Common Law Division
Supreme Court
New South Wales

Case Name:	State of New South Wales v Carr
Medium Neutral Citation:	[2020] NSWSC 643
Hearing Date(s):	26 May 2020
Date of Orders:	26 May 2020
Date of Decision:	26 May 2020
Jurisdiction:	Common Law
Before:	Hamill J
Decision:	Pursuant to s 13(1) of the Crimes (High Risk Offenders) Act 2006 (NSW) the extended supervision order made by Hall J on 14 August 2009 is revoked.
Catchwords:	CIVIL LAW – high risk offender – revocation of extended supervision order – 5 year order still in force after 11 years – Aboriginal offender – proud Wiradjuri man – mild intellectual disability – no serious offence in 19 years – where repeated minor breaches result in incarceration – smoking cannabis – breaching curfew – multiple gaol sentences imposed – punitive impact of ESO – protective purpose not served – counterproductive to rehabilitative purpose – failure toppling successes – Steinbeck – change of circumstances – ESO no longer necessary – order revoked
Legislation Cited:	Crimes (High Risk Offenders) Act 2006 (NSW), ss 10,13 Crimes (Serious Sex Offenders) Act 2006 (NSW) Crimes Act 1900 (NSW) Crimes Act 1914 (Cth), s 20
Cases Cited:	R v Wilhem [2010] NSWSC 378 State of New South Wales v Bugmy [2017] NSWSC 855 State of New South Wales v Carr [2014] NSWSC 1348

Texts Cited:	John Steinbeck, *The Grapes of Wrath* (William Heinemann Ltd, 1939) chp 25
Category:	Principal judgment
Parties:	State of New South Wales (Plaintiff) Darryl Edward Carr (Defendant)
Representation:	Counsel: D New (Plaintiff) Solicitors: Crown Solicitors Office (Plaintiff) R McMillan, Legal Aid Commission (Defendant)
File Number(s):	2009/294569
Publication Restriction:	Nil

EX TEMPORE JUDGMENT (REVISED)

1 **HAMILL J:** Darryl Carr is a proud Wiradjuri man. He has ambitions to be an artist, and has strong cultural ties to his community. He has a mild intellectual disability. Mr Carr has spent the vast majority of his adult life in prison. Most of the time he has been locked up is not referrable to any heinous crime he has committed, but has been because he failed to comply with the strictures of an extended supervision order ("ESO") imposed under the *Crimes (High Risk Offenders) Act 2006* (NSW) or its predecessor. Some of these breaches involve using illegal drugs, others involve breaches of curfews, schedules of movements and accommodation conditions. These were described by the author of a risk assessment report as "technical" breaches. None involve the commission of violent or sexual offences.

2 In 2014, when I was asked to make some variations to the conditions of the pre-existing ESO, I suggested that the operation of the ESO in Mr Carr's case had been punitive.[1] By way of one singular example, Mr Carr had been locked up for smoking cannabis, not because anybody charged him with such an offence; such offences are almost never prosecuted,[2] but because his use of drugs, disclosed by compulsory testing, constituted a breach of one of the scores of conditions of his ESO. On other occasions, he has been sentenced to prison for failing to comply with his movement schedule or breaching a curfew. With one exception, every item on his criminal history since his release involves a breach of the ESO. He has committed no other serious offences.

3 In the result, since he completed the non-parole period for the terrible crimes he committed when he was a 16 year old he has been in custody for around 10 or 11 years of the 16 years that have passed by. In all of that time he has committed no serious offence, or serious indictable offence, as those phrases are defined in the *Crimes Act 1900* (NSW) (and incorporated into the *Crimes*

[1] *State of New South Wales v Carr* [2014] NSWSC 1348 at [8].
[2] *State of NSW v Carr* at [9]; *R v Wilhem* [2010] NSWSC 378 per Howie J at [12], [27]-[28] and [37]-[38].

(High Risk Offenders) Act). He has committed no act of violence of which I am aware, let alone any act of sexual violence.

