SUPREME COURT OF QUEENSLAND

CITATION:	*R v Buckley* [2005] QCA 273
PARTIES:	**R** **v** **BUCKLEY, Robert Wayne** (applicant)
FILE NO/S:	CA No 148 of 2005 DC No 159 of 2005 DC No 328 of 2005 DC No 565 of 2004 DC No 414 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Beenleigh
DELIVERED ON:	5 August 2005
DELIVERED AT:	Brisbane
HEARING DATE:	1 August 2005
JUDGES:	McPherson, Williams and Jerrard JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – OTHER MATTERS – applicant pleaded guilty to various offences including dangerous driving and multiple assaults – offences committed on 8 October 2000 breached an 18 month suspended sentence earlier imposed on the applicant – a previous breach of that suspended sentence resulted in the activation of four months of that sentence – judge found it not unjust to activate the remaining 14 months of that sentence – activated period imposed cumulatively upon the effective sentence of two years suspended after nine months ordered for the current offences – whether in the circumstances it was unjust to activate the entire remaining suspended sentence
COUNSEL:	J D Griffiths for the applicant D L Meredith for the respondent
SOLICITORS:	No appearance on behalf of the applicant Director of Public Prosecutions (Queensland) for the respondent

[1] **McPHERSON JA:** The application for leave to appeal should be dismissed. I agree with what Jerrard JA has written.

[2] **WILLIAMS JA:** All the relevant facts are fully set out in the reasons for judgment of Jerrard JA which I have had the advantage of reading.

[3] In my view the fact that the applicant has been ordered to serve 23 months in custody must be considered in the light of the totality of his conduct on 8 October 2000 and 1 November 2003, and the fact that such conduct breached the suspended sentence imposed on 9 July 1998. When that totality of criminal conduct is considered I am of the view that a sentence of 23 months imprisonment is not manifestly excessive.

[4] I agree generally with what has been said by Jerrard JA in his reasons. The application for leave to appeal should be dismissed.

[5] **JERRARD JA:** On 21 February 2005 Robert Buckley pleaded guilty to one count of dangerous operation of a motor vehicle and three offences of common assault, all committed on 8 October 2000. He also pleaded guilty to three other offences committed that day, namely driving without due care and attention, breaching a domestic violence restraining order, and possession of a utensil used to consume a prohibited drug. He also pleaded guilty on 21 February 2005 to a series of offences committed on 1 November 2003, those being entering a dwelling and committing an offence of common assault, an offence of wilful damage, and seven offences of serious assault of police officers. He also pleaded guilty to two summary offences of failing to stop at a traffic accident, and an offence of driving under the influence of liquor. Mr Buckley was sentenced on 20 May 2005 for all of those offences, and the learned sentencing judge ordered he serve concurrent sentences of two years imprisonment, suspended after nine months for an operational period of three years, on all the indictable offences; and a concurrent sentence of three months imprisonment for the offence of driving under the influence of liquor. The learned judge imposed convictions on all other summary offences, but no further punishment.

[6] What brings these matters to this Court on an application for leave to appeal against the sentences imposed was a further order made by the learned judge, namely that 14 months of an 18 month sentence of imprisonment imposed on 9 July 1998, and wholly suspended for four years, be activated, and that the concurrent sentences of two years imprisonment suspended after nine months imposed on 20 May 2005 be served cumulatively upon the activated 14 month sentence. The effect of the orders made by the learned judge was that Mr Buckley must serve a minimum term of imprisonment of one year and 11 months before next being released. It was open to the learned judge to activate that sentence suspended in July 1998, because it was breached by the offences committed on 8 October 2000. Finally, the learned judge declared pursuant to s 161 of the *Penalties and Sentences Act* 1992 (Qld) that 121 days spent in pre-sentence custody between 3 November 2003 and 1 March 2004 be deemed time already served under the sentences imposed. Mr Buckley contends on this application that the learned judge ought only to have activated nine months of that previously suspended sentence, and further ought to have ordered that that activated nine months imprisonment be served concurrently with all other sentences imposed on 20 May 2005.

