Neutral Citation Number: [2023] EWCA Crim 1786

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2022/03606/B5, 2022/03608/B5

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 28th July 2023

**B e f o r e:**

**LADY JUSTICE MACUR DBE**

**MR JUSTICE GARNHAM**

**MRS JUSTICE THORNTON DBE**

---

**R E X**

**- v -**

**DARREN DAVID WHEELER**

---

Computer Aided Transcription of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

---

**Mr C Drinnan** appeared on behalf of the Appellant

---

**J U D G M E N T**

---

Friday 28th July 2023

**LADY JUSTICE MACUR:** I shall ask Mr Justice Garnham to give the judgment of the court.

**MR JUSTICE GARNHAM:**

1. On 17th June 2022, in the Crown Court at Woolwich, the appellant pleaded guilty to two counts of breach of a Sexual Harm Prevention Order. On 31st October 2022, he was sentenced by His Honour Judge Mann KC to six months' imprisonment on count 1 and 12 months' imprisonment consecutive on count 2.

2. He now renews his application for an extension of time (129 days) in which to apply for leave to appeal conviction following refusal by the single judge. He appeals against sentence by limited leave of the single judge.

3. Although in respect of the challenge to the conviction he is technically an applicant rather than an appellant, for convenience we will refer to him as the appellant throughout.

4. The appellant also seeks leave, pursuant to section 23 of the Criminal Appeal Act 1968, to introduce fresh evidence from Deborah Wheeler (his mother) regarding the service he received from Boothroyd Solicitors.

5. We will consider, first, the facts of the case and the application for an extension of time in which to apply for leave to appeal against conviction.

6. On 11th February 2019, in the Crown Court at Woolwich, the appellant was made subject to a Sexual Harm Prevention Order ("SHPO") for a period of ten years. This order was varied on 11th March 2022 and was ordered to remain in place until 10th March 2032. The terms included

a prohibition on creating a social media account, or using an electronic device capable of accessing the internet without notifying the police within three days.

7. Following enquiries, it was discovered that the appellant had an active Facebook account about which he had not informed the police. That was the subject matter of count 2. He was arrested at his home address. He stated that he required his solicitor's phone number which was stored on his Samsung Galaxy tablet – a device he purchased on 13th May 2022 and had not registered with the police (count 1).

8. On 17th June 2022, at the plea and trial preparation hearing, the appellant was represented by counsel who stated that he had clear instructions from the appellant that he wished to be arraigned on counts 1 and 2. The appellant then entered guilty pleas.

9. On 31st October 2022, the defence applied for an adjournment. A notice had been received from the cells that the appellant had not attended court. Counsel had been informed that the appellant was not happy with his solicitors and wished to appeal against his conviction. Counsel was concerned that the appellant may not have been happy with him representing him and mitigating for him. The prosecution submitted that the appellant had previously refused to attend two hearings in July of that year.

10. The judge ruled that the court would proceed to sentence in the appellant's absence. He said that the appellant was deliberately absent and had previously refused to attend. His displeasure with those representing him had only been indicated that day. Given that arraignment was in June, if there had been a real and genuine problem, it was unclear why enquiries or submissions had not been made previously. It was in the interests of justice to proceed.

11. When refusing leave to appeal against conviction the single judge gave detailed reasons. It is not necessary to repeat those remarks here. We agree with them in their entirety.

12. The appellant seeks to adduce fresh evidence. He wishes to rely on a letter from Deborah Wheeler, his mother, dated 6th April 2023. In that letter she outlines the interaction she had with trial solicitors, Boothroyd's, which includes specific conversations she had with the appellant's solicitor, Rachel Cheetham. There is nothing in that letter that leads us to differ from the single judge's views.

13. Looking at the matter in the round, we see no properly arguable ground of appeal. It cannot be said that the appellant entered a plea he did not intend. On 17th June 2022, his counsel told the court that he had clear instructions from the appellant that he wished to be arraigned. He then entered guilty pleas. It cannot be said that incorrect legal advice had been given to the appellant. The case against him was overwhelming. There is nothing that even arguably vitiates the plea voluntarily made. In those circumstances we refuse the extension of time in which to apply for leave to appeal against conviction.

