

CITATION: Wayne O'Neil (NT Police) v Brian Kenyon [2016] NTLC 012

PARTIES: Wayne O'Neil (Police)  
V  
Brian Kenyon (Defendant)

TITLE OF COURT: LOCAL COURT

JURISDICTION: Criminal

FILE NO(s): 21557080

DELIVERED ON: 10 JUNE 2016

DELIVERED AT: Katherine

HEARING DATE(s): 21 APRIL 2016

JUDGMENT OF: Judge Oliver

**CATCHWORDS:**

Criminal Law – Escape Lawful Custody – Validity of General Leave Permit –  
Correctional Services Act 2014.

**REPRESENTATION:**

*Counsel:*

Complainant: Mr Jones  
Defendant: Mr Karpeles

*Solicitors:*

Complainant: DPP  
Defendant: NAAJA

Judgment category classification: A  
Judgment ID number: NTLC 012  
Number of paragraphs: 29

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

No. 21557080

BETWEEN:

Wayne O'Neil  
Police

AND:

Brian Kenyon  
Defendant

REASONS FOR JUDGMENT

(Delivered 10 June 2016)

JUDGE OLIVER:

1. The defendant is charged with, being a prisoner following sentence, escaping from lawful custody contrary to section 112(1)(a) of the Criminal Code. It is an element of the offence that the prosecution are required to prove beyond reasonable doubt that the defendant was in lawful custody at the time of his escape.
2. The defendant was sentenced in the Court of Summary Jurisdiction in Darwin on 13 March 2015 to 12 months imprisonment with a non-parole period of eight months.
3. At the time of the alleged escape lawful custody on 17 November 2015 the defendant was residing at the Venndale Rehabilitation Centre near Katherine. His residency there was facilitated by a General Leave Permit issued by the then Commissioner of Correctional Services with a subsequent variation of the permit made by the Deputy Superintendent

Accommodation. Although no evidence was given, I will assume that the Deputy Superintendent had a delegation from the Commissioner to make the variation.

### **The General Leave Permit**

4. The power of the Commissioner to grant a general leave permit is provided by section 118 of the *Correctional Services Act*.

#### **S118 Commissioner may issue general leave permit**

The Commissioner may issue a permit (a **general leave permit**) to a prisoner that authorises the prisoner to be temporarily absent from a custodial correctional facility for a purpose the Commissioner considers appropriate.

*Examples for section 118*

*Examples of purposes for which a permit may be issued include the following:*

- (a) *education and training;*
- (b) *employment;*
- (c) *compassionate grounds;*
- (d) *recreation;*
- (e) *participation in community projects;*
- (f) *reintegration into the community.*

5. The Act does not provide any restrictions as to the category of prisoner or the form of the sentence that a prisoner may be serving for the issue of a general leave permit. However, in two associated cases that were listed for hearing with this matter, the charges of escape lawful custody were withdrawn by the prosecution on the basis that both of those persons were subject to mandatory minimum sentences of imprisonment and their release under a general leave permit was contrary to and inconsistent with the provisions of the *Sentencing Act* that require certain offenders who have committed violent crimes to serve a specified period of imprisonment. Where the court is required to set such a sentence it cannot make an order either suspending or partially suspending a sentence or suspending a

sentence on a home detention order until the mandatory minimum sentence prescribed has been served<sup>1</sup>.

6. Although the Court was not called upon to determine the issue, it seems to me that the view taken by the prosecution that the general leave permits were not a valid exercise of power is correct. Both men were released on permits that initially were to place them at a rehabilitation centre under the supervision of a probation and parole officer and then varied to provide for them to reside at the rehabilitation centre and undertake a community work project at a local community. The variation was made to the general leave permits prior to, or at the very latest, on the date that the prisoners were transferred from the prison to the rehabilitation centre. This occurred in each case prior to the prisoners completing the mandatory minimum sentence prescribed. If a Court is restricted in its ability to sentence a prisoner and order his or her release on a suspended sentence or a home detention order during a prescribed period of the sentence, it seems to me that it is highly unlikely that the Legislature would have intended that the Commissioner of Correctional Services would have the power to nevertheless release an offender who has not served that period to premises that might ordinarily form part of a supervised suspended sentence or a home detention order. The conditions of the general leave permit essentially replicated the usual conditions of a suspended sentence order under supervision of Community Corrections.
7. In the case of Mr Kenyon a similar process in terms of the issue of a general leave permit and subsequent variation took place. On 17 September 2015 the defendant signed a general leave permit. It was signed by the then Commissioner and endorsed by the Executive Director, Community Corrections on 18 September 2015. On 24 September 2015 the defendant signed a variation of the permit and on 30 September the Deputy Superintendent Accommodation signed the variation. On that same day the

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<sup>1</sup> Section 78DH *Sentencing Act*

defendant was transported from the prison to Venndale Rehabilitation Centre.