Mr Buckley's record

[7] Mr Buckley has a history of committing offences of violence. He has convictions for an offence of assaulting police committed on 6 February 1993, an offence of assault occasioning bodily harm committed on 22 August 1993, an offence of assault occasioning bodily harm committed on 11 April 1996, an offence of assault occasioning bodily harm committed on 14 November 1996, an offence of assault occasioning bodily harm committed on 7 December 1997, an offence of assault occasioning bodily harm committed on 2 August 1999, and now the offences of assault committed on 8 October 2000, and of common assault and serious assault committed on 1 November 2003. That is a history of repeated physical aggression over a decade. I add that there was no explanation given to the sentencing judge, or this Court, as to why the offences committed in October 2000 were dealt with only in February and May 2005, and likewise why the offences committed on 1 November 2003 also took an otherwise surprisingly long time to be dealt with.

[8] The information before the court did not describe the circumstances of most of those prior offences of violence, but those committed in October 2000 and November 2003 had similar features, accurately described by the prosecutor to the learned sentencing judge in these terms:

> "Effectively, in both cases what has occurred is that the prisoner has been operating a vehicle in a dangerous manner; has been driving that vehicle recklessly, and in the point – or at the point, sorry, of where the vehicle has stopped, where the prisoner has stopped it, effectively on both occasions the prisoner has then assaulted people around the incident, including in relation to the second indictment, police officers."

[9] A schedule of facts upon which the learned judge was invited by both counsel to act describe the offences committed on 8 October 2000 as follows. Mr Buckley had been drinking and had an argument with his then de facto, in whose favour a domestic violence restraining order had been made against him. They were in a motor vehicle; he instructed her to get out of the car, grabbed her by the hair and pulled her head down into his lap, and told her to drive. He then hit her over the head, she called for help, and he then took control of the vehicle and drove off. That conduct constituted the offence of breaching the domestic violence restraining order. Mr Buckley crashed the car he was driving into a cyclone fence at the front of units where he then lived at 709 Kingston Road, Waterfront West (that was the offence of driving without due care and attention); and some of the residents of those units, neighbours of Mr Buckley, came outside to see what had happened. They saw his vehicle fish-tailing down one driveway, travelling at about 30 kph, and a boy had to jump out of the way to avoid being hit by his car. He then drove down another unit driveway (all of this conduct was the basis of the dangerous operation of a vehicle charge) causing another person to take evasive action, and his car finally came to a stop. One neighbour complained to him about his driving, and he approached her, pushed her with his chest, and spat in her face. That was one offence of assault. He then walked to another neighbour, punched that person on the left side of his head around the ear with a closed fist (a second count of assault), and when the woman who had been his first victim pushed him to stop him hitting the second victim (her partner), Mr Buckley grabbed that woman by the arm, and pulled her hair, then knocked her head several times against the side of the car. That was the third offence of assault, and he was fortunate it was not a charge of

assault occasioning bodily harm. Mr Buckley was then tackled by the two complainants and another neighbour, and restrained until he calmed down and the police subsequently arrived. When they arrived they found in his unit a utensil he had used to consume a drug.

[10] Those assaults seem not to have caused serious physical damage, but his behaviour generally that evening would have been shocking and distressing both to his victims and to other witnesses. The offences committed three years later on 1 November 2003 followed a similar but more aggravated path. Somewhere shortly before 5.45 pm on that date he was involved in a motor vehicle accident on Wembley Road Woodridge, and left the scene. The police were notified and came across a second accident in Jacaranda Avenue which he had caused, this time a head on collision with another vehicle. Once again he had left the scene in his car, followed by drivers of other vehicles, and he fled to his then residence in Poinciana Street, Woodridge. Neighbours saw him drive up in his badly damaged utility and park it, and when he got out he began to kick and punch his garage door, swearing loudly. He saw one neighbour pointing out his behaviour to another, and then came onto that first neighbour's property, and assaulted the neighbour. The neighbour went into his garage and Mr Buckley followed him into that, assaulted him again, this time in the presence of the neighbour's children. That incident ended with the neighbour being hit on the back of the head by Mr Buckley as the neighbour attempted to shepherd the children back into the house.

