

CITATION: *Stephen McWilliams v Elliot Bryant* [2022] NTL007

PARTIES: Stephen McWilliams

v

Elliot BRYANT

TITLE OF COURT: LOCAL COURT

JURISDICTION: CRIMINAL

FILE NO(s): 22131200

DELIVERED ON: 8th April 2022

DELIVERED AT: Darwin

HEARING DATE(s): 16th February 2022

DECISION OF: Deputy Chief Judge Fong Lim

CATCHWORDS:

Criminal Law – Mandatory sentencing – “second and subsequent offence”- “whenever committed”

Burnham v Westphal [2012] NTSC 2

McMillan v Pryce (1997) 115 NTR 19

Sentencing Act 1995 (NT), sections 78DD, 78EA

Interpretation Act 1978 (NT), section 62B

REPRESENTATION:

Counsel:

Police: Ms Searle

Defendant: Dr Marks

Solicitors:

Police: Director of Public Prosecutions

Defendant: Territory Criminal Lawyers

Decision category classification: A
Decision ID number: NTLC 007
Number of paragraphs: 15

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 22131200

BETWEEN:

Stephen McWilliam

AND:

Elliot BRYANT

Defendant

REASONS FOR DECISION

(Delivered 8th April 2022)

DEPUTY CHIEF JUDGE FONG LIM

1. On the 16th of February 2022, the defendant pleaded guilty to an aggravated assault which occurred on the 28th of June 2021.
2. His criminal history shows that on the 8th of December 2021, I found him guilty of an aggravated assault which occurred on the 30th of August 2021. In other words, he has been found guilty prior to the finding of guilt on the 16th of February 2022 for offending which post-dated the offending on the 28th of June 2021. It is agreed that both assaults fall under the definition of a level 3 offence for the purposes of the *Sentencing Act 1995* (NT).
3. The question to be decided is whether mandatory sentencing under section 78DD applies to the defendant.

Level 3 offence –second or subsequent offence

(1) This section applies if:

(a) a court finds an offender guilty of a level 3 offence; and

(b) the offender has previously been convicted of a violent offence (whenever committed).

(2) The court must impose a minimum sentence of 3 months actual imprisonment.

4. The defendant argued mandatory sentencing under section 78DD does not apply to this defendant. It is submitted that the court must attach the time of “second and subsequent” to the word “offence” and therefore, the date of the offence. This argument has some merit given the effect of the provision was to punish an offender more severely if they have been found guilty of a violent offence and then reoffend. In this case the defendant, at the time of the earlier offending, had not had the benefit of the court warning him of the mandatory gaol term should he reoffend.

5. However, the words of “(whenever committed)” place some doubt on that interpretation. I have not been referred to any authorities out of the Northern Territory Supreme Court which address the interpretation of these sections and their application in the factual circumstances relating to this offender.
6. The provisions under Division 2 – of the *Traffic Act 1987* (NT), which also refer “to first second or subsequent offence” have been the subject of some adjudication,¹ are not of assistance as the words “(whenever committed)” do not appear in the provisions under the Traffic Act.
7. When interpreting statutory provisions, it is trite that the Court must consider the ordinary meaning of the words of the provision in the context of the Act and can refer to extraneous material to confirm the ordinary meaning of the words taking into account context and when the meaning is not clear.²
8. The ordinary meaning of the words – “whenever committed” – can only attach to the offence of which the defendant has previously been convicted. They are contained in that particular subsection and must be given meaning in that context.
9. The words were inserted by the *Sentencing Amendment Act 2013* (NT). The Second Reading Speech for the introduction of the words “whenever committed” explains that the insertion of those words were to clarify any uncertainty caused by the insertion of section 78EA of the *Sentencing Act* which states in relation to Division 6A³ –

This division does not apply in relation to an offence committed before the commencement of section 6 of the Sentencing Amendment (Mandatory) Minimum Sentences Act 2012.

10. The then Attorney General stated the intention of section 78EA was not to limit the scope of the previous convictions the court could take into account –

*It was intended that the court must take into account any previous conviction for a violent offence committed at any time in the offenders past and there was to be no limitation on that.*⁴

11. The Attorney General accepted that section 78EA could be read to limit the operation of Division 6A to take into account only prior convictions since May 2013 (when Division 6A became operational) considering the decision of the Court of Criminal Appeal in *McMillan v Pryce* (1997) 115 NTR 19 and added that inclusion of the words “whenever committed” was to –

¹ *Burnham v Westphal* [2012] NTSC 2 - the Court discussed the meaning of the phrase “second and subsequent offence” and particularly paragraphs 18, 19, and 20 and made the comment that section 78BA of the *Sentencing Act* as it then was included express words which were not included in the *Traffic Act*.

² *Interpretation Act 1978* (NT), s 62B.

³ Mandatory sentences provisions regarding violent offences.

⁴ Page 1 of the Second Reading Speech for Sentencing Amendment Act 20 of 2013

*Make it clear that the court must consider all prior convictions for violent offences no matter when they occurred- before or after the commencement of the division.*⁵

12. It was not intended those words included the present situation where the “prior conviction” was for subsequent offending. Given the mandatory sentencing provisions were intended to make it clear to repeat offenders their punishment for subsequent level 3 violent offending was to serve a 3 month term of imprisonment, and given there is no indication in the second reading speech that the defendant’s situation was intended to be included in that regime, I find that section 78DD does not apply to this defendant. He has pleaded guilty to offending that occurred before he was given the warning by this court on his conviction for the later offending, and therefore he had not, at the time of his offending first in time, been given notice of the mandatory sentencing that might apply to him.
13. In other words, if the defendant had pleaded guilty to this offending before he committed the second in time offence he would not have been subject to mandatory sentencing and the court would have had the opportunity to warn him about the sure term of imprisonment should he commit another violent offence. He then would have run the gauntlet of the mandatory sentencing regime as intended by Parliament in relation to his offending second in time.
14. I find in these circumstances section 78DD does not apply to the defendant’s situation.
15. If I am wrong about that ruling and section 78DD does apply then I would then have to consider whether there are exceptional circumstances for him to avoid being sentenced to at least 3 months actual imprisonment.

Dated this 8th day of April 2022



Tanya Fong Lim
LOCAL COURT JUDGE

⁵ Page 2 of Second Reading Speech.