8. The original permit contained 14 conditions. Relevantly,
  2. The prisoner is under the ongoing supervision of a probation and parole officer, must obey all reasonable directions from a probation and parole officer and must report to a probation and parole officer when required.
  3. The prisoner must not leave Venndale Rehabilitation Centre except at the times and for the periods as prescribed by the program provider, or for medical attention as prescribed by a medical practitioner or as otherwise permitted by a probation and parole officer.
  4. The prisoner will abide by the rules of the residential rehabilitation centre at all times and do nothing to cause his early discharge from the program;
  5. The prisoner must wear and have attached an approved monitoring device in accordance with the directions of a probation and parole officer, and allow the placing or installation in, and retrieval from the premises or place specified in the order of such machine , equipment or device necessary for the efficient operation of the monitoring device. The prisoner must not remove or tamper with any such devices.
  9. The prisoner will attend counselling for alcohol abuse or other specific counselling as directed by the probation and parole officer.
  13. Upon release the prisoner offender must return immediately to nominated community unless directed otherwise by a probation and parole officer.

6. In any event, as I have noted, on the day of his release to travel to Venndale, the general leave permit was said to be varied. According to that document, Deputy Superintendent Accommodation Michael Cox of the Northern Territory Department of Correctional Services authorised a variation to the general leave permit dated 18.9.2015 to “depart from Venndale Rehabilitation Centre on Monday to Friday between the hours of 0600 hours to 1800 hours for the purpose of participation in community work projects with Kalano Community Association, Lot 58 McKeddie Road Katherine and be varied to encompass the following:” There follows a list of unnumbered but bullet pointed conditions. Amongst these are conditions that the prisoner is not to enter licensed premises, not gamble or enter gaming areas including TABs and casinos unless authorised by the Commissioner or enter any premises associated with the sex industry.
7. It is not clear whether the intent of the conditions said to be encompassed by the variation were to be in total substitution for the conditions in the original permit or in addition to them. Some are inconsistent with the original conditions. For example, and significantly, conditions 3, 4 and 9 all appear to have the objective that the prisoner will engage in a rehabilitation program at the Venndale Rehabilitation Centre to address alcohol abuse but the variation seems to have substituted the rehabilitation centre as the place where he will **reside** and he will otherwise be participating in a community work project outside and at a distance from the rehabilitation centre during week days. At the very least, his ability to be part of any rehabilitation program appears to have been greatly limited by the variation. However, some other conditions, such as the restrictions on alcohol and drug use and good behaviour are replicated by the variation.
8. A significant aspect of the question of whether the “variation” leaves in place some of the original conditions is the question of the duration of the leave permit. Section 110 of the Act states that a leave permit is in force for the period stated in it. For a general leave permit, the period is one that

the Commissioner considers appropriate having regard to the purposes for which the permit is issued.

### **110 Duration of leave permit**

A leave permit is in force for the period specified in it (unless sooner revoked), being:

- (a) for an administrative home detention permit – the period mentioned in section 134; or
- (b) otherwise – a period the Commissioner considers appropriate having regard to the purposes for which the permit is issued.

9. The variation to the leave permit does not state such a period. It does not give any indication of the project that the defendant was to undertake other than that it was at Kalano. It must therefore be assumed that the duration stated in the first permit is applied also to the variation, that is that the permit is in force until the defendant was released having served his sentence.

### **Was the defendant in the lawful custody of the Commissioner at the time that he left the facility?**

10. Section 9 of the *Correctional Services Act 2014* provides for the circumstances where a prisoner in the lawful custody of the Commissioner.

s9 Lawful custody and unlawful absence

- (1) A prisoner is in the *lawful custody of the Commissioner* if the prisoner:
- (a) is at a custodial correctional facility; or
  - (b) is at a health care facility under section 86; or
  - (c) is attending court; or
  - (d) is working at a place outside a custodial correctional facility as mentioned in section 54; or
  - (e) is being transported to a custodial correctional facility, or between 2 places mentioned in paragraphs (a) to (d); or

- (f) is absent from a custodial correctional facility as authorised by a leave permit as mentioned in section 109(2); or
  - (g) is absent from a custodial correctional facility under other lawful authority.
- (2) A prisoner is *unlawfully absent* if the person is not in the lawful custody of the Commissioner.

*Note for section 9*

*See section 63A of the Sentencing Act for the effect that being absent from a custodial correctional facility has on a prisoner's term of imprisonment.*

11. Of particular relevance are paragraphs (f) and (g). Paragraph (d) does not appear to be relevant because the defendant was not “working as mentioned in section 54” but participating “in a community work project.” Paragraph (g) likewise does not appear applicable. No authority other than that provided by the general leave permit has been put forward.
12. The issue then is whether the defendant was absent from a custodial correctional facility as authorised by a leave permit as mentioned in section 109(2). This authorises the prisoner to be absent from a custodial correctional facility in accordance with the terms and conditions of the permit. However if the leave permit has not been issued in accordance with the power granted to the Commissioner for the grant of a general leave permit it will not be a valid permit and the defendant will have ceased to be in the lawful custody of the Commissioner.
13. The power in s118 to issue a general leave permit is a power limited to authorising a temporary absence from a custodial correctional facility.
14. The question then is whether the general leave permit together with the variation of the permit authorised the defendant to be absent temporarily from the custodial correctional facility? In my view it did not. Condition 13 of the original permit required that the defendant return immediately to “nominated community” upon release. This can only be reference to release



on completion of his sentence of imprisonment<sup>2</sup>. Although this condition comply with s110 in that the permit states a duration (assuming that condition remained part of the permit upon variation), that duration is from the time of his arrival at Venndale to the end of his sentence of imprisonment. In my view that is not in compliance with the requirement that general leave permits only be authorised for temporary absences. It cannot in my view be said to be a temporary absence from a correctional facility if the defendant is placed elsewhere for the duration of his sentence without provision for return to the correctional facility. At the time of his transfer to Venndale the defendant still had almost 6 months of a 12 month sentence of imprisonment to serve. He had not applied for parole and in fact his non-parole period of 8 months had expired shortly before he left Venndale.

15. The explanatory statement for the Correctional Services Bill explained the the intention of the then clause 118. It was “to allow the Commissioner to grant leave for short-term or intermittent periods”. In my view a release for a period of 6 months can neither be said to be short term and certainly it is not intermittent.

16. In *Hafza v Director General of Social Security* (1985) 6 FCR 444 at 451 Wilcox J said

“The *Shorter Oxford Dictionary* defines “temporary” as lasting for a limited time; existing or valid for a time (only); transient; made to supply a passing need”. The *Macquarie Dictionary* definition is to similar effect, with the addition of “not permanent.” In one sense any absence from Australia, which in fact comes to an end, is temporary; it turns out to have lasted for a limited – as distinct from an unlimited – time and to have been not permanent. In this sense everything in human affairs, including life itself, is “temporary”. But

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<sup>2</sup> Although where the power of a probation and parole officer to direct otherwise exists for a person who has completed a sentence of imprisonment is a mystery.

it is doubtful whether the word temporary was used in this wide sense in s103(1)(d). As I have pointed out, had been intended to protect the endowment right of persons absent abroad for lengthy periods, or ultimately returned to Australia and who, in the meantime, maintain some association with Australia, would have been enough to refer to residents in Australia. Plainly it was intended to be more restrictive than that. I think that the adjective “temporary” was used to denote an absence that was, both in intention and in fact, limited to the fulfilment of passing purpose. The purpose might be of a business or professional nature; it might be for a holiday or for compassionate or family reasons. But, whatever the purpose, it seems to me to be implied in the concept of “temporary” absence that the absence will be relatively short and that its duration will be either defined in advance or be related to the fulfilment of a specific, passing purpose.” (emphasis added)

17. Although on the one hand it might be said that the defendant's grant of leave to Venndale and from Venndale to Kalano was for the fulfilment of a passing purpose of participating in a community project and defined in advance, it could not be described as an absence that was relatively short against his sentence as a whole if it is accepted that the duration of the permit is until he is released from his sentence.
18. In any event the meaning of “temporary” must be considered in the context of the *Correctional Services Act* 2014. The permit system applies to persons who are prisoners having been sentenced by a court to a term of imprisonment. This is a term of fixed duration. In that context, in my view a “temporary” absence does not envisage one that encompasses almost half of the sentence of imprisonment and finishes at the time of completion of the sentence. In my view, where there is a fixed time frame, a temporary absence will be one that starts and ends within the fixed time frame.