4 Whilst this is a matter of dispute, it seems like nothing much changed after the case was before me in 2014. What I had before me was an application by the State to vary the ESO, including by the reintroduction of electronic monitoring. I refused to reintroduce electronic monitoring. Rather, I insisted upon the parties fashioning different and more simple conditions that may be easier for Mr Carr to understand and comply with. I made what I thought were fairly pointed observations as to the way in which the order was being administered. Of particular concern was the alacrity with which relatively minor breaches were dealt with by criminal punishment (that is, incarceration), a lack of engagement with culturally appropriate programmes given Mr Carr's clear identification with his indigenous heritage, and the isolation of Mr Carr from his family, especially his mother. Overall the concern was that the order was having a punitive, rather than a protective or rehabilitative, impact.

5 It is difficult to be critical of the staff who administer these orders. It is an extremely difficult job, and involves balancing the community's interest in being protected from violent offenders with the rights of an individual citizen who has served their sentence but who remains on a strict regime of supervision. Even so, it is hard to escape the conclusion that much, if not all, of what I said in 2014 fell on deaf ears. Lawyers and courts called upon to fashion conditions for orders under the *Crimes (High Risk Offenders) Act*, and those with the difficult task of administering and enforcing such conditions, would do well to recall the important words of Fullerton J in *State of New South Wales v Bugmy* [2017] NSWSC 855. Her Honour said (at [89] with citations omitted):

> "The conditions must not be unjustifiably onerous or simply punitive. Neither may they simply be an expression of state paternalism or imposed to meet what might be thought to be the public interest, in some generalised sense, or because they might be convenient or resource sufficient means of the department exercising supervision under an extended supervision order."

6 Since October 2014, Mr Carr has been sent to gaol on about 10 occasions, involving more than 20 breaches of the conditions attached to the order. None of the breaches involved the commission of any serious crime. Most involved drug use or failing to comply with reporting and curfew conditions. On only one occasion in that time has he committed a criminal offence not associated with the ESO. This involved using a carriage service to menace or harass a former girlfriend. For this offence he was sentenced to imprisonment, but placed under a bond under s 20(1)(b) of the *Crimes Act 1914* (Cth).

7 Ms McMillan of the Legal Aid Commission appeared for Mr Carr at the hearing today. As she submits, there is very little evidence of the Department exercising any real discretion or restraint in enforcing the conditions. It has been rare that it has elected not to prosecute these breaches or to attempt to manage Mr Carr in a more sensitive way. As Ms McMillan says, Mr Carr has spent about two-thirds of the last decade in custody for breaches of the ESO.

8 Having said that, I accept the State's submission that there is some evidence of a more restrained or sympathetic approach, involving the exercise of discretion not to prosecute in the course of a number of breaches, and repetitive breaches, in 2015 through to 2017.

9 The State now seeks to revoke the ESO on the ground that Mr Carr no longer presents an unacceptable risk to the community. In doing so, it reminds me of the statutory test to be employed when making orders under the Act. The existing ESO made by Hall J in 2009, for a period of 5 years, is still current, 11 years later, because each time Mr Carr has been incarcerated for breaching the order the ESO is suspended, in accordance with s 10(2) of the *Crimes (High Risk Offenders) Act*. As things stand, and in the absence of its revocation, the order will remain in force until at least 2021.

10 However, on the evidence now before the Court, and based on the joint position of the parties, I propose to make an order revoking the ESO. That order will be effective immediately after I conclude delivering this judgment.

11 Mr Carr is currently in gaol. He is in gaol for a breach of the ESO. There are no surprises there. The breach involved the use of methylamphetamine. As I noted in my judgment in 2014, Mr Carr became addicted to hard drugs in 2012, when he was in custody serving a sentence for breaching the ESO by failing to comply with the residential condition and breaching a curfew. For that crime he was sentenced to 15 months imprisonment and a non-parole period of 8 months. Some eight years later, it seems Mr Carr is still using methylamphetamine. One of the authors of the some of the reports, referred to below, indicated that this drug taking does not seem to have any association, in Mr Carr's case, with a violent disposition or sexually deviant behaviour.

12 Having discovered evidence of the use of amphetamine on 21 January 2020, those administering the ESO arranged for Mr Carr to be charged with breaching the conditions of the order. He was sentenced to 4 months gaol, and is due to be released on 29 May 2020, that is, in 3 days' time.

13 When he is released Mr Carr, having just celebrated his 35th birthday in custody, will be a truly free man for the first time since he was 16 and sentenced to a minimum period of 4 years gaol, only to be denied parole and serve the full 8 years of the sentence imposed on him.

