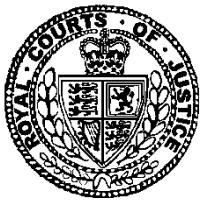
IN THE COURT OF APPEAL

CRIMINAL DIVISION



Neutral Citation Number:

[2023] EWCA Crim 1685

CASE NOs 202201715/B5 & 202201716/B5

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday, 1 December 2023

Before:

LORD JUSTICE WILLIAM DAVIS
LADY JUSTICE WHIPPLE DBE
HIS HONOUR JUDGE WATSON
(Sitting as a Judge of the CACD

REX
V
THOMAS MOORE

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
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The Appellant appeared in person
MISS A BOND appeared on behalf of the Crown

J U D G M E N T

1. LORD JUSTICE WILLIAM DAVIS: On 3 May 2022 in the Crown Court at Preston, Thomas Moore pleaded guilty to two counts of breach of a Sexual Harm Prevention Order and one count of failure to comply with notification requirements. He was sentenced to a period of nine months' imprisonment. With the leave of the single judge he appeals against his conviction. The single judge refused him leave to appeal against sentence. Mr Moore in writing has renewed his application for leave to appeal against sentence. At the moment we do not need to consider that. Sentence will be of no significance should we accede to his appeals against conviction.
2. Although granted a representation order, the appellant is unrepresented. Counsel, Ms Farhad Arshad, was assigned by the registrar and lodged a skeleton argument. She then withdrew because there was a breakdown in her relationship with the appellant such that effective representation could not be provided. The same thing happened with new counsel that was assigned thereafter. The appellant has submitted a skeleton argument of his own. A significant part of that document consists of the argument prepared by Ms Arshad. Indeed her signature still appears at the end of it.
3. The factual position is relatively straightforward. On 18 July 2017 at Minshull Street Crown Court in Manchester the appellant was convicted of making indecent photographs of children. He was sentenced on 8 September 2017. He was conditionally discharged for two years. A Sexual Harm Prevention Order was imposed. The duration of that order was five years. The appellant was also subject to notification requirements. Those requirements could only be extant for the period of the conditional discharge. The Sexual Harm Prevention Order prohibited the appellant from using any device capable of accessing the internet unless he made the device available on request for inspection by a police officer.

4. On 16 November 2021 police went to the appellant's home and asked him to provide devices for inspection pursuant to the conditions of the Sexual Harm Prevention Order. The appellant provided one mobile telephone. The police went upstairs where they found another mobile telephone. According to them the appellant refused to give the officers the PIN number for one of the telephones. He offered to enter the PIN himself but the officers apparently were concerned he might delete data on the handset before giving it to the officers.
5. Also at the appellant's home was a Capital One credit card. The notification requirements which had been put in place in September 2017 required him to notify police within three days of the issue of any credit card. The credit card had not been registered with the police.
6. The appellant appeared at the Magistrates' Court on 19 November 2021. He was sent for trial to the Crown Court sitting in Preston. Thereafter he appeared at the plea and trial preparation hearing and pleaded not guilty. His case was adjourned for trial. He provided a defence statement in which he set out his defence, namely that he would have produced all the devices had he been given an opportunity to do so. He was only not willing to give the police his PIN number because he was given no assurances as to how it would be used.
7. His case was listed for trial on 3 May 2022. His case was called on before the judge at about 11 o'clock in the morning. He was not present because he was in custody and had not been brought up from the cells. Prosecution counsel was not present either. Once defence counsel was before the judge, the judge said this:

> "JUDGE MEDLAND KC: ... it is obviously at the moment this is no more than a sort of informal process.

> ...
>
> It strikes me that your, if I have understood the case correctly, your client [a reference to the appellant] has been in custody for about four and a half months now.
>
> ...
>
> The nature of the breaches is, if I understand right, that the supervising officers go round there, and he partially complies but sort of does not really on their account. His contrary account is well if only they had given me more time and been less difficult I would have given them what they wanted."

8. The judge went on to say:

> "... if that analysis of the facts of the case is broadly correct, marrying it up against the sentencing guidelines ... it would fall within a bracket it seems to me whereby to all intents and purposes he has done his time."

9. He then said this:

> "The equivalent of a nine-month sentence although the sentence would probably, after trial, actually be of the order of 12 months or thereabouts ... if he pleads without the evidence being challenged there is room for some credit."

10. Defence counsel acknowledged what the judge had said. He pointed out the obvious, namely that the defendant was not present. Nor was prosecution counsel. The judge said this:

> "We can go through this process then [by which he was referring to a time when the appellant would present], but whether it be upon your application for a Goodyear indication or my giving one of my own volition that will be the outcome."

