

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Denny*, 2014 NSPC 58

Date: 2014-07-28

Docket: 2569704

Registry: Pictou

Between:

Her Majesty the Queen

v.

Maurice Julian Denny

DECISION ON APPLICATION TO VARY INTERMITTENT SENTENCE

<p>Restriction on Publication: No one shall publish any information that might identify the complainant in this matter</p>

Revised Decision: The text of the original decision has been corrected according to the attached erratum dated August 15, 2014 and replaces the previously released decision.

Judge: The Honourable Judge Del W. Atwood

Heard: 28 July 2014, in Pictou, Nova Scotia

Charge: Section 271 of the Criminal Code of Canada

Counsel: Jody McNeill, for the Nova Scotia Public Prosecution Service
Stephen Robertson, for Maurice Julian Denny

By the Court:

[1] On October 9 2013, I found Maurice Julian Denny guilty of a single count of sexual assault. On 18 February 2014, I sentenced Mr. Denny to a 90-day term of imprisonment, to be served intermittently, and to a three-year term of probation.

[2] Mr. Denny makes an application before the court today, seeking to have the court amend the warrant of intermittent committal in order to change the time he is required to report to the prison to serve his weekends. The sentence administrator has determined that Mr. Denny's warrant-expiry date will be 15 September 2014. Unfortunately, that will conflict with Mr. Denny's community-college schedule. Mr. Denny's counsel proposes that the warrant of committal be changed to allow Mr. Denny to report to prison on Fridays, rather than Saturdays; this would accelerate the warrant expiry and allow Mr. Denny to get to his classes on time at the start of the academic year.

[3] I have declined to grant these sorts of applications in the past, as our Court of Appeal made it clear in *R. v. Germaine* that there exists no jurisdiction in law allowing a court to vary a warrant of committal it made for an intermittent sentence.¹

¹ 39 N.S.R.(2d) 177 at para. 5.

[4] Defence counsel argues very ably that the jurisdiction to vary a warrant of committal to change the report-in or check-out times may be found in sub-s. 732(2) of the *Code*, which provides:

An offender who is sentenced to serve a sentence of imprisonment intermittently may, on giving notice to the prosecutor, apply to the court that imposed the sentence to allow it to be served on consecutive days.

[5] It is the submission of defence counsel that this provisions does not state that an order for consecutive service under sub-s. 732(2) must include the entire remanet of the intermittent sentence. Accordingly, I ought to be able to order that Mr. Denny serve three consecutive days this weekend—that is, this Friday, Saturday and Sunday—followed by the same three consecutive days next weekend, and so on, allowing him to wrap up his jail time two weekends early. Or so the argument goes.

[6] I have considered the argument of defence counsel, as it would appear to be one of first impression. When *Germaine* was decided, there was no equivalent of sub-s. 732(2) in the former revision of the *Criminal Code*.

[7] While I am sympathetic to Mr. Denny's predicament, and while the argument of counsel—which was not opposed by the prosecution—is certainly ingenious, I am unable to accept it.

[8] In my view, the wording of sub-s. 732(2) is clear: if an order for intermittent service is to get collapsed on the application of the offender, then the resulting warrant of committal must provide that the entire remanet be served on consecutive days. This is the plain meaning of the statute. Normally, a jail sentence starts when it is imposed, and runs, without interruption, until the warrant expires, less earned or statutory remission. Indeed, sub-s. 719(1) of the *Code* states that a sentence commences on the date it is imposed. There is nothing in s. 719 that provides for the intermittent cessation and recommencement of a sentence. The only provision in the *Code* allowing for that sort of thing is sub-s. 732(1), which gives a sentencing court the jurisdiction to make intermittent sentences.

[9] If I were to apply sub-s. 732(2) in Mr. Denny's case, I would have to order that he start serving his remanet right now, to run continuously on consecutive days until the expiry of the warrant. That is what "consecutive days" means.

[10] I have reviewed the decision of Gorman J.P.C. of the Provincial Court of Newfoundland and Labrador in *R. v. Crocker* which dealt with this very issue.² I agree entirely with his ultimate conclusion:

² [2012] N.J. No. 266.

18 I conclude that once a trial judge imposes an intermittent sentence he or she is *functus*, except for applications made pursuant to section 732(2) or section 732.2(3) of the *Criminal Code*. In the absence of a statutory provision providing the jurisdiction to vary the time at which an intermittent sentence is to be served, this Court cannot do so. To apply the doctrine of implied jurisdiction to create a statutory authority which Parliament decided not to create would extend that doctrine well beyond the scope delineated in *Cunningham*. It would result in the judicial creation of substantive and procedural rights and would constitute an order which would extend well beyond the court's ability to control its own process (see *United States of America v. Wilson*, [2001] O.J. No. 3806 (S.C.J.), at paragraph 10).

[11] Regrettably, I decline to grant Mr. Denny's application.

[12] I suppose the argument could be made that a warrant of committal in an intermittent-sentence case might be crafted to read as follows: "ninety days to be served intermittently, with the offender to report to prison and to be released at times specified in a probation order made under para. 732(1)(b) of the *Code*." The concurrent probation order would then include the report-in and check-out times. In that event, it might be argued that an application to vary report-in and release times could be advanced under sub-s. 732.2 (3) of the *Code* as an application to vary a probation order. The problem with dealing with intermittent sentences in such a fashion is that I am not sure para. 732.1(3)(c) would allow a sentencing court to include in a probation order conditions setting out times an offender must report to prison to serve an intermittent sentence. However, this is an issue to be decided another time.

JPC

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ERRATUM:

[1] In paragraph 12, the sentence “In that event, it might be argued that an application to vary report-in and release times could be advanced under sub-s. 732.2 (2) of the *Code* as an application to vary a probation order” should read: “In that event, it might be argued that an application to vary report-in and release times could be advanced under sub-s. 732.2 (3) of the *Code* as an application to vary a probation order.”