SHERIFF APPEAL COURT

[2017] SAC (Crim) 10
SAC/2017/000289/AP

Sheriff Principal C Turnbull
Sheriff N C Stewart

OPINION OF THE COURT

delivered by SHERIFF N C STEWART

in

APPEAL AGAINST SENTENCE

by

RICHARD SMITH

Appellant

against

PROCURATOR FISCAL, HAMILTON

Respondent

Appellant: Farrell; Ian Moir & Company, Glasgow
Respondent: M McFarlane, advocate depute; Crown Agent

21 June 2017

[1] The appellant pled guilty at Hamilton Sheriff Court on 2 March 2017 to charges of breaches of the peace in contravention of section 90(1)(e) of the Police and Fire Reform (Scotland) Act 2012 and a contravention of section 6 of the Road Traffic Act 1988. Reports were ordered, and sentence was deferred on all matters until 18 April. This appeal relates only to the sentence imposed in respect of the latter charge.

[2] On 18 April 2017 the appellant was disqualified from holding or obtaining a driving licence for a period of 8 years in relation to his plea of guilty to a contravention of section 6 of the 1988 Act. The sheriff also required him to resit the extended test of competency to drive. His plea was tendered at a continued intermediate diet.

[3] The grounds of appeal are firstly, that the headline sentence of 8 years is excessive in that the sheriff fails to give sufficient weight to the appellant's personal circumstances and secondly, that the sheriff failed to discount the period of disqualification in light of the timing of the plea tendered. To that a third ground has been added namely that the sheriff erred in the view he took of section 6 and the seriousness thereof.

[4] The somewhat dramatic circumstances against which sentences, including that of the sentence appealed against were imposed, are set out in paragraphs 5 to 14 of the sheriff's note. In relation to the sentence imposed on this, the only road traffic matter, the sheriff had regard to the appellant's previous convictions which include two contraventions of section 5(1)(a) and one contravention of section 7(6) of the Road Traffic Act 1988. He also has a further conviction for a contravention of section 172 of the 1988 Act. He currently has nine penalty points on his licence.

[5] The sheriff concluded that the appellant has a history of committing offences relating to driving whilst unfit or the investigation thereof, that he self-reported taking alcohol and substances continuously for four days at the time of the offence, that his effort to thwart police investigations and the potential consequences thereof ought to be regarded as serious and that the appellant required to be disqualified from driving for a significant period to reflect the fact that his conduct represents a serious risk from which the public require to be protected and to deter him from continuing to offend in this manner.

[6] In our view the sheriff fell into the error of equiperating a failure to co-operate with a preliminary breath test with the appellant's significant record for drink driving offending and regarded it as a further incident in a "history of committing offences relating to driving whilst unfit for the investigation thereof. This is a fourth such offence." The reason given by him for imposing a lengthy period of disqualification, namely public protection, supports our view.

[7] Whilst participation in the preliminary breath test is used for the purpose of obtaining an indication of whether the proportion of alcohol in the person's breath or blood is likely to exceed the prescribed limit and therefore provides a useful first step in deciding whether to proceed onwards in the testing process, it is not an essential first step, or a pre-requisite, for a prosecution in terms of section 5 of the 1988 Act. The results thereof cannot be founded upon for the purpose of establishing a drink driving offence. In the present case the appellant in a test some hours later was found to be below the prescribed limit. The sheriff seems to have lost sight of the function the section 6A procedure fulfils and the limited consequences prescribed by statute for breach of a section 6 requirement. A contravention of section 6 does not fall within the sentencing regime applicable to drink and substance related driving offences. Imprisonment is not an option. Rather, a level three fine constitutes the maximum available sentence. Only four penalty points can be imposed. We note that in this case the imposition of that number of points would bring into play the totting up procedure and thus result in a period of disqualification of 6 months.

[8] In our view there is no reason in respect of this, a first conviction for a contravention of section 6, in the circumstances narrated to depart from the imposition of penalty points as provided for by statute. The court's power to make an order originally disqualifying until the passing of the appropriate driving test was not challenged, but belatedly that point is

now taken. That power is regulated by section 36 of the Road Traffic Offenders Act. Section 36(3)(a) allows for such orders to be made in respect of offences of which involve disqualification under section 35 of the Act and therefore could theoretically apply to the current order.

[9] Whilst an obligatory 6 months' disqualification follows in this case, given the operation of the section 35 totting up procedure, mandatory disqualification until the extended test has been passed has not yet been required by order of the Secretary of State and so such a requirement remains a discretionary decision. A court in applying its discretion to make such an order is required by sub-section 6 to have regards to the safety of road users.

[11] As indicated above the qualifying conviction, a failure to co-operate with the preliminary breath test, does not relate directly to the quality of the appellant's driving and accordingly does not automatically engage the safety of road users. No justification is provided by the sheriff for the requirement that he sit and pass the extended test other than an attempt by the sheriff to engage issues of safety by reason of the length of disqualification imposed. We are not persuaded that such an order was justified and that the sheriff erred in the exercise of his discretion in so determining.

[12] Accordingly we have determined that the disqualification imposed by the sheriff should be quashed, that instead the appellant's licence should be endorsed with four penalty points. Given that four penalty points represents both the minimum and maximum sentence prescribed by law the question of any reduction thereof by reason of the utilitarian value of any plea does not fall to be considered.

[13] We also order that the order that the appellant resit the extended test of competency to drive should be quashed.