

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *R. v. Melvin*, 2010 NSCA 5

**Date:** 20100129

**Docket:** CAC 312539

**Registry:** Halifax

**Between:**

Cory Patrick Melvin

Appellant

v.

Her Majesty the Queen

Respondent

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**Judge:** The Honourable Justice Nancy Bateman

**Appeal Heard:** January 28, 2010

**Subject:** Appeal pursuant to s.839 of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46 from dismissal of appeal from Summary Conviction Appeal Court on fitness of sentence.

**Summary:** The offender was sentenced to sixty days' incarceration, to be served intermittently, followed by two years' probation with conditions on two convictions for failing to respond to compliance checks in relation to a curfew, contrary to s.145(3) of the **Criminal Code**. He unsuccessfully appealed to the Summary Conviction Appeal Court alleging that the sentence was unfit.

**Issue:** Was there merit to the further appeal?

**Result:** Without determining whether fitness of sentence is an error of law (as is required on a s.839 appeal), the appeal was dismissed. The summary conviction appeal court judge (SCACJ) applied a deferential standard of review to the sentence, as is the law. He found that the sentencing judge did not err in principle, fail to

consider a relevant factor or overemphasize irrelevant factors. The SCACJ correctly concluded that the sentence imposed was well within the range of sentencing options. Accordingly, neither the SCACJ nor the sentencing judge erred.

**This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 4 pages.**

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**Judges:**

MacDonald, C.J.N.S.; Bateman and Oland, JJ.A.

**Appeal Heard:**

January 28, 2010, in Halifax, Nova Scotia

**Held:**

Appeal dismissed per reasons for judgment of Bateman, J.A.; MacDonald, C.J.N.S. and Oland, J.A. concurring.

**Counsel:**

Warren K. Zimmer, for the appellant  
Mark A. Scott, for the respondent

**Reasons for judgment:**

[1] Cory Patrick Melvin appeals his sentence resulting from a guilty plea to two counts of failing to respond to compliance checks in relation to a curfew, contrary to s.145(3) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46. The sentencing judge ordered sixty days' incarceration, to be served intermittently, followed by two years' probation with conditions.

[2] Mr. Melvin was unsuccessful on his appeal to the Summary Conviction Appeal Court, alleging that the sentence was unfit (reported as **R. v. Melvin**, 2009 NSSC 152). His further appeal to this Court pursuant to s. 839 of the **Criminal Code** requires leave and must raise a question of law:

839. (1) Subject to subsection (1.1), an appeal to the court of appeal as defined in section 673 may, with leave of that court or a judge thereof, be taken on any ground that involves a question of law alone, against

(a) a decision of a court in respect of an appeal under section 822;

...

[3] The circumstances giving rise to the sentence are straightforward. Mr. Melvin was subject to an undertaking with various conditions, including a curfew and a term requiring him to prove compliance with the curfew. On both the 21st and the 28th of June, 2007 he failed to attend at the front entrance of his residence when the police made a routine check. It is unknown whether he was elsewhere or at home but ignoring the contact.

[4] Mr. Melvin admitted to three prior convictions as a young person, dating back to 2002. He had been sentenced as an adult to 14 days intermittent time for a breach of a Release Order condition in 2004. At the time of that sentence he was serving a six month deferred sentence for trafficking in an illegal substance.

[5] On the two counts which are the subject of this appeal Mr. Melvin requested either a conditional sentence of imprisonment or 15 to 20 days' incarceration, to be served intermittently. The Crown urged 30 to 60 days' incarceration, straight time.

[6] Mr. Melvin sought bail pending appeal pursuant to s. 679(1)(b) of the **Criminal Code**. The granting of leave to appeal is a prerequisite to bail. Pursuant to **Civil Procedure Rule** 91.24 the motion for leave is made to a judge of the Court of Appeal in conjunction with the request for bail. Here, the Crown consented to both leave and release on conditions. Mr. Melvin was granted bail. Consequently, the question of leave is not before us.

[7] However, the Crown says the appeal is not properly before the Court because “fitness of sentence”, assuming the sentence is not an illegal one, does not raise a question of law alone. We would agree with the Crown that the weight of authority appears to support this submission. However, it is unnecessary to conclusively determine that issue here.

[8] It is our unanimous view that, even if a question of law is raised by challenging the fitness of sentence, the appeal is entirely without merit. Mr. Melvin says that the summary conviction appeal court judge (SCACJ) erred by dismissing the appeal in the face of an unfit sentence imposed by the sentencing judge.

[9] The SCACJ applied a deferential standard of review to the sentence, as is the law. He found that the sentencing judge did not err in principle, fail to consider a relevant factor or overemphasize irrelevant factors. The sentencing judge had rejected the defence request for a conditional sentence, finding it to be an inappropriate disposition where the offences sentenced arose from a failure to comply with release conditions. He was then left with the options of straight or intermittent time. He chose an intermittent sentence of 60 days to accommodate Mr. Melvin’s part-time employment, followed by a two year period of probation. We would agree with the SCACJ that the sentence imposed was well within the range of sentencing options. Accordingly, neither the SCACJ nor the sentencing judge erred.

[10] The appeal is dismissed.

[11] Although dismissing the appeal we would respectfully not necessarily endorse the *obiter* comments of the SCACJ at para 28 of his reasons.

Bateman, J.A.

Concurred in:

MacDonald, C.J.N.S.  
Oland, J.A.