CITATION:	*Paul Francis Tudor- Stack v Neville Ross Anderson* [2004] NTMC 017
PARTIES:	Paul Francis Tudor-Stack (Informant) v Neville Ross Anderson (Defendant)
TITLE OF COURT:	Court of Summary Jurisdiction
JURISDICTION:	Criminal
FILE NO(s):	20313697;20212980
DELIVERED ON:	3 March 2004
DELIVERED AT:	Nhulunbuy
HEARING DATE(s):	3 March 2004
DECISION OF:	Jenny Blokland SM

CATCHWORDS:

SENTENCING – suspended sentence – whether unjust to restore sentence in suspense – *s 43 (7) Sentencing Act (NT); O'Brien v Quinn [2003] NTSC 99, unreported* ; *Wilson v Taylor (1997) 138 FLR 186* - successful completion of the Court Referral Evaluation Drug and Treatment Programme CREDIT (NT) – effect on sentence*; R v Tyrone Shields, NT(SC), Martin CJ, 23 February 2004, unreported;* whether time in residential drug treatment should be treated as quasi-incarceration: *R v Eastway, NSW (CCA), 19 May 1992, unreported; R v Delaney NSW (CCA) 14 November 2003 unreported; s 37 .Misuse of Drugs Act; Duthie v Smith (1992) 107 FLR 458).*

REPRESENTATION:

Counsel:

Informant:	Mr Duguid
Defendant:	Mr Hill

Solicitors:

Informant:	ODPP
Defendant:	NTLAC
Judgment category classification:	A
Judgment ID number:	[2004] NTMC 017
Number of paragraphs:	11

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20313697;20212980

BETWEEN:

PAUL FRANCIS TUDOR-STACK
Informant

AND:

NEVILLE ROSS ANDERSON
Defendant

REASONS FOR DECISION

(Delivered 3 March 2004)

Ms Jenny Blokland SM:

Introduction

1. This matter concerns the application of sentencing principles in the context of a successful participant in the Court Referral Evaluation Drug and Treatment Programme "CREDIT". The CREDIT programme is a voluntary bail programme in which eligible defendants may undertake drug rehabilitation under the auspices of the Court of Summary jurisdiction and the Court clinician. The defendant was eligible to participate as assessed by the court clinician Mr Rysavy. Defendants in the CREDIT programme are told they will be given *credit* in sentencing for their participation. When defendants are reviewed by the court each month, or thereabouts, (as Mr Anderson has been), they are told that continued participation will result in a more favourable sentencing outcome. The process is informed by therapeutic jurisprudence where offenders are given incentives to participate in their own rehabilitation.

The Previous Sentence

2. This case has novel aspects that have involved detailed submissions by counsel. First, Mr Anderson is in breach of a suspended sentence imposed by the court on 7 November 2002 for methylampthetamine and cannabis offences. He was sentenced on 7 November 2002 to six months imprisonment suspended after one month. The operational period was set at two years. In the same disposition, he was sentenced to three months home detention at the expiration of the one month imprisonment served. I note that the sentence is of questionable validity. It has now been confirmed by the Supreme Court that it is an error to combine those two sentencing dispositions: *O'Brien v Quinn [2003] NTSC 99, unreported.* There are two months outstanding on the suspended sentence.

The Current Offences and Progress through Rehabilitation

3. On 17 July 2003 Mr Anderson committed a number of cannabis offences; three were of supply and although nowhere near the magnitude of the first set of offences, were clearly in breach of the suspended sentence. He was admitted to the Credit Programme on 5 August 2003 after being assessed as suitable. He spent until 18 November 2003 on the programme.

4. The particular treatment form was the Bridge programme, a residential programme run by the Salvation Army that requires complete abstinence from consumption of drugs, attendance at workshops and counselling, submission to urine analysis, and compliance with all of the house rules. Mr Anderson completed the programme on 18 November 2003 and also stayed at the Salvation Army for another period of time until either the end of November or early December 2003 as he was making arrangements to go back to Nhulunbuy. There are a number of reports concerning Mr Anderson's progress before the Court. He was particularly involved in counselling.

5. He was bailed to Nhulunbuy Court in early December 2003 for mention and has also appeared on bail at the February sittings at Nhulunbuy. The reason sentencing was further deferred was that Mr Anderson advised the Court in Darwin last year that he was worried about returning to his home in Nhulunbuy because of being close to the drug scene again yet. He explained he needed to work and he is readily able to obtain work in Nhulunbuy. Conditions of his bail required him to report to Correctional Services and to undertake counselling in Nhulunbuy. He has been regularly tested and has been clean. He has been working since his return to Nhulunbuy and a further reference was supplied to the court today from his current employer. This has been a remarkable achievement against a background of opiate and amphetamine addiction and related offending. Mr Anderson is 44 years of age.

