

THE HIGH COURT

JUDICIAL REVIEW

[2005 No. 50 JR]

BETWEEN

GARETH MCCARTHY

APPLICANT

AND

JUDGE PATRICK BRADY, JUDGE OF THE DISTRICT COURT

RESPONDENT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

Judgment of Mr. Justice de Valera delivered on the 30th day of July 2007

Following submissions made on 12th January, 2007 it has been agreed between the parties that two matters remain to be decided in respect of this application.

These are:-

1. The period of suspension imposed in this matter should not exceed the term imposed unless there are stated special reasons, and a factor of twelve is not proportionate

and

2. A thirty six month period of suspension exceeds the summary jurisdiction of the District Court.

1. The period of suspension should not exceed the terms imposed unless there are stated special reasons and a factor of twelve is not proportionate

The only authority cited to me in respect of this proposition is the unreported decision of the *People (D.P.P.) v. William Hogan* (Unreported, Court of Criminal Appeal, 4th March, 2002).

This decision suggests that it is within the jurisdiction of, in this case, the District Court to suspend a sentence for a longer period than the sentence actually imposed, that is to suspend for thirty six months a three month sentence as in the instant matter.

However the learned presiding judge, Keane C.J., went on to state:-

"The court does not want to lay down any hard and fast rule in relation to this. It may be possible to envisage circumstances in which that is an appropriate course, namely, to suspend the sentence for a longer period than the sentence actually imposed. But it would need special circumstances because after all, a person who is the subject of a suspended sentence and then spends three years or whatever period it is without getting into any trouble of any sort with the law and takes the chance that he is being offered by the court and honours, as it were, that chance that he is being given, is entitled, in general terms, to have a line drawn under the matter at that stage. The court is not satisfied that, in general, it is a desirable practice to do what was done in this case and suspend it for a longer period than the actual term imposed."

It is accepted that no "special circumstances" were specified by the learned District Court Judge in the instant case.

It is also accepted, and relied upon by the respondent, that the applicant did not appeal the decision of the learned District Court Judge though it was open for him to appeal.

I am satisfied that I should follow the reasoning and conclusions set forth in the *Hogan* case as set out above, as being a correct statement of the law. But I am also satisfied that, by failing to exhaust all the remedies open to him, the applicant is not entitled to have the decision of the District Court Judge judicially reviewed.

2. A thirty six month period of suspension exceeds the summary jurisdiction of the District Court.

No authority has been submitted to me, by either party, in respect of this contention. It appears to me that the conclusion reached by the learned author (at p. 457) of *O'Malley Sentencing Law and Practice* 2nd Ed., (Dublin, 2006) that a suspended sentence may validly be treated as punitive, is logical and a proposition with which I should adopt.

I also note, and approve, the same learned author's conclusion that where a suspended sentence is to be re-activated it must be re-activated in its entirety. This would lead therefore, in this matter, that the applicant having to serve the final three months of his sentence if this was activated at any time within the thirty six month suspension period. If, for the sake of argument, the sentence was re-activated in the thirty fifth month of the suspension period, the applicant would have served the initial nine months (less any remission) then after a period of a further thirty five months serve a further three months (less remission) a period from commencement to finality of an excess of forty three months – assuming, as I do, that the intervening period of thirty five months between release and re-activation is a period which because of the punitive element of the suspensory process should be taken into consideration. However, again because of the applicant's failure to appeal and therefore exhaust the remedies available to him, I do not accept that the applicant is entitled to have the decision of the learned District Court Judge judicially reviewed.