14 The history I have recounted, which is by no means comprehensive, is reminiscent of Steinbeck:

> "There is a failure here that topples all our successes".[3]

15 On the hearing of the application I received a bundle of evidentiary material from both parties, and extremely helpful written submissions from Ms McMillan and Ms New of Counsel, who appears for the State. The State read two affidavits of Briony O'Loughlin, exhibiting various documents. Ms McMillan read an affidavit of Diane Elston, Mr Carr's solicitor, and various annexures. It is unnecessary to provide all of the detail of this material, but it

[3] John Steinbeck, *The Grapes of Wrath* (William Heinemann Ltd 1939) chp 25.

is important to provide a brief history of the matter before returning to where things stand now.

16 When Mr Carr was 16 years old he committed three very series sexual offences. Two of these related to a 13 year old girl who he and a co-offender sexually assaulted a number of times, after they broke into her home. The third sexual offence, committed at a separate time and place, involved aggravated sexual offending against his uncle, including the infliction of actual bodily harm. Because of the seriousness of the offending, and in spite of his age and intellectual disability, the case was dealt with at law.

17 On 28 February 2002, Mr Carr was sentenced in the District Court by his Honour Judge Woods QC. In relation to each of the sexual offences he was sentenced to 8 years imprisonment, commencing on 5 June 2001, with a non-parole period of 4 years. At the same time he was sentenced to 6 years with a non-parole period of 3 years, for an associated break and enter offence. All of the sentences were ordered to be served concurrently, and the non-parole period was due to expire on 4 June 2005.

18 While he was eligible for consideration of release to parole at the conclusion of the non-parole period he was not in fact released until the expiration of the entire sentence. In other words, in spite of the intention of Judge Woods in finding special circumstances, and making a substantial adjustment to the length of the non-parole period, the young offender served the whole of the total sentence imposed by Judge Woods in custody. It is inappropriate for me to gainsay the decision-making process that led to that outcome, and I will say no more about it. However it was the first of many administrative decisions that have meant that there appears to have been sparse focus on the rehabilitation of this man, while the State's actions have consistently resulted in him being punished by incarceration for relatively minor, if repeated, misconduct.

19 Prior to his release in 2009 a number of interim orders were made under the *Crimes (Serious Sex Offenders) Act 2006* (NSW), the precursor to the current

legislation. The State sought an ESO under that Act. Mr Carr was released from gaol on 4 June 2009. The final hearing of the application for an ESO came before Hall J on 12-13 August, and an ESO was made on 14 August 2009, for a period of 5 years. That order remains in force, 11 years later.

20 Returning to material tendered by the parties on the present application, I can summarise the relevant material quite briefly. As I have said more than once, Mr Carr has committed no serious offence or serious indictable offence since he was 16 years old. That is a period of 19 years. Risk assessment reports, risk management reports and an ESO completion report, all prepared over the last few years, provide a mixed review of Mr Carr's performance under the ESO. However ultimately they support the proposition that he does not now present a high risk of sexual offending.

21 The reports place some emphasis on the many occasions that Mr Carr has breached the order. Some describe his engagement as superficial, and note his obvious abuse of or addiction to hard drugs. Little emphasis is placed on the reasons for his conduct, his frustration at the strictures of the ESO, the fact that his drug use escalated while in prison serving a sentence for breaching the ESO, or his need for culturally appropriate interventions and programmes. I should note that Ms New, on behalf of the State, indicates that this last proposition, which finds support in some of the material in the volumes, is disputed by the Department. It is said that there were attempts to find culturally appropriate or sensitive programmes. In any event, the impact on the ESO, based on the material before me and the opinions expressed by the various authors of reports, has been detrimental to Mr Carr's re-engagement in the community.

22 Over the 11 years he has been subject to the 5 year ESO, Mr Carr has repeatedly demonstrated resistance to and resentment of the involvement of the Department in controlling his life and movements. Some of these incidents were set out in my 2014 judgment. For example, at [16] and [17], I recorded the fact that he had said to those administering the order, "Fuck off, I don't want you in my face every day. I just want to be left alone with my

people", and "Fuck the community compliance group. They just want to lock me up", and something to the effect that the community compliance group were putting too much pressure on him. In spite of the fact that Mr Carr had committed no serious offences since 2001, and my words of encouragement in 2014, the Department appeared to contemplate applying for a continuing ***detention*** order in 2016. How anybody could have considered that to be an appropriate response to the circumstances is astonishing. It appears, with respect, to be no more than what Fullerton J described in *Bugmy* as a "convenient or resource efficient means of the department exercising supervision".

