

On 4 February 2015 Estcourt J sentenced the respondent, Benjamin Bakes, to imprisonment for five months, wholly suspended for two years. On 7 October 2015 I sentenced the respondent to imprisonment for six months wholly suspended for two years. Both sentences were subject the condition that during the period of suspension the respondent commit no offence punishable by imprisonment. In each case, the respondent admits that the condition has been breached and the State now applies for orders pursuant to the *Sentencing Act*, s 27. The effect of that provision is that I must activate each sentence unless I am satisfied that it is unjust.

The sentence imposed by Estcourt J was for the crime of unlawfully setting fire to property committed some time prior to 15 October 2014. In his sentencing remarks his Honour referred to the respondent's life being at a turning point following a long history of abuse of drugs, and the opportunity for rehabilitation following a period of abstinence while in custody. His Honour then commented. "if he relapses into drug use he will be required to serve the sentence". After the sentence was imposed Mr Bakes committed further offences. On 13 January 2015 a family violence order was made to protect his partner and their infant son. A condition of the order was that he not go to any house in which she was living or damage her property. In breach of that order he, at her invitation, lived with her at her home in Ulverstone between 14 April 2015 and 6 September 2015. Eventually, she asked him to leave. She allowed him to stay another night on 20 September 2015. On this occasion they argued and he punched several holes in the plaster wall and the bedroom door.

The sentence I ordered was for a common assault committed by the respondent on 13 July 2014. It was an unprovoked assault by repeated blows which caused facial fractures to the victim which required surgery. The sentence was imposed on 7 October 2015 after a successful Crown appeal against a sentence imposed by a magistrate. By then the respondent was already subject to the earlier suspended sentence. About three weeks later the respondent failed to appear in court in answer to his bail. Then, in November and December 2015, more offences were committed. On 29 November 2015 he again went to his former partner's home in breach of the family violence order. She acquiesced in his presence but had not invited him. On 2 December 2016 he was seen riding a motor cycle in the grounds of the Ulverstone High School. He had no driver licence, and the motor cycle was unregistered and uninsured. When the police arrived he accelerated away to avoid interception. They followed but he evaded them by riding off through parkland. Four days later, on 6 December 2015, the respondent went back to his partner's home, this time waiting in a car outside. When his partner saw him and called the police he fled on foot, but was arrested hiding in the backyard of a nearby house. He was searched and found with two valium tablets, a syringe, three bags each containing 20 grams of morphine powder and other snap lock bags. He admitted to the police he had been using morphine by injecting it and intended to use the drugs he still had.

All of the offences to which I have referred are punishable by imprisonment and breach the sentence imposed by Estcourt J. Those committed after 7 October 2015 breach the sentence I imposed. On 26 February 2016 the respondent was sentenced by a magistrate to imprisonment for three months from 5 December 2015 for these summary offences charged across three complaints. He was also ordered to serve yet another suspended sentence, a sentence of one month, imposed by a magistrate on 2 March 2015. He completed those sentences and was released from custody on 4 March 2016.

The respondent is now 25. I have extracted much of the following summary of his background and record from my earlier decision. He now has six children. The three youngest are from his relationship with the partner to whom I have already referred. His upbringing was dysfunctional. His childhood was marred by the suicide of his father, and violence and alcohol abuse at home. He is of low intelligence. He suffered a brain injury in a motor cycle accident when he was 8. He lived on the streets from about age 12. Since then his life has been characterised by abuse of alcohol and illicit drugs, including morphine and methylamphetamine. His abuse of drugs is reflected in his bad record of offending. As a youth he committed many offences, including common assaults, for which he was given actual and suspended detention. As an adult his offending continued. On 30 April 2010 he was sentenced to imprisonment for eight months, partly suspended, together with community service and probation, for numerous summary offences including three counts of common assault. On 18 May 2010 he was sentenced to a further eight months' imprisonment, to be served cumulatively, for a *Criminal Code* assault committed on 6 July 2009. When sentencing the respondent on that occasion the learned sentencing judge referred to the respondent's tendency for violence. Imprisonment did not deter the respondent from continuing to offend. On 20 March 2013 a magistrate made a drug treatment order with a custodial part of 12 months for more than 50 summary offences, including six common assaults committed between January 2009 and June 2012. There were problems with his compliance with the order because a fresh drug treatment order was made for the same offences in the same terms on 21 August 2014. That order did not remain in place for long. He re-offended and the order was cancelled on 15 October 2014. He was required to serve seven months of the custodial part of the sentence, as well as a cumulative period of two months for the new offences.

In summary, even before the offences directly relevant to this application, the respondent had a bad record for violence over a long period. He had already had the benefit of suspended sentences without apparent effect and has served many sentences of actual imprisonment. He is no longer entitled to any lenience.

Ordinarily, suspended sentences are meant to be a last chance, and the clear starting point is that the sentences should be activated. The respondent submits however that activation of both sentences would be unjust. There are two principal grounds for that submission. The first is that, having regard to the nature and circumstances of the offences for which the sentence was originally imposed, and the nature and gravity of the breaches, activation of the suspended sentence would be a disproportionate response. The second factor concerns the history of his custody and this application. There is some merit in both arguments, but not so much as to persuade me that activation of both sentences is unjust.

As to the first contention, whilst there is some difference in the nature and gravity of the offending, the suspended sentences seem to have had little, if any, deterrent effect. In each case the respondent committed further offences a short time after the suspended sentence was imposed. The respondent did not take the opportunity for reform which suspension of the sentences was intended to permit, and has displayed a continuing disregard for the law and for authority. He repeatedly breached the court order. It was submitted that the person to be protected by that family violence order either agreed or acquiesced in the breaches. I give that little weight. It was for the respondent to comply with the order. Sometimes orders are made to protect people from themselves. The most recent offences indicate a return to drug use and drug-related offending.

As to the second aspect of the respondent's submissions, these applications could have been made much more promptly than they were. The effect of the delay is that the respondent has completed the sentence of imprisonment imposed for the breach offences and been released. He now faces the prospect of being returned to custody. He says that in the meantime he has started to get his life back together. He is living with his mother. Fearful that his former partner is not adequately caring for his children, he has assumed care of one of them. He is organising independent housing for himself. He claims to have been abstinent from drugs. However, similar submissions have been made on his behalf over many years. He has never sustained any attempt at rehabilitation despite the many opportunities offered to him. Enough is enough. I am not satisfied that activation of the sentences is unjust. I think the potential for injustice arising from his re-incarceration after release should be dealt with by ordering that the sentences be served partly concurrently and not cumulatively, even though they all arise from quite separate criminality.

For those reasons I make the following orders:

- 1       The application is allowed.
- 2       The sentence of 5 months' imprisonment ordered by Estcourt J on 4 February 2015 is activated and is to be served from 21 June 2016.
- 3       The sentence of 6 months' imprisonment ordered by me on 7 October 2015 is activated and is to be served. I order that 3 months of that sentence be served concurrently with the sentence just ordered.