

same sentence imposed upon the defendant" in the other case. The motion emphasized that the victim in the other case was six years old, with the inference that that crime was more serious. The superior court heard argument on and denied the motion, and reserved and transferred the defendant's exception.

The defendant's contention is simply that all persons convicted of a particular crime must receive the same sentence. This has never been the law. Even if the crimes were identical, the defendants may not be. *State v. Streeter*, 113 N.H. 402, 308 A.2d 535 (1973). Implicit in the defendant's argument is a challenge to the fairness of his sentence considered by itself. This challenge may be addressed to the review division of the superior court. RSA 651:57 *et seq.*; Laws 1975, ch. 267. RSA 651:58 I requires applications for review of sentence to be filed within thirty days after sentencing, except for good cause shown. Such cause exists here because having seasonably pursued his pending appeal the defendant should now be entitled to apply to the review division. Therefore this appeal is dismissed to allow the defendant to pursue his statutory remedy.

Dismissed without prejudice.

Hillsborough
No. 7169

ANDREW J. DOW v. BENJAMIN ELECTRIC COMPANY

BENJAMIN ELECTRIC SUPPLY CO. v. ANDREW J. DOW

September 30, 1975

George J. Basbanes, by brief and orally, for Andrew J. Dow.

Paul A. Rinden and *Jay M. Niederman* (Mr. Niederman orally) for Benjamin Electric Supply Co.

GRIMES, J. The issue in this case is whether the evidence compelled a verdict in favor of Andrew J. Dow in his cross action against Benjamin Electric Company. We hold that it did not.

In December 1966, Benjamin Electric Supply Co., named as Benjamin Electric Company in Dow's writ and hereinafter referred to as Benjamin, entered into a written contract to install insulation in a house being built by Dow who acted as general contractor. Benjamin also agreed to supply other items. The contract specified that the insulation in the sidewalls would be covered with polyethylene, a vapor barrier. No such specification was included for other areas. It was specified that the work was to be completed in a workmanlike manner according to standard practices.

After completion of the house in March 1969, and the refusal of Dow to pay a \$561.61 balance, Benjamin brought suit. Dow brought a countersuit against Benjamin claiming damages for negligent failure of Benjamin to perform in a workmanlike manner. This was based on a failure to install a vapor barrier in the ceiling of the basement. Only the case of *Dow v. Benjamin* was tried, it being agreed that there was a balance of \$561.51 due on the contract if it was not eliminated by a verdict in the cross action.

The trial court found for Benjamin and returned verdicts accordingly. Dow's exceptions were transferred by *Flynn, J.*

The sole question is whether the evidence compelled a finding in Dow's favor. He had the burden of proof on his claim, "and we must view the evidence most favorably to the defendant . . ." *Sindorf v. Dow*, 112 N.H. 114, 116, 289 A.2d 394, 395 (1972); *Bothwick v. LaBelle*, 115 N.H. 279, 339 A.2d 29 (1975). No vapor barrier for the ceiling of the cellar was specified in the contract, but it is argued that standard practice would require one. The evidence did not compel such a conclusion. There was evidence to the contrary where as here the basement was not to be lived in. Nor does the evidence compel a

finding that the damage claimed (rusting of tools, mildew on clothes, buckling of floors, etc.) was caused by the absence of such a barrier.

Judgment on the verdicts.

All concurred.

Hillsborough
No. 7178

STATE OF NEW HAMPSHIRE

v.

PAUL LAVALLEE

September 30, 1975

Warren B. Rudman, attorney general, and *Edward N. Damon*, attorney, by brief, for the State.

Edward R. Thornton, Jr., and Paul Lavallee, pro se, by brief, for the defendant.

MEMORANDUM OPINION

The defendant was found guilty of aggravated assault by a jury in May 1974 and was sentenced to a term of three to six years in the New Hampshire State Prison. In June 1974, the de-