23 Mr Ardasinski, who prepared a risk assessment report in contemplation of that application, seems, implicitly at least, to have shared my bewilderment. He said, amongst other things, that:

> "Mr Carr falls in either the Medium or High risk categories for sexual reoffending compared with other male sexual offenders; however his situation is novel in that he has not committed any sexual offences as an adult. His entire adult criminal history consists of Failures to Comply With The Conditions of his ESO. Aside from technical breaches, he has not demonstrated any specific behaviour whilst under supervision which appears to closely parallel his offence pathways in 2001."

24 He went on to say that if Mr Carr were subject to a continuing detention order the mitigation of future risk would be enhanced, firstly through his incapacitation, by which I take to mean incarceration in the custody of Corrective Services New South Wales. He also said that if he was in custody he may be able to engage in sex offender programs. He said the only foreseeable benefit to Mr Carr being detained under an ESO would be that he appeared better able to cope with life in prison since that is what he knows best having spent the majority of his young adult life in custodial settings. Later he provided an assessment of the overall risk, which he assessed to be "medium".

25 Mr Ardasinski, in a report prepared in June 2019, concluded that:

> "Taking into consideration dynamic factors predictive of sexual violence specifically Mr Carr could not be said to pose a high risk of sexual reoffending anymore".

26 While an "actuarial measure of static risk" placed Mr Carr in the high risk category, Mr Carr's case, according to Mr Ardasinski, is "relatively unique in that he has never committed any form of sexual assault as an adult". This comment echoes those in the earlier report to which I have referred.

27 A risk management plan prepared on 23 July 2019 referred to Mr Carr as being at a high risk for general reoffending without clarifying what that expression means. It referred without comment to Mr Ardasinski's opinion of 21 June 2019 that Mr Carr, "does not pose a genuinely high risk of sexual reoffending relative to other male sex offenders". The management plan then detailed had little to commend it in terms of a sensitive response to Mr Carr's unique situation or in terms of the provision of culturally appropriate interventions or programs. Again, I note that the Department contests this.

28 The ESO completion report dated 9 February 2020 noted that while Mr Carr had committed no new offences, and one might have emphasised no violent or sexual offences at all, whilst subject to the ESO, he had been returned to custody 16 times during the currency of the ESO. Again, Mr Ardasinski's assessment that he no longer poses a high risk of sexual reoffending was reproduced without comment. There is a reference to the Department approaching the matter differently in future by employing "a discretionary reduction of punitive consequences of breaches of his ESO". It was acknowledged that this may help him complete the balance of the ESO. Why such an approach had not been taken much earlier is and remains unexplained.

29 Some of the reports suggest that the impact of the order and the way it is being enforced may be counterproductive to Mr Carr's rehabilitation. I am quite sure that it has been.

30 Section 13(1) of the *Crimes (High Risk Offenders) Act* provides that the Supreme Court may at any time revoke an ESO. Without limiting the grounds upon which such action may be taken, s 13(1B) provides that revocation may occur if the Court is satisfied that "circumstances have changed sufficiently to render the order unnecessary." I am satisfied that the circumstances have changed in two significant ways.

31 First, the risk assessments no longer establish or suggest that Mr Carr represents a high risk of reoffending. His lack of any sexual offences in almost 20 years is a good indicator of that. The experts who have assessed him have not been struck by any sexual preoccupation expressed by him. I am satisfied that the order, as it presently stands, is serving little or no protective purpose.

32 Second, it is now clear that the impact of the order resulting in Mr Carr's repeated incarceration for relatively minor infractions and his consequent institutionalisation is adversely impacting on his prospects of rehabilitation. Neither the primary nor the secondary objectives of the legislation are being served by this order remaining in place.

33 For those reasons I make the follow order:

(1) Pursuant to s 13(1) of the *Crimes (High Risk Offenders) Act 2006* (NSW) the extended supervision order made by Hall J on 14 August 2009 is revoked.

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I certify that this and the preceding 10 pages are a true copy of the judgment of Justice Peter Hamill

[redacted]

Associate to Justice Peter Hamill