[11] Police had arrived and a breath sample was taken, which indicated a reading of 0.197 per cent, almost four times the legal limit of 0.05 per cent. Mr Buckley became abusive to one of the police officers who was taking him into custody, and began to hit the window of the police car. He succeeded in smashing it, and police attempted to remove him from that vehicle and place him in another one. He resisted, and in the course of doing so assaulted two of the officers. He was then taken to the Logan Police Station, and when at that station continued to resist police, and spat directly into the face of one of them. He was placed in a holding cell, and then taken to a room where an attempt was made to take a specimen of blood from him. He resisted that, and barged into another police officer forcing that officer into a wall. He was then taken back to his cell. Later, when police were attempting to transfer him to the Beenleigh Watch-house, he spat in the face of two other officers, and pushed yet another one back by kicking a door onto that officer. He was ultimately restrained with capsicum spray.

[12] Those incidents resulted in the charges of leaving the scene of the accident, driving under the influence, entering the neighbour's residence and assaulting that neighbour, and the seven counts of assaulting police officers. All of that behaviour would by its nature be both shocking and upsetting to the victims and the witnesses, and victim impact statements from the police officers who were spat upon show how seriously and adversely they were each affected by that being done to them. They all feared for their future health, and each felt degraded and insulted. One resigned from the Police Service because of what Mr Buckley had done. His conduct in November 2003, considered alone, warranted substantial punishment. It was an aggravated repetition of the conduct of October 2000, committed by a person with a history of aggression.

[13] The offence of assault occasioning bodily harm committed on 7 December 1997 had occurred when Mr Buckley was employed as a "bouncer" at a nightclub, and he

severely assaulted one of the patrons whom he was evicting. That complainant received a severe laceration above his left eye, his jaw was fractured with his teeth malaligned, and correction of that required an operation under general anaesthetic. The complainant had to eat only soft food for four weeks. He was obliged to give up his employment, which had necessitated going in and out of refrigerated areas.

[14] For that offence Mr Buckley was sentenced to 18 months imprisonment, suspended for four years, by an order made on 9 July 1998 in the Beenleigh District Court. On 31 July 1998 he was dealt with in the Brisbane District Court for an offence of assault occasioning bodily harm committed over two years earlier on 11 April 1996, and placed on 18 months imprisonment suspended for three years. Then he was dealt with in the Beenleigh District Court again on 26 April 2001, this time for one offence committed on 14 November 1996, and therefore before he was placed on either of those suspended sentences (that being an offence of assault occasioning bodily harm) and one offence of assault occasioning bodily harm committed after placement on those suspended sentences, committed on 2 August 1999. He was sentenced to four months imprisonment to be followed by two years probation on each of the assaults committed in August 1999 and November 1996, and the learned sentencing judge activated four months of the 18 months suspended sentences imposed on each of 9 July 1998 and 31 July 1998. All of those four month sentences were to be served concurrently. Each of those July 1998 suspended sentences were breached by the offences committed in October 2000, but as it happened the learned sentencing judge imposing sentence in May 2005 only activated the remaining 14 months of the suspended sentence imposed on 9 July 1998, after concluding that it was not unjust to require Mr Buckley to serve the balance of that suspended term.