11. Defence counsel said that he had had significant conferences with the appellant and

described the appellant as "a cautious character". The case was then adjourned in order to allow counsel to speak to the appellant.

12. When the case was called back on, still with the appellant not in court, defence counsel said this:

> "l I have conveyed your Honour's thoughts to the defendant. Now my learned friend is in Court [a reference to prosecution counsel], can I invite your Honour to repeat those comments in front of the defendant?"

13. There was then the inevitable short delay before the defendant was brought up. Once he was in court the judge said this:

> "Prior to the defendant coming into Court, about an hour and a half ago you were in Court on your own Miss Bond being otherwise detained in Court 10, and I expressed certain views to you about this case which I am happy to express again in the presence of the defendant.
>
> ...
>
> In my view, bearing in mind the facts of this case, and the manner in which the breaches are alleged to have occurred, bearing in mind that the defendant has now been in custody for in round figures four and a half months, that is the equivalent of a nine-month sentence.
>
> In view of that, if the defendant, and this is a Goodyear indication which I am giving of my own volition, in the event of the defendant pleading guilty to the indictment without there being a Newton Hearing, I would take the view that he had effectively served what the public required him to serve, namely a sentence of the order of nine months, and therefore he would be released."

The appellant then asked to speak to his counsel below.

14. The matter was called back on after the lunch adjournment and the appellant was

re-arraigned. In relation to each count he said amongst other things "I plead guilty". The recording of the proceedings makes it clear that he said something to qualify those pleas but in each case the transcript simply reads "(inaudible) I plead guilty".

15. The judge said this when arraignment had concluded:

> "Now, Mr Farley, departing from the usual format of simply answering either guilty or not guilty, your client [a reference to the appellant] sought to indicate that there was some gloss which he wished to put on it. May I check with you that you are quite satisfied those pleas are entered voluntarily by the defendant?"

16. Defence counsel said:

> "I believe so. Those are my instructions when we were in the cells. I expected him to say guilty and he did."

17. It is apparent from the transcript that the judge's question and counsel's response followed immediately one after the other without further discussion with the appellant.
18. Counsel have been asked for their recollection now of what the appellant said which was not audible on the recording. Prosecution counsel told the court that her recollection was that the appellant said he was pleading guilty for a particular reason, essentially qualifying his pleas. But counsel both then and today is unable to recall precisely what was said. Defence counsel's recollection is even less clear. He cannot remember if he heard anything which the appellant may have said prior to pleading guilty.
19. The judge moved quickly to sentence. His sentencing remarks were very brief and did no more than announce that the sentence would be one of nine months' imprisonment on each count concurrent.
20. As we have said, the notification requirement imposed as a result of the sentence imposed

in September 2017 lasted only for the length of the conditional discharge. It expired in September 2019. Count 3 alleged a failure to comply with the notification requirements on or before 16 November 2021, namely significantly outside the period of the requirements resulting from the conviction in 2017. The prosecution accept that in law the appellant cannot be guilty of the offence charged in count 3. It is unfortunate to say the least that nobody realised that at the time. However, the effect is that the conviction on count 3 inevitably is unsafe, notwithstanding the plea of guilty. The appellant pleaded guilty to something of which in law and fact he could not be guilty.

21. In relation to counts 1 and 2, the argument is that the pleas of guilty were vitiated due to the approach taken by the judge. The judge's approach placed impermissible pressure on the appellant. That is evidenced in part by whatever qualification was expressed when the pleas were tendered.

22. Our starting point for consideration of this submission is Nightingale [2013] EWCA Crim 405, a decision of the Court of Appeal Court-Martial court. We refer in particular to paragraphs 10 to 14 of that judgment, the relevant parts of which read as follows:

> "... a defendant charged with an offence is personally responsible for entering his plea, and that in exercising his personal responsibility he must be free to choose whether to plead guilty or not guilty ... The principle applies whether or not the court or counsel on either side think that the case against the defendant is a weak one or even if it is apparently unanswerable...
>
> What the principle does not mean and cannot mean is that the defendant, making his decision, must be free from the pressure of the circumstances in which he is forced to make his choice. He has, after all, been charged with a criminal offence...
>
> In addition to the inevitable pressure created by considerations like these, the defendant will also be advised by his lawyers about his prospects of successfully contesting the charge and the implications for the sentencing decision if the contest is

