[2019] EWCA Crim 2249
2019/03021/A2
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 12th December 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE WARBY

and

HIS HONOUR JUDGE PICTON
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E G I N A

- v -

ANDREW RALPH WOOFF

Computer Aided Transcript 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 J Underhill appeared on behalf of the Appellant

J U D G M E N T
(Approved)

Thursday 12th December 2019

LORD JUSTICE HOLROYDE: I shall ask Mr Justice Warby to give the judgment of the court.

MR JUSTICE WARBY:

1. In July 2018, in the Crown Court at Southampton, the appellant pleaded guilty a week before trial to two counts of possessing Class A drugs with intent to supply (counts 1 and 2). His previous convictions for Class A offences meant that his case engaged the minimum sentence provisions of section 110 of the Powers of Criminal Courts (Sentencing) Act 2000, headed "Minimum of seven years for third class A drug trafficking offence".

2. At the sentencing hearing on 18th July 2019, the appellant's case was that it would in all the circumstances be unjust to impose the minimum seven year term. The judge refused an application for a pre-sentence report and proceeded to sentence. He rejected the appellant's case and, after reduction for the guilty pleas, imposed a sentence of six years' imprisonment on each count, to run concurrently.

3. The appellant now appeals against sentence by leave of the single judge.

4. His case in this court is that the sentence imposed was both wrong in principle and excessive for two reasons: first, a pre-sentence report should have been ordered to allow the court to consider fully, in proper detail, the history of the offender in order to consider whether or not it was unjust to apply the minimum sentence provisions; and secondly, the previous convictions which triggered the minimum sentence were old and the sentencing judge was not in possession of any of the detailed facts of the previous offending.

5. We start our consideration of those grounds of appeal by recalling some of the chief features of the legal framework surrounding the minimum sentence provisions. In the context of this case there are six points to be made:

(1) The right approach for the sentencing judge is to start by applying the relevant sentencing guidelines to determine the appropriate sentence without reference to the minimum sentence provisions. Only then should the judge consult those provisions to ensure that the sentence complies with the statute: see *R v Silvera* [2013] EWCA Crim 1764.

(2) Under section 110, the starting point when sentencing an adult for a third drug trafficking offence is that the court "shall" pass a custodial sentence of at least seven years, except where the court is of the opinion that "there are particular circumstances which (a) relate to any of the offences or to the offender, and (b) would make it unjust to do so in all the circumstances".

(3) The minimum sentence provisions are qualified by section 144 of the Criminal Justice Act 2003 which requires the court to take into account a guilty plea and allows it to reduce the prescribed minimum sentence by up to 20 per cent for that reason. That produces a minimum sentence following a plea of guilty of 2,045 days (about 67 months). It is clear that the ability to reduce the minimum to this extent must be taken into account when assessing whether the application of section 110 would be unjust: see *Attorney General's Reference (R v Marland)* [2018] EWCA Crim 1770, [2018] 2 Cr App R(S) 51 at [22].

(4) The question of whether particular circumstances would make it unjust to impose the minimum sentence is inherently fact-sensitive. For that reason the authorities suggest that in cases where the burden lies on the defendant to persuade the court that particular circumstances would make it unjust to apply the minimum sentence provisions, a pre-sentence report should usually be obtained: *R v Densham (Neil James)* [2014] EWCA Crim 2552; [2015] 1 Cr App R(3) 37 at [8], and *Marland* at [7]. The failure to obtain a report is not, however, of itself a fatal flaw in the sentencing exercise, as is clear from *Densham*, where the appeal was dismissed, despite such a flaw.

(5) One way of testing whether or not a sentence would be unjust in the particular circumstances of the case is to ask whether or not the sentence under section 110 is markedly more severe than the sentence that would have been passed, applying the Sentencing Council guidelines for the offence. This, however, has to be measured against the deterrent element which underlies section 110: see *Marland* at [31].

(6) The court must loyally apply the law that Parliament has enacted. It must not circumvent or dilute the effect of the statute by taking too liberal an approach to the notion of what is "unjust" as, for instance, by treating perfectly normal circumstances as “particular circumstances” within section 110 in order to circumvent the operation of those provisions: see *R v Lucas* [2011] EWCA Crim 2806, [2012] 2 Cr App R(S) 15 at [13]; *R v Chaplin* [2015] EWCA Crim 1491, [2016] 1 Cr App R(S) 10 at [5] and [13] (in the context of the parallel provisions relating to domestic burglary); and *Marland* at [23-24 and [29-30].

6. There is a further point of particular relevance to this case when it comes to the antiquity of a triggering conviction. This is an issue discussed in *R v McDonagh* [2006] 1 Cr App R(S) 111 at [10]; *R v Gallone* [2014] EWCA Crim 1140, [2014] 2 Cr App R(S) 57 at [19]; and *Marland* at [25-27] and [32]. The effect of the authorities is summarised in *Marland* at [32]:

> "The length of time since the last qualifying offence and implicitly since the last offence is not a circumstance which renders the imposition of the mandatory sentence unjust of itself, although it may be a matter to be taken into account."