19. The variation of the permit appears to me to direct, first that the defendant is to reside at Venndale for the duration of his sentence and then secondly for him to participate in a community work project authorising him to leave Venndale for that purpose.
20. I have no doubt that it is a valid exercise of the power to allow release under a general leave permit for a prisoner to participate in a community project. Participation in a community project is given as an example of a reason for the grant of a permit in the Act. However the leave for that participation must be, as the explanatory statement sets out, for a short period or an intermittent period. In my view what this envisages is a prisoner leaving a custodial facility to perform work by way of a community project and returning from that to the Correctional facility, in other words a day release program. It might also include a short term placement for example at a work camp whilst a project is undertaken. I do not think that it envisages a prisoner being released, particularly within the a non-parole period of the sentence, to reside at a non-custodial facility and then leave that facility to work at a place with no return to the Correctional facility within the term of his or her sentence.

**Was the permit upon which the defendant was released from the Correctional Centre actually a form of a general leave permit or an administrative home detention permit?**

21. In addition to general leave permits the *Correctional Services Act 2014* introduced a new form of permit that could be issued to a qualifying prisoner.

**132 Commissioner may issue permits**

- (1) The Commissioner may issue a permit (an ***administrative home detention permit***) to a qualifying prisoner that authorises the

prisoner to reside at a place outside a custodial correctional facility that is specified in the permit.

22. The defendant was not a “qualifying prisoner” as he was a disqualified prisoner<sup>3</sup> because he had a sentence for which a non-parole period had been set.
23. There is a strong inference that can be drawn that the “general leave permit” form was utilised to allow the defendant to reside elsewhere than in the Correctional facility thereby avoiding the restrictions that are placed upon the issue of an administrative home detention permit. The features of the “general leave permit” as varied bear a strong similarity to the conditions that would be imposed on an administrative home detention permit. I note that it was issued by the Deputy Superintendent **Accommodation** (emphasis added). The following provisions apply to Administrative Home Detention Permits

#### **134 Duration of permit**

An administrative home detention permit is in force from the date it is issued (or a later date specified in it) until the prisoner's release date.

#### **135 Compulsory conditions on permit**

The conditions specified in an administrative home detention permit under section 111(d) must include the condition that the prisoner must not leave the approved residence except at times and for periods:

- (a) prescribed by regulation; or
- (b) otherwise permitted by the Commissioner or a probation and parole officer.

#### **136 Non-custodial offender provisions apply**

Chapter 4 (including any regulations made for the purposes of that Chapter) and section 197(3) apply in relation to a prisoner for whom an administrative home detention permit is in force as if:

- (a) the prisoner were a non-custodial offender; and
- (b) the permit were a monitoring order.

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<sup>3</sup> As defined in s132(3)

24. The varied “general leave permit” contained conditions that would be in compliance with each of these provisions, most notably ss134 and 135. The duration of the defendant’s permit was not, as I have found, of a temporary nature but provided precisely what s 134 requires, that is it was in force from the issue date until the time of the defendant’s release from sentence.
25. Likewise as required by s135 it provided a condition to permit him to leave Venndale to undertake the Community project at Kalano by providing the time period (0600 to 1800) during which he might do so.
26. The condition of supervision and having a monitoring device would fulfil the requirements of s136.
27. In my view, the varied “general leave permit” is not a valid exercise of a permit of that nature and could be properly categorised as an administrative home detention permit. As such it would not be valid as the defendant was not a prisoner for whom such a permit could be made.

### **Conclusion**

28. In either case, the permit releasing the defendant was not a valid exercise of the power of the Commissioner or his delegate. Although the discretion for the issue of a general leave permit might be said to be unfettered, it must nevertheless be consistent with the objective of the provision which is to provide only for temporary absences. The permit did not provide for a temporary absence. The documents that purport to be a general leave permit provide for conditions consistent with what is required for an Administrative Home Detention Permit. The limitations of those permits cannot be avoided simply by calling the permit by some other name.
29. Consequently, I am not satisfied beyond a reasonable doubt that the defendant at the time of his departure from the Venndale facility was in the lawful custody of the Commissioner of Correctional Services. He is found not guilty of the charge.

Dated this 10th day of June 2016

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LOCAL COURT JUDGE