

*R. v. Stephen Shields, 2005 NWTTC 01*

*File: T-01-CR-2004003038*

**IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES**

**IN THE MATTER OF:**

HER MAJESTY THE QUEEN

- and -

Stephen SHIELDS

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**REASONS FOR JUDGEMENT  
of the  
HONOURABLE JUDGE Bernadette Schmaltz**

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Heard at: Yellowknife, Northwest Territories  
February 9, 2005

Decision: February 22, 2005

Counsel for the Crown: D. Mahoney

Counsel for the Defendant : J. Mahon

(Charged under s. 733.1 CC)

[1] Stephen Shields, the Defendant, has been charged that on September 27<sup>th</sup>, 2004 he failed to comply with a condition of his Probation Order. The facts on this trial are not in issue: on March 10<sup>th</sup>, 2004, the Defendant was sentenced to 18 months' imprisonment, to be served in the community, that is an 18 month conditional sentence. On May 18<sup>th</sup>, 2004, the Defendant was sentenced to 15 days imprisonment to be followed by 6 months' probation, one of the conditions being that he pay restitution of \$174.22 within four months. The Defendant was released from prison on May 27<sup>th</sup>, 2004. The restitution was not paid. At the time relevant to the current charge, which is between May 27<sup>th</sup>, 2004 and September 27<sup>th</sup>, 2004, the Defendant was serving his conditional sentence in the community.

[2] The issue on this trial is whether or not the Probation Order that the Defendant had been placed on May 18<sup>th</sup>, 2004, was in force on September 27<sup>th</sup>, 2004, the date alleged that he breached the Probation Order.

[3] For the reasons that follow, I find that the Probation Order of May 18<sup>th</sup>, 2004, will not come into force until the expiration of the Conditional Sentence Order that the Defendant was placed on on March 10<sup>th</sup>, 2004. The Probation Order not being in force on September 27<sup>th</sup>, 2004, the Defendant could not have breached it, and the charge is dismissed.

**Crown's Position:**

[4] As I understand it, the Crown's position on this trial is that s. 732.2(1)(c) of the *Criminal Code*, is only applicable to situations where an offender is sentenced to a conditional sentence to be followed by probation, i.e. the conditional sentence and the probation order relate to the same sentence, and consequently is not applicable to this case. The Crown submits that the Defendant was previously sentenced to imprisonment (on March 10<sup>th</sup>, 2004) for another offence, and had been "released from prison." Therefore s. 732.2(1)(b) of the *Criminal Code* is applicable in this situation, and the Probation Order was in force.

**Defendant's Position:**

[5] The Defendant submits that based on the clear wording of s. 732.2(1)(c), the Probation Order will not come into force until the expiration of the conditional sentence order. Consequently, the Probation Order not being in effect on September 27<sup>th</sup>, 2004, the Defendant could not have breached it.

**ANALYSIS**

[6] Section 732.2(1) of the *Criminal Code* sets out when a probation order comes into force:

732.2(1) A probation order comes into force

(a) on the date on which the order is made;

(b) where the offender is sentenced to imprisonment under paragraph 731(1)(b) or was previously sentenced to imprisonment for another offence, as soon as the offender is released from prison or, if released from prison on conditional release, at the expiration of the sentence of imprisonment; or

(c) where the offender is under a conditional sentence order, at the expiration of the conditional sentence order.

**The Sentences:**

[7] First, it must be determined whether the sentences of March 10<sup>th</sup>, 2004, and May 18<sup>th</sup>, 2004, were to run concurrently, or whether the latter was to run consecutively to the former. The sentence of May 18<sup>th</sup>, 2004, could have been ordered to be consecutive to the sentence of March 10<sup>th</sup>, 2004. However, it was not. Section 718.3(4) of the *Criminal Code* states:

718.3(4) The court ... that sentences an accused may direct that the terms of imprisonment that are imposed by the court ... or that

result from the operation of subsection 734(4) or 743.5(1) or (2) shall be served consecutively, when

(a) the accused is sentenced while under sentence for an offence, and a term of imprisonment, whether in default of payment of a fine or otherwise, is imposed;

[8] The court that sentenced the Defendant on May 18<sup>th</sup>, 2004, did not direct that the term of imprisonment be consecutive, and consequently the sentence of May 18<sup>th</sup>, 2004, would run concurrently with the sentence of March 10<sup>th</sup>, 2004.