7. Turning to the facts of this case, the prosecution followed street observations by a police officer on 19th April 2019. The appellant was seen by the officer to hand something to a female in the street. Although nothing was found on searching her, the police conducted a search of the appellant's bedsit. In the course of that search he volunteered that there were drugs in some Kinder Egg shells wrapped in a sock. So it proved. They were later found to contain 25 wraps of cocaine and 21 wraps of heroine, estimated to have a street value of £500. Each wrap represented a 1 gram deal for street selling. A fuller search of the address identified a further Kinder Egg in a jacket containing about twice as many wraps as had been found in the eggs identified by the appellant. The drugs found in the jacket amounted to 80 wraps of cocaine and 35 wraps of heroin, with an estimated street value of £1,150.

8. The officers' search also harvested paraphernalia associated with drug dealing, including a tick list, razors, scales, pieces of plastic and six mobile telephones. Those phones were examined. Three of them were found to contain messages relating to selling drugs, one of which indicated a wish to use someone's flat as a base to sell 8 ounces of drugs a day.

9. At the time of sentence the appellant was aged 58. He had a total of 21 previous convictions for 58 offences between 1978 and 2012, sixteen of which were drug offences, dating from

between 1986 and 2008. Four convictions were drawn to the attention of the sentencing judge.

10. The first was on 28th May 1986, when the appellant was sentenced in the Crown Court at Reading to a total of three years' imprisonment for two offences of supplying a controlled drug, two of possessing drugs and breach of a suspended sentence order, with a consecutive term of six months' imprisonment for a Bail Act offence.

11. Secondly, on 5th August 1992, he was sentenced by magistrates to 60 hours of community service for possessing a controlled drug with intent to supply, possessing a controlled drug, and cultivating cannabis.

12. Thirdly, on 23rd June 1997, in the Crown Court at Southampton, he received a suspended sentence of two years' imprisonment for being concerned in supplying Class A drugs, being concerned in supplying Class B drugs, and possession of Class B drugs.

13. Fourthly, on 7th March 2008, in the same court, he was sentenced to 42 months' immediate imprisonment for supplying and being concerned in supplying Class A drugs.

14. Little was known, and little was said to the judge, about the facts and circumstances of the 1986 and 1992 offences. The appellant maintains that the first occasion involved cannabis and amphetamines, and the second cannabis only. The prosecution has been unable to provide details of these old offences. We proceed on the assumption, which seems reasonable, that the offending did indeed relate to controlled drugs of Class B.

15. The offences in 1997 and 2008 did, however, involve Class A drugs. As the sentencing judge was told, the drugs were LSD in 1997, and heroin in 2008. It is these which were

correctly treated below as the "trigger" convictions for the purposes of section 110. (We pause to observe that although section 110 only applies when the third drug trafficking conviction relates to an offence committed on or after 1st October 1997, there has never been any restriction on the dates of the earlier offences which can operate to trigger the minimum sentence provisions.)

16. Sentencing the appellant, the judge observed that examination of his telephones showed that he was an entrenched, habitual user of Class A drugs and that he was selling them either to make a profit or to obtain a discount to feed his own drug habit. This was street dealing in category 3. The appellant may have been providing to friends, but he was providing for profit and his role was significant. The judge identified the appropriate starting point, before aggravating or mitigating features and before consideration of the guilty plea, as four and a half years' custody after a trial. He then referred to the appellant's previous offending and observed that it would have been apparent to the appellant from 1997 that a further drug trafficking offence would lead to a seven year minimum term. The appellant was fortunate, the judge suggested, that in 2008 he had received only three and a half years' imprisonment. The judge rejected the suggestion that it would be unjust to impose the minimum term with a reduction for the guilty plea. He said:

> "The fact of the matter is you must have known that dealing in Class A drugs would expose you to the minimum term … because of what happened in 2008."

17. The judge gave what he described as "more credit for your plea than you deserve", reduced the minimum sentence by one year, and ordered the resulting sentences of six years' imprisonment to run concurrently.

18. Granting leave to appeal, the single judge directed the preparation of a pre-appeal report. That report describes the appellant as having a long-standing and entrenched addiction to illicit drugs. It began with the misuse of cannabis at the age of 15 and escalated to Class A drugs over 40 years ago, when he was aged 17. There have been periods of reduction, but these have been followed by relapses. Previous sentences have been ineffective in addressing his addiction. Personal relationships have been problematic and have broken down due to his drug misuse. He has deliberately distanced himself from all of his seven children, the purpose being, he says, to spare them the impact of his substance misuse. He has obtained some work in the past, but there is no evidence of employment since 2012.

19. The report notes that the present matter is the appellant's fifth drug conviction, representing a pattern of offending behaviour. In interview with the probation officer, the appellant sought to justify and minimise his behaviour. He maintained that his supply was only to friends and that it spared them the dangers and expense of buying from street dealers. He claimed to have been engaging with a local substance misuse support agency, but enquiries by the Probation Service contradicted that account.

20. We also have from the prosecution some additional details about the offences of 1997 and 2008. The 1997 offences involved possession of 45 LSD tablets, 112 grams of herbal cannabis and £325 in cash. The 2008 conviction resulted from undercover police operations in the course of which the appellant was observed street dealing £10 wraps of heroin. In interview he admitted dealing, claiming to be a runner for a local dealer. This is the offending which led to a sentence of three and a half years' imprisonment, after reduction for the guilty plea.

21. Mr Underhill, in his submissions to us today, has addressed the further information now available. He has pointed out that the amount of drugs supplied in 2008, as now known from the

prosecution, was very small. He has, however, acknowledged that this point, for what it is worth, could have been made to him by the appellant by way of instructions.

22. Mr Underhill has also acknowledged that the pre-appeal report is "mixed", but he has drawn attention to the periods of reduction of drug use and what he characterises as genuine attempts by the appellant to address his addiction. Broadly, Mr Underhill has submitted that the circumstances which he relied on as mitigation below, as supplemented by the further information now available, can and should be treated as "particular circumstances" that would make it unjust to impose the minimum term. There are four such circumstances identified in the Notice of Appeal:

> (i) A "significant gap" in offending behaviour, with no offences since 2012, and no drug offences since 2008;
>
> (ii) the historic nature of the "trigger offences";
>
> (iii) the appellant was a long-standing user who had made attempts to deal with his habit; and
>
> (iv) his habit was significant and developed from a young age when he became addicted.

23. It can be seen that two of those are circumstances relating to the offences, and two of them are circumstances relating to the offender.

24. We have reflected on these submissions, but find ourselves unpersuaded. We start, as did

the judge, with the guidelines. In 2019, the appellant played a significant role in street dealing of heroin and cocaine. The guideline starting point for a single such offence is four and a half years' custody, with a range from three and a half years to seven years. Here there were two offences. The appellant was found in possession of a total of 161 grams of Class A drugs – more, one would suppose, than is common when dealing only to friends. The starting point for a category 3 offence that is not street dealing is based on 150 grams.

25. On any view, the appellant's four previous convictions for involvement in the supply of drugs represented a significant aggravating factor. The Class B offences, although not trigger offences for the purposes of section 110, were nonetheless part of the overall picture of previous offending. It is legitimate to treat the 1986 offences as relatively serious, given the length of the sentence imposed following a guilty plea for involvement in the supply of Class B drugs.

26. The most recent Class A offences were street dealing. They were committed after the appellant had been subject to a suspended and then an immediate custodial sentence for Class A dealing which, in the case of the 2008 offending, was also street dealing. In the light of what we now know about the previous offences, the picture is one of escalating offending, albeit over a period of some 20 years. We note that on the account contained in the pre-appeal report, the appellant was throughout those 20 years a heavy drug user.

27. There is little to be said in mitigation. It may be that the appellant was only supplying drugs to which he himself was addicted; but in the light of the array of phones, the messages on them, and the other dealing paraphernalia, the judge was clearly entitled to take the view that the supply in this case was not just social, but for profit. The pre-appeal report does not assist the appellant in this respect.

28. In all the circumstances it would be hard to criticise a notional sentence of six years or more after a trial. The appellant's very late plea of guilty could not justify a reduction of more than fifteen per cent. The appropriate sentence, without regard to section 110, would therefore be in the range of five years and one month to five and a half years' custody. In our judgment, the sentence actually imposed of six years overall cannot be characterised as "markedly more severe" than this. Nor are we able to agree with Mr Underhill that there are any “particular circumstances” which would make it unjust to impose that longer sentence.

29. It may be that the judge should have ordered a pre-sentence report, although we do not ourselves read the authorities as suggesting that this is mandatory in all cases. It may, in our judgment, be arguable that there is a threshold requirement for a defendant to give at least some indication of the kinds of circumstance capable of amounting to particular circumstances within section 110 that might be disclosed or corroborated by such a report. Certainly, an application for a pre-sentence report will be the stronger if the advocate can point, one would expect on instructions, to some particular circumstance in relation to which further information could be expected to be obtained by the National Probation Service. We do not need to decide that point as we now have the pre-appeal report, and counsel's submissions upon it. We also have as much information as can be provided about the facts and circumstances of the previous offending that was relied on at the sentencing hearing. We are, therefore, for practical purposes in the position that the appellant says should have been enjoyed by the sentencing judge.

30. The pre-appeal report portrays an all-too-familiar picture in the context of offending of this kind. We have not identified anything in the report that qualifies as a “particular circumstance” relating to the appellant, such as to satisfy the test of injustice under section 110. The mere fact that the appellant is a long-term abuser of Class A drugs with a significant habit cannot count, and the report does not suggest that this appellant has made any very meaningful attempts to

address his addiction. Nor can we regard the details of the Class A offences as including any such circumstance. The timing of the convictions was known to the judge. The new information adds nothing on the question of timing. The mere fact that the first qualifying conviction was over 20 years before the third cannot be enough. Nor can the fact that the second was ten years old at the time of the latest conviction. As for the additional details, besides being largely matters that the appellant himself could have told his counsel, they are unsurprising and in no way unusual.

31. It is now apparent that the judge was wrong to conclude that section 110 had been engaged when the appellant was sentenced in 2008. That was only the second, and not the third, qualifