1983), 58 N.S.R. (2d) 110 where Pace, J.A. wrote at p. 115, para. 24:

"A probation order by virtue of s. 664(1)(b) [now 738(1)(b)] comes into force upon expiration of the sentence. Sentence as it is used in both sections of the **Code** [now 737(1)(b) and 738(1)] seems to me to refer to the total sentence and not to the parts of which it is composed."

Mr. Justice Pace continued:

"I am supported somewhat in that conclusion by the **Parole Act**, R.S.C. 1970, c. 31 (1st Supp.), s. 14(1), which reads:

14. (1) Where, either, before, on or after the 25th day of March 1970,
 - (a) a person is sentenced to two or more terms of imprisonment, or
 - (b) an inmate who is in confinement is sentenced to an additional term or terms of imprisonment,

the terms of imprisonment to which he has been sentenced, including in a case described in paragraph (b) any term or terms that resulted in his being in confinement, shall, for all purposes of this Act, the **Penitentiary Act** and the **Prisons and Reformatories Act**, be deemed to constitute one sentence consisting of a term of imprisonment commencing on the earliest day on which any of those sentences of imprisonment commences and ending on the expiration of the last to expire of such terms of imprisonment."

In **Hennigar**, the trial judge imposed a series of consecutive sentences of imprisonment totalling three years. These were to be followed by two years probation. For the reasons indicated by Mr. Justice Pace, the Court directed that the probation order be quashed.

In **R. v. Power** (1989), 93 N.S.R. (2d) 96, the accused was sentenced to twenty months imprisonment and probation of three years. This was to run consecutive to a separate sentence of nine months imprisonment for other offences. Thus the total period of imprisonment exceeded two years. On Appeal, Mr. Justice Jones, referring to s. 737(1) of the **Code**, and relying upon **Hennigar**, said at p. 96:

"Under that provision a person cannot be placed on probation where the sentence exceeds two years. See **R. v. Hennigar** (1983), 58 N.S.R. (2d) 110; 123 A.P.R. 110."

The current **Parole Act**, R.S.C. 1985, c. P-2, s. 20(1), in effect when the appellant was sentenced on February 18, 1992, provides:

20. (1) Where, either before, on or after the coming into force of this section, a person sentenced to a term of imprisonment that has not expired is sentenced to an additional term of imprisonment, the terms of imprisonment to which the person has been sentenced shall, for all purposes of the **Criminal Code**, the **Penitentiary Act**, the **Prisons and Reformatories Act** and this Act, except subsections (1.1) and (1.2), be deemed to constitute one sentence consisting of a term of imprisonment commencing on the earliest day on which any of the sentences of imprisonment commences and ending on the expiration of the last to expire of those terms of imprisonment. (emphasis added)

Unlike s. 14(1) of the **Parole Act** to which Pace, J.A. referred in **Hennigar**, s. 20(1) expressly states that the deeming provision is applicable "for all purposes of the **Criminal Code** ...". Interestingly, the marginal note to s. 20(1) is "Consecutive and concurrent sentences".

The Crown submits that **Hennigar** and **Power** can be distinguished because they were cases where consecutive, rather than concurrent, sentences were imposed. In my opinion the decisions in **Hennigar** and **Power** are not only applicable to the instant case but s. 20(1) of the **Parole Act** adds conclusive legislative support.

Accordingly, I would grant leave to appeal, allow the appeal and vary the sentence imposed on the appellant on February 18, 1992, by striking the order of probation.

C.J.N.S.

Concurred in:

Chipman, J.A.

Freeman, J.A.

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REASONS

JUDGMENT

CLARKE, C.J.N.S.