### **Conditional Sentences:**

[9] Section 742.1 of the *Criminal Code* allows for conditional sentences. That section states:

742.1 Where a person is convicted of an offence, ... and the court

(a) imposes *a sentence of imprisonment* of less than two years, and

(b) ...

the court may, ..., order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under this section. [emphasis added]

[10] Section 742.6 of the *Criminal Code* sets out the procedure to be taken when a condition of a conditional sentence order is breached. Specifically, s. 742.6(9) sets out what a court can do on finding that a conditional sentence order has been breached:

742.6(9) Where the court is satisfied ... that the offender has ... breached a condition of the conditional sentence order, the court may

(a) take no action;

(b) change the optional conditions;

(c) suspend the conditional sentence order and direct

- (i) that the offender *serve in custody a portion* of the unexpired sentence, and
- (ii) that *the conditional sentence order resume* on the offender's release from custody, either with or without changes to the optional conditions; or

(d) terminate the conditional sentence order and direct that the offender be committed to custody until the expiration of the sentence. [emphasis added]

[11] A conditional sentence is a form of imprisonment; it is a sentence of imprisonment that is served in the community. It is imprisonment without incarceration. (see *R. v. Wu* (2003), 180 C.C.C. (3d) 97 (S.C.C.), para. 3 and para. 25).

[12] A conditional sentence is a sentence of imprisonment, based on the wording of s. 742.1 and the interpretation from the Supreme Court of Canada in *Wu, supra*. But I find it an unnecessary and perhaps unworkable position, or even a fiction, to say that an offender on receiving a conditional sentence, is sentenced to imprisonment, and is immediately released from prison.

[13] In order to rely on s. 732.2(1)(b), when dealing with a conditional sentence, one has to interpret the wording of that section in an unnecessarily complicated manner. With respect, I find it an absurdity to say that an offender who receives a conditional sentence, which is a sentence of imprisonment, is immediately upon receiving a sentence of imprisonment released from prison. A conditional sentence is a sentence of imprisonment served in the community, and the offender is not released from "prison"; he or she may potentially end up in prison, but there is no release from prison upon receiving a conditional sentence. Again, such an interpretation is unnecessary, and I suspect could be considered incomprehensible.

[14] If s. 732.2(1)(b) were applicable to situations where a conditional sentence is running concurrently with a probation order, then there could be situations where a probation order would be in force while the offender was in the community serving his or her conditional sentence, it could then be suspended for an amount of time were the

offender ordered to serve some portion of his or her conditional sentence in custody pursuant to s. 742.6(9)(c)(i), it could then be back in force, and even be suspended again. To find s. 732.2(1)(b) applicable to situations where an offender subject to a conditional sentence receives a term of probation would be completely without merit; it could produce confusing and potentially unworkable situations. Such a finding is even more unnecessary when the wording of s. 732.2(1)(c) is clear and unambiguous.

[15] Another result that would follow from a finding that s. 732.2(1)(b) is applicable to the current situation, is that the defendant would then be subject to two court orders simultaneously (a probation order and a conditional sentence order). This type of situation is not contrary to law, and is perhaps not even that unusual. But it is certainly not a preferable situation. It would appear that the legislators were also trying to avoid such a situation. I note that if an offender is released from prison on conditional release, then the probation order does not come into force until the expiration of the sentence<sup>1</sup> (as opposed to when the offender is released from prison). An offender who was released on conditional release would not be subject to the conditions of probation while on conditional release, i.e. he or she would not be subject to two different sets of conditions. I think it is reasonable to assume that the legislators were also cognizant of the difficulties that could arise if an offender were subject to both a probation order and a conditional sentence order at the same time, and thereby minimized such situations by the enactment of s. 732.2(1)(c).

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<sup>1</sup> Section 99(2) (References to *expiration of sentence*) of the *Corrections and Conditional Release Act* states:

99(2) For the purposes of this Part [Part II CONDITIONAL RELEASE, DETENTION], a reference to the expiration according to law of the sentence of an offender shall be read as reference to the day on which the sentence expires, without taking into account

(a) any period during which the offender could be entitled to statutory release; or  
(b) any remission that stands to the credit of the offender on the coming into force of this section.

**CONCLUSION:**

[16] The wording of s. 732.2(1)(c), is clear and unambiguous, and this case falls clearly within that section. On May 18<sup>th</sup>, 2004, the Defendant was placed on probation for 6 months from the date of the expiration of his sentence of imprisonment. The Defendant was released from prison on May 27<sup>th</sup>, 2004. If that was the only sentence that the Defendant was subject to at the time, clearly, his Probation Order would have come into force on May 27<sup>th</sup>, 2004. But at all relevant times, the Defendant was also under a conditional sentence order, and, pursuant to s. 732.2(1)(c), his Probation Order comes into force at the expiration of that conditional sentence order. For the purpose of this case, it is not necessary to determine when that conditional sentence order will expire – suffice it to say that it had not expired on September 27<sup>th</sup>, 2004, the date alleged that the Defendant breached a condition of his probation. The Probation Order not being in force, the Defendant could not have breached it, and the charge is dismissed.

Bernadette Schmaltz  
J.T.C.

Dated this 22<sup>nd</sup> day of February, 2005, at  
The City of Yellowknife, Northwest Territories.

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