> unsuccessful...
>
> ... the provision of realistic advice about his prospects helps to inform his choice.
>
> In marked distinction, unlike the defendant's lawyers who are obliged to offer dispassionate, even if unwelcome, advice, the judge, subject only to express exceptions must maintain his distance from and remain outside this confidential process. The decided cases ... identify specific exceptions to this rule. They include the discretion in the judge, if invited to do so, to provide the defendant with a 'Goodyear indication' ... If the judge chooses to respond to such a request, that would not constitute inappropriate judicial pressure just because the judge agrees to respond to a request by or on behalf of the defendant. It is also open, and perhaps as far as the judge can ever go, to remind the defence advocate that he is entitled, if the defendant wishes, to seek a Goodyear indication. But if he chooses not to do so, it remains wholly inappropriate for the judge to give, or to insist on giving, any indication of sentence. Goodyear underlines that 'the judge should not give an advance indication of sentence unless one has been sought by the defendant'.
>
> There is one further exception to the general principle which we must mention. There is one situation in which the judge is entitled to use his own initiative to give an indication of sentence. It is where he decides to let the defendant know that the sentence or type of sentence will be the same whether the case proceeds as a guilty plea or following a trial, results in a conviction ... "

23. More recently in R v AB and others [2021] EWCA Crim 2003, this court considered those principles in the context of ordinary Crown Court proceedings. It confirmed that the principles in Nightingale apply equally to such proceedings. The court in AB and others acknowledged that the pressure on the Crown Court to dispose of cases is intense. It was intense at the time of AB and others and it is even more intense now. Judges are being encouraged to engage whenever possible in active case management to ensure that proper pleas are tendered. However, that kind of encouragement cannot allow any derogation from the general principles as set out in Nightingale.

24. We can understand why the judge in this case was anxious to do all that he could to create space for other cases in the Crown Court. It may be that the judge considered that there was no real basis for the pleas of not guilty in the appellant's case. Whatever the position, the principle is clear. It is wholly inappropriate for a judge to give any indication of sentence in the absence of an express request by the defendant. Here the judge took matters into his own hands. That was before the appellant had even been brought up to court. In that exchange the judge said in terms the sentence after a plea would be nine months, after a trial more likely 12 months. When the appellant was brought up, he (the appellant) did not invite any indication of sentence; he was simply told, were he to plead guilty to the indictment he would be released.
25. In our judgment, what the judge said and the order in which he said it amounted to improper pressure on the appellant to tender pleas of guilty. When he did plead guilty he said something to indicate his equivocation in respect of his pleas. Unfortunately counsel who represented him did not investigate the position. He simply said without more that he believed that the pleas were entered voluntarily. Whether discussion then with the appellant would have led to some change in the position we simply do not know. But taking all of those matters into account, in our judgment the pleas of guilty tendered to counts 1 and 2 cannot stand. Those convictions, for all of the reasons we have set out, are unsafe. It follows that we quash all of the convictions on each of the counts to which the appellant pleaded guilty.
26. We repeat our understanding of the pressure that is on Crown Court judges in the current climate. We do not suggest that judges should not do all that they can properly to case manage cases. But there is a fundamental principle at play here, the principle that the defendant in any criminal case is entitled to assess his plea by reference only to the

advice he is given by his counsel and his own wishes and not by what is said by the judge.

27. MISS BOND: My Lord, I am instructed to ask the court to consider ordering a retrial on counts 1 and 2. Not on count 3.
28. LORD JUSTICE WILLIAM DAVIS: I see. On what basis do you say there should be a retrial?
29. MISS BOND: My Lord, it is submitted that it is in the interests of justice given the nature of the offences, that they are breaches of a Sexual Harm Prevention Order and that the appellant has previous convictions for the same. Whilst I appreciate any sentence following a trial may not make any difference --
30. LORD JUSTICE WILLIAM DAVIS: It could not. Whoever tried Mr Moore again, if they were to do so, could not impose a sentence longer than the one imposed by Judge Medland KC.
31. MISS BOND: No, but it would be marked on the appellant's record that he had further breaches of the Sexual Harm Prevention Order and given the nature of the offences were he ever to commit offences of a similar nature it would be important that that were marked on his record and so it is on that basis that the Crown seek a retrial on counts 1 and 2 only.
32. LORD JUSTICE WILLIAM DAVIS: We will retire to consider that.

(Short adjournment)

33. LORD JUSTICE WILLIAM DAVIS: Miss Bond, we are quite satisfied that the interests of justice do not require a retrial. So these convictions are quashed and that will be the end of it so far as the appellant is concerned.
34. MISS BOND: Very well. Thank you.

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