

IN THE SUPREME COURT OF NOVA SCOTIA

**Citation:** *Nova Scotia (Central Nova Correctional Facility) v. Butler*, 2005 NSSC 294

**Date:** 20050825

**Docket:** CR 203360

**Registry:** Halifax

**In the matter of:** Richard Allen Butler, presently incarcerated at the Central Nova Scotia Correctional Facility having been sentenced to a term of imprisonment to be served in the community on May 13, 2004;

**-and-**

**In the matter of:** A hearing on July 15, 2005 wherein the Conditional Sentence Order was terminated and the said Richard Allen Butler was committed to custody until expiration of sentence;

**-and-**

**In the matter of:** An application for a Writ of *Habeas Corpus ad Subjiciendum*.

**Between:**

Randy McQuaid, Acting Superintendent,  
Central Nova Correctional Facility

Respondent

v.

Richard Allen Butler

Applicant

**Judge:** The Honourable Justice M. Heather Robertson

**Heard:** August 25, 2005, in Halifax, Nova Scotia

**Oral Decision:** August 25, 2005

**Written Decision:** October 31, 2005

**Counsel:** Glenn R. Anderson, Q.C., for the respondent  
Kevin A. Burke, Q.C., for the applicant

**Robertson, J.: (Orally)**

[1] Richard Allen Butler received a conditional sentence on May 13, 2004, with respect to an offence under *CDSA* 5(2) possession of a controlled substance. He received a 15 month conditional sentence to be served in the community. He was serving this sentence on July 1, 2005, when he was sentenced to a 90-day intermittent sentence in respect of an unrelated offence under s. 95(1)(A) of the *Criminal Code*.

[2] Subsequent to this Mr. Butler breached a term of his conditional sentence and a breach hearing was held on July 15, 2005, at which time the conditional sentence order was terminated and he was committed to custody. At this hearing an issue arose as to the calculation of sentence and the credit he might receive with respect to his sentence. After an adjournment of the matter to July 27, 2005, the court ordered that Mr. Butler serve a period of 26 days from the date of the July 27 order. Mr. Butler's release date was then August 9, 2005, with respect to this conditional sentence taking into consideration his good behaviour.

[3] However, Mr. Butler was not released as correctional services interpreted s. 732(3) of the *Criminal Code* to mean that Mr. Butler was required to serve his intermittent sentence on a consecutive basis.

[4] Section of the *Criminal Code* reads:

Where a court imposes a sentence of imprisonment on a person who is subject to an intermittent sentence in respect of another offence, the unexpired portion of the intermittent sentence shall be served on consecutive days unless the court otherwise orders.

[5] Counsel for Mr. Butler argues that in order to have s. 732(3) apply in this instance Mr. Butler would have had to be sentenced on July 15, 2002 to a "sentence of imprisonment." However, he argues that the proceeding on July 15 was a continuation of a conditional sentence imposed on Mr. Butler on May 13, 2004, and that a conditional sentence when imposed is not a final order. He argues that the sentencing process is a continuous one and may be varied at any time if the circumstances require it referencing s. 742.6(9) of the *Criminal Code* and *R. v. Whitty*, [1999] 135 CCC (3d) 77, (Nfld. CA). I am in agreement with Mr. Burke's interpretation of s. 732.2(3).

[6] *R. v. Whitty* is helpful to the extent that it demonstrates that such a hearing is not a further criminal charge. It is a proceeding having to do with the breach of the conditional sentence and the conditional sentence was rendered for an offence that occurred before the intermittent sentence was made by the court.

[7] I find therefore that the custodial order made on July 27, 2005 did not trigger s. 732(3) of the *Code* in such manner as to collapse the intermittent sentence. There would have had to be a subsequent criminal conviction entered, not a matter relating to the ongoing sentence procedure.

[8] I would agree that s. 732(3) is not triggered and Mr. Butler can serve out his intermittent sentence on weekends until it is completed.

[9] He will commence his weekend sentence Friday, September 2, 2005.

Justice M. Heather Robertson