

***Bernard v Williams* [2015] WASC 182 (30 April 2015) – Western Australia Supreme Court**

‘Breach of violence restraining order’ – ‘Consent’ – ‘Immediate imprisonment’ – ‘Repeated breaches of a restraining order’ – ‘Temporary protection order’

Charge/s: Breach of violence restraining order.

Appeal type: Appeal against sentence.

Facts: The appellant pleaded guilty to two breaches of a violence restraining order. He breached the order by living with the protected person and by being within a hundred metres of the protected person (in the same house as her). At the same time, the appellant was also dealt with for an earlier breach alleging that he was within a hundred metres of the protected person (attending and remaining at the protected person’s address). This was a ‘third strike’ case in which the magistrate was required to impose a penalty that is or includes imprisonment. The magistrate imposed a term of imprisonment for six months for each offence. A sentence of six months or less may not be imposed (*Sentencing Act 1995 (WA)* s86). The day before the hearing of this appeal, the Magistrates Court recalled the sentence and imposed a sentence of 6 months and 1 day.

Issue/s: One of the issues was that the sentence contravened the *Sentencing Act*.

Decision and Reasoning: The appeal was allowed. If it was not for the error in imposing a sentence of six months, the decision of the magistrate to impose a sentence that included imprisonment would have been within the sound exercise of sentencing discretion. The appellant had breached a VRO repeatedly (See *Pillage v Coyne* [2000] WASCA 135 at [13]-[15]). The correction of the sentence to 6 months and 1 day was not made in compliance with s 37(2) of the *Sentencing Act* as the magistrate did not give the appellant the opportunity to be heard. The appellant fell to be resentenced.

A sentence of suspended imprisonment would have been appropriate but for the fact that the appellant had already served 6 weeks in prison. The term of imprisonment was set aside and the appellant fined \$1,500. The court took into account a number of factors including that the protected person expressed no fear of the appellant at the time of appeal; it was important to demonstrate to the appellant that he could not disregard the order of the court with impunity; the consent of the protected person was not a mitigating factor but it was relevant in considering the circumstances of the offence; and although there had been repeated breaches of the order, there was nothing to suggest actual violence or threat of violence (See [25]-[28]). His Honour also cited *Pillage v Coyne* [2000] WASCA 135 where his Honour Miller J described the *Restraining Orders Act* as social legislation of the utmost importance:

'...protected persons in the community generally must have confidence that restraining orders will be obeyed and complied with ... [When] they are not, there must be significant consequences to support the fact that restraining orders mean something ... [The] courts [must] ensure that their orders are not ignored [14].'