SUPREME COURT OF QUEENSLAND

CITATION:	*R v Wilkinson* [2005] QCA 452
PARTIES:	**R** **v** **WILKINSON, Joshua Earl** (applicant)
FILE NO/S:	CA No 279 of 2005 DC No 383 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED EX TEMPORE ON:	6 December 2005
DELIVERED AT:	Brisbane
HEARING DATE:	6 December 2005
JUDGES:	McMurdo P, Helman and Chesterman JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application refused**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – APPLICATIONS TO REDUCE SENTENCE – where applicant pleaded guilty to one count of unlawfully using a motor vehicle and one count fraud – where applicant originally sentenced to 150 hours of community service – where applicant was re-sentenced to 9 months imprisonment in breach proceedings – whether sentence imposed was manifestly excessive – where applicant not entitled to declaration for pre-sentence custody because on remand for other charges *Penalties and Sentences Act* 1992 (Qld), s 126, s 161
COUNSEL:	The applicant appeared on his own behalf M R Byrne for the respondent
SOLICITORS:	The applicant appeared on his own behalf Director of Public Prosecutions (Queensland) for the respondent

HELMAN J: This is an application for leave to appeal against sentences of imprisonment imposed on the applicant on 3 October 2005 in the District Court at Maroochydore. The applicant was before the court on two charges under the Criminal Code: unlawfully using a motor vehicle without the consent of the person in lawful possession of it, and fraud in dishonestly making off, knowing that payment on the spot was required for petrol lawfully supplied, without having paid and with intent to avoid payment. The first offence was committed on 12 November 2003 at Maleny, and the second on 13 January 2004 at Glen View. For each offence the learned Judge imposed a penalty of imprisonment for nine months. There was before his Honour a report dated 30 September 2005 from the court co-ordinator of the Arthur Gorrie Correctional Centre showing that the applicant had been in corrections custody from 7 July 2005. (It seems from other documents produced to the Court in the course of the hearing of this application that the applicant was probably in custody from 4 July 2005 and only on 7 July 2005 came formally into corrections custody.) His Honour did not make a declaration relating to the time the applicant had been held in pre-sentence custody under s. 161 of the *Penalties and Sentences Act* 1992 (Qld) because he was told, correctly, that the applicant had been held on remand on other charges.

The only ground upon which the application is made is that the sentences were manifestly excessive.

An account of the history of the two charges is necessary for an understanding of the issues on this application. On 15 November 2004 the applicant pleaded guilty to the two offences before the same judge in the District Court at Maroochydore. His Honour then imposed a community based order requiring the applicant to perform 150 hours of unpaid community service for the two offences. In addition to dealing with the applicant for the two charges that have given rise to this application on 15 November 2004 his Honour dealt with the applicant's breaches of suspended sentences imposed in the District Court at Maroochydore by another judge on 21 October 2003. On 20 October 2003 the applicant had pleaded guilty to two charges of entering premises and committing an indictable offence in the premises. In one case a motor vehicle had been entered and a quantity of tools stolen in December 2002 at Maleny, and in the other case a restaurant had been entered and a quantity of alcohol stolen, also in December 2002 at Maleny. There was a third charge of receiving stolen property, an outboard motor, in January 2003 at Maroochydore. The learned judge who dealt with the applicant on that occasion sentenced him to imprisonment for twelve months on each charge, to be suspended in each case after fifty-one days, which was the time the applicant had been in pre-sentence custody. The fifty-one days were declared under s. 161 of the *Penalties and Sentences Act* to be imprisonment already served under the sentences. The operational period imposed was two years in each case. The applicant had breached the suspended sentences by committing the two offences the subject of this application and by a breach of the *Bail Act* 1980 (Qld) committed on 17 July 2004

for which he was sentenced in the Maroochydore Magistrates Court to imprisonment for three months on 19 July 2004. From his criminal history it appears there may have been other breaches but those were the only ones relied on by the Crown. When the applicant came to be dealt with on 15 November 2004 the judge ordered that the operational period of the suspended sentences be extended for a period of twelve months.

The applicant is now twenty-one years old. He was born on 24 February 1984 at Wagga Wagga in New South Wales. He has a lengthy criminal history which begins with recording his appearance before the Maroochydore Magistrates Court on 14 April 2001 on charges under the *Drugs Misuse Act* 1986 (Qld) and the Criminal Code in relation to which a twelve-month probation order was made. There followed appearances in the Maroochydore Magistrates Court on seven occasions beginning on 27 June 2001 and ending on 4 February 2002.

On 14 May 2002 he was before the Noosa Magistrates Court. On 2 September 2002 he was again before the Maroochydore Magistrates Court and later appeared in that Court on six further occasions beginning on 23 January 2003 and ending on the 29 September 2004. He was before the Caboolture Magistrates Court on the 14 October 2004. He has been dealt with for a wide variety of offences including drug offences, wilful damage to property, offences of dishonesty, and breaches of court orders.

The applicant was dealt with leniently on 15 November 2004 following a concession by the Crown prosecutor concerning the "nature of the offences" and the period of 137 days the applicant had been in custody in 2004, but not for any time in relation to which a declaration could have been made under s. 161 of the *Penalties and Sentences Act*. The offence of unlawfully using a motor vehicle had been committed by the applicant when, after driving a stolen vehicle in ignorance of its having been stolen, he was told by the thief of the theft and had continued driving it for a short time but later gave the keys back to the thief. The fraud offence concerned petrol valued at $15.01.

When this matter came before the learned judge on 3 October 2005 his Honour was presented with a court report dated 18 March 2005 by a community correctional officer giving details of the contravention of a requirement of the community service order. On the 25 February 2005 the applicant had failed to report as directed by an authorized Corrective Services officer. The officer's report was to the effect that the breach was not an isolated incident but rather part of a course of conduct indicating an unwillingness to comply with the requirements of the order. The applicant was not represented before his Honour, but expressed his desire that the hearing proceed. His Honour indicated he was satisfied that there had been a breach of the community service order and then dealt with the applicant under s. 126(4) of the *Penalties and Sentences Act* sentencing him to imprisonment, as I have related.

The applicant asserts that the sentences are “steep” but adds that all he is asking for is a “backdate”, but the applicant is not entitled to a declaration under s. 161 of the *Penalties and Sentences Act* in respect of either the period of pre-sentence custody in 2004 or that in 2005. The sentences could, I think, seem quite severe for the offences in question when one takes into account the circumstances of the applicant's committing the unlawful use offence and the value of the petrol, but taking into account as well the applicant's criminal history in general and the particular history of these offences, I am not persuaded that the applicant has demonstrated that the sentences are manifestly excessive.

I should refuse the application.

WILLIAMS JA: I agree.

CHESTERMAN J: I agree.

WILLIAMS JA: The application is refused.