The Question of Restoration of the Term

6. Would it be unjust to restore the term? The usual and expected response to a breach of a suspended sentence is to restore the sentence or part of the sentence in suspense unless, under *s 43(7) Sentencing Act* 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.* Both counsel have made extensive submissions on this point and I thank them again for their consideration. Mr Duguid cited the factors noted by Justice Kearney in *Wilson v Taylor (1997) 138 FLR 186,* for example, an examination of whether the subsequent offending was of the same kind, whether the new offending was relatively trivial, whether the new offending would justify imprisonment in its own right and the length of time that the suspended sentence has been complied with. On those matters, I note that the cannabis offending in the subsequent offending is not as serious as the original offending. The original offending concerned amphetamines and a much larger amount of cannabis. The subsequent offending concerned very

small amounts of cannabis but did also concern *supplies*. They were not trivial and they could, in my view attract a short gaol sentence, especially given the structure of the penalty provisions in the *Misuse of Drugs Act.*

7. In my view, the combination of the rehabilitation that has been undertaken and the restraints on the defendant's liberty while participating in the Credit Court and while on bail in Nhulunbuy lead me to the view that it would be unjust to restore the suspended sentence. I note the comments counsel have drawn to my attention from Martin CJ in *R v Tyrone Shields, unreported, 23 February 2004* to the effect that the community interests are served by promoting continued rehabilitation. *Mr Shields* had spent twelve weeks in a rehabilitation programme at FORWAARD. I note also the obvious distinctions that can be drawn in that case; namely, Mr Shields was not on a suspended sentence, had spent 35 days in custody and was only 22 years of age. I have noted the New South Wales CCA decisions referred to me by counsel where the courts consider some forms of rehabilitation a form of deprivation of liberty that must be taken into account: (for example, *R v Delaney*, *NSW(CCA) 14 November 2003, unreported* where the CCA considered it was an error not to take into account restrictions on liberty and *R v Eastway NSW(CCA) 19 May 1992, unreported* where credit was given for periods of time in drug rehabilitation).

8. I don't regard the Bridge Program as a form of deprivation of liberty or a de-facto or quasi custody situation but it is a restraint of some kind. It is undertaken voluntarily. Being a reasonably significant restraint, it does incorporate some elements of the punitive aspect of sentencing. In my view it also goes some way to satisfy principles of general and specific deterrence. The main feature is, however rehabilitation. In Mr Anderson's case, the rehabilitation has been so complete as noted in the most recent counsellor's reports in Nhulunbuy that it would be unjust to restore the sentence. It would place at risk the defendant's rehabilitation and the subsequent benefit to the community of having Mr Anderson drug free. He

is currently a contributing member of the community and that should not be jeopardised. I am also concerned about the prospect of attempting to restore a sentence that is irregular as the law currently states it. I note also there was no CREDIT or equivalent programme when Mr Anderson was sentenced in 2002 and placed on the suspended sentence.

Misuse of Drugs Act, Section 37

9. In relation to sentencing on the fresh offences, counsel indicate and I agree that on counts 1, 3, 4 and 5, considerations of *particular* circumstances under the *s 37 Misuse of Drugs Act* apply. As Justice Mildren and other members of the Supreme Court have previously indicated: (eg, *Duthie v Smith (1992) 107 FLR 458)*, *particular* does not require an examination of *exceptional*. For similar reasons as I have mentioned in relation to the breach of suspended sentence, I do find *particular circumstances* exist that indicate I should not pass a sentence of actual imprisonment. The defendant has spent 3-4 days in custody and has completed the Bridge Programme; the supply counts concern very small amounts of cannabis; he has been reporting to Corrections and to the Court by way of appearing on approximately a monthly basis to the court both throughout the CREDIT programme period and since then. He indicated a plea of guilty early and entered that plea after completion of the CREDIT Programme.

10. I am going to pass a sentence as recommended by his counsellor and by Corrections. I note he is suitable for supervision according to Ms Briston's report. Had there not been a plea of guilty and had he not cooperated he would be serving actual terms of imprisonment. I have also been impressed with the defendant's frankness to the Court when he has appeared, (sometimes without counsel), and has been asked quite probing questions from the bench. The sentence has been deferred for quite some time. Despite the breach of the suspended sentence, for the reasons stated above, orders will be made for the defendant to be at conditional liberty.

Orders

11. On file 20212980 the breach is found proved and noted with no further action taken. On file 20313697, counts1,3,4 and 5, convicted and sentenced to an aggregate term of imprisonment of three months suspended forthwith. I set 18 months as the operational period during which the Defendant must not commit an offence punishable by imprisonment. The conditions are: (1) Accept the supervision of correctional services and comply with all directions in relation to reporting, residence, employment, counselling, and treatment for drug and alcohol use. (2) Not use any illicit drugs. (3) Submit to urine analysis when requested by his corrections officer. Counts 6 and 7, Convicted and fined an aggregate fine of $500.

Dated this 3rd day of March 2004.

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JENNY BLOKLAND
STIPENDIARY MAGISTRATE