14. We turn to consider the appeal against sentence, for which the single judge gave limited leave. In his sentencing remarks the judge said that the breaches occurred about two months after the order in question was made. The appellant had a history of failing to comply with his SHPOs. Whatever the difficulties he had, he was not beyond understanding the requirements of the SHPO. He had been subject to them for a long time and he had breached them on many occasions. They were deliberate breaches. It was difficult not to regard them as serious breaches because they were repeated.

15. The sentencing judge went on to say that the offences were all culpability B. They were

either harm category 3, as they caused little harm or distress, or category 2, given the repeated breaches and previous convictions, which were a statutory aggravating feature that could push the offending from one category up to another. The offences, coming so soon after the order was made, and with a history of offending in exactly the same way, made them particularly serious.

16. On count 1 the judge adopted a starting point of eight months' imprisonment, and on count 2 a starting point of 16 months' imprisonment. Both were reduced by 25 per cent to reflect the guilty plea. The sentences were ordered to run consecutively to each other and concurrently with the appellant's recall to prison.

17. It is to be noted that the appellant was 38 years old at the time of his conviction and sentence. He had six convictions for 16 offences, spanning from 2010 to 2022. His relevant convictions included a breach of a Sexual Offences Prevention Order in 2010, breach of a Sexual Rehabilitation Order in 2019, and breach of a SHPO in 2019 and 2022.

18. The judge sentenced the appellant without a pre-sentence report. We agree that one was not necessary then and is not necessary now.

19. In a report from the prison it was noted that the appellant had a hernia which was awaiting surgery. He had a diagnosis of frontal lobe syndrome and a mild learning disability. He was severely sight impaired.

20. The appellant initially lodged his own grounds of appeal against sentence. The single judge granted leave to appeal against sentence on a limited basis and a representation order was granted. New counsel was appointed by the Registrar to advance the points identified.

21. On the appellant's behalf Mr Drinnan has lodged a helpful skeleton argument. It is argued, first, that the sentence was wrong in principle. It is said that the judge had no basis to lift the offences up a category on the ground of the appellant's history of breaches. The correct categorisation is said to be 3. Second, it is argued that the sentence was manifestly excessive, because the appellant's history of breaches did not justify an increase in the starting point for count 2 from six months to 16 months' imprisonment. Third, it is submitted that the judge did not properly allow for totality when he imposed consecutive sentences.

22. In his sentencing remarks the judge made clear that he regarded this case as falling into culpability category B and harm category 2 or 3. The judge regarded the short period between the commencement of the order and its breach as a serious aggravating feature. The judge adopted the starting point of 16 months' imprisonment on count 2 and eight months' imprisonment on count 1. He allowed a reduction of 25 per cent credit for the guilty plea, and ordered that the two sentences run consecutively.

23. In our judgment, the judge was right to place this case into culpability category B. It plainly fell into harm category 3, because the particular offending reflected in the two counts caused or risked little or no harm or distress. The starting point for a B3 offence is 26 weeks' custody and the sentencing range is a mid-level community order to 36 weeks' custody.

24. We agree that the short period between the commencement of the order and its breach was a serious aggravating feature. However, in our view, the move from six months to 16 months in respect of count 2 was unwarranted. The frequency of the breaches was reflected in the adoption of culpability category B. The seriousness of the offending so soon after the order would properly justify an increase from six months to nine months, but not more.

25. There was some personal mitigation in the appellant's disability. That leads us to reduce

the nine months to eight. Allowing for credit of 25 per cent for the guilty plea, that makes a figure on count 2 of six months' imprisonment.

26. The judge rightly regarded count 1 as the less serious of the two offences. In our view a consecutive term of eight months' imprisonment on count 1 was manifestly excessive. We regard the appropriate starting point to be six months. The judge gave credit for the guilty plea, but made no allowance at all for mitigation. If, as the judge decided and as we agree was right, a consecutive sentence was appropriate, a further reduction was necessary to reflect totality. Taking account of mitigation, totality and the guilty plea, we reduce the sentence on count 1 to two months' imprisonment.

27. Accordingly, we allow the appeal and substitute for the consecutive terms of 12 months and six months' imprisonment, a term of six months' imprisonment on count 2 and of two months' imprisonment on count 1. Those sentences will continue to run consecutively, making a total sentence is now one of eight months' imprisonment.

---

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk