

***Musgrove v Millard* [2012] WASC 60 (22 February 2012) – Western Australia Supreme Court**

‘Breach of violence restraining order’ – ‘Double jeopardy in sentencing’ – ‘Double punishment’ – ‘Following, harassing, monitoring’ – ‘Sentencing’ – ‘Stalking’ – ‘Unlawful installation of a tracking device’

Charge/s: 113 offences including: Stalking, unlawful installation of a tracking device, breach of violence restraining order (104 counts), breaching a protective bail condition (7 counts).

Appeal Type: Application for leave to appeal against sentence.

Facts: The applicant was served with an interim restraining order prohibiting him from communicating with his former partner in any way. In breach of this order, he attended her address and/or workplace, sent her a number of text messages and unlawfully installed a tracking device on her vehicle. This conduct also comprised the stalking offence. Later, the applicant called his former partner 80 times. The Magistrate noted that there were a significant number of offences committed over an extended period which had a considerable impact on the victim. A total effective sentence of 16 months’ imprisonment was imposed which comprised of 8 months’ imprisonment for stalking, 4 months’ imprisonment for unlawfully installing the tracking device (to be served cumulatively on the sentence for stalking) and 4 months’ imprisonment for 15 convictions including breaching bail conditions and the restraining order. All the other convictions for breaching the restraining order were to be served concurrently for the stalking offence.

Issue/s: Whether the Magistrate erred in making the sentence for unlawfully installing a tracking device cumulative upon the sentence imposed for stalking - the conduct which formed the basis of the stalking charge including the installation of the tracking device, such that a cumulative sentence resulted in the applicant being punished twice for the same conduct.

Decision and Reasoning: Leave was granted and the appeal was upheld.

The Court noted the ‘complexities’ involved in this issue and found it was not necessary to be resolved directly because of the application of the ‘common elements principle’ which states ‘when two offences of which an offender stands convicted contain common elements... it would be wrong to punish that offender twice for the commission of the elements that are common’ (see, for example *Pearce v The Queen* (1998) 194 CLR 610). This principle applied directly to this case. The facts indicated that the conduct which formed the basis of the tracking device charge was the same conduct, ‘which was part of the conduct relied upon to support the stalking charge’ (see at [40]). This falls directly within the common elements principle.

The Court found that there was a substantial miscarriage of justice caused by this error. The application of the common elements principle means that there could have been no additional punishment for the unlawful installation of the tracking device. As such, the 4-month sentence for the surveillance device offence was made concurrent, which resulted in the overall sentence being reduced to 12 months.