[15] Mr Buckley had also been dealt with on 8 April 2002 for an offence of wilful destruction of property committed on 15 February 2002, which had consisted of his kicking out the window of a police vehicle when placed in it after being arrested under the provisions of the *Domestic and Family Violence Protection Act* 1989 (Qld). He succeeded in escaping from the police car, but was then restrained. That offence also breached the 9 July 1998 suspended term. The Crown Prosecutor appearing on 20 February 2005 submitted that Mr Buckley had demonstrated a complete insolence and contempt for the law over a substantial period of time, and that a sentence of approximately three years would be within range. On Mr Buckley's behalf, his counsel submitted to the sentencing judge that had Mr Buckley been dealt with in April 2001 for the offences committed in October 2000, as Mr Buckley had apparently instructed his then solicitors he wished to have happen, the learned judge imposing sentence on 26 April 2001 would probably not have imposed any greater sentences than that one actually handed down that day, namely terms of four months imprisonment concurrent and two years probation.

[16] That submission was repeated in the written outline of argument of Mr Buckley's counsel on the appeal, but I respectfully disagree with it. I consider that the District Court judge imposing sentence in April 2001, if asked to sentence for offences breaching the suspended sentences imposed in July 1998 and committed in both August 1999 and October 2000, would have dealt appropriately with those offences by imposing substantially more than four months imprisonment *in toto* for all of the offences committed in October 2000, the assault committed in August 1999, and for the two breaches of orders for suspended sentences. Mr Buckley could have expected sentences at least equal to the activation in full of both 18 months

suspended terms in April 2001, had the October 2000 offences then been before the District Court. The conduct then facing the sentencing judge would have been evidence of continued resort to violence, whereas Mr Buckley was dealt with as if he had not offended (as at April 2001) for the best part of two years.

[17] If that is kept in mind, the effective term of 14 months imprisonment imposed now for that October 2000 conduct in breach of the 9 July 1998 order was a sound exercise of sentencing discretion, as was the effective additional term of nine months imprisonment imposed in respect of the November 2003 offences. The only issue is whether or not Mr Buckley has received insufficient mitigation by reason of the efforts he has made since being released on bail on 1 March 2004, and insufficient allowance also for the fact that that October 2000 offences were so stale by May 2005.

[18] The November 2003 offences certainly justified a head sentence of two years imprisonment, and Mr Buckley's counsel did not dispute that on the appeal. His ultimate contention was simply that Mr Buckley ought to have received more credit for his efforts at rehabilitating himself since granted bail in March 2004. The information put before the learned sentencing judge, and before this Court, is that upon being released on bail Mr Buckley attended upon the Australian Tobacco and Other Drug Services, and that he has not consumed alcohol since being granted bail. There was no report from that service confirming that fact, but his counsel on the appeal explained that that service does not provide such reports. Mr Buckley certainly provided the sentencing judge with a statement signed by both himself and his current partner, in which he said he had used neither drugs nor alcohol since 1 November 2003, and in which he expressed remorse for his behaviour towards the police on 1 November 2003 and his understanding that they were simply doing their job. In an affidavit in support of his application for bail in March 2004 he described continuing frustration in the prison environment caused by difficulty in getting to see a counsellor when in custody, and by the behaviour of other prisoners. He also told a psychologist who interviewed him on 4 April 2005 that he had not used alcohol or drugs since 3 November 2003.

[19] Mr Buckley has obviously made efforts to change his behaviour since last being released from custody, and to understand the effect that his alcohol abuse has had on himself and other people. Taking that circumstance into account, and the circumstance that the October 2000 offences were being dealt with so late, I consider it would have been within the range of available orders for the learned sentencing judge to reactivate say 10 months of the remaining 14 months of the sentence imposed on 9 July 1998, and to suspend the cumulative two year term after say eight months of that sentence had been served. That would have meant a minimum 18 month term, and been lenient to Mr Buckley because of his more recent efforts. Suspending the two year term after nine months, with reactivation in full of the 14 months, gave Mr Buckley little moderation of the overall sentences to reflect both his pleas of guilty and the improvement in his personal circumstances since 2004. An effective minimum term of 18 months imprisonment may have better reflected this mix of circumstances, but would be close to the bottom of the minimum appropriate term. A minimum term of 23 months to serve was much more towards the higher end of the scale; but it was not manifestly excessive. There was simply too much dangerous and aggressive behaviour overall.

[20] I would accordingly dismiss the application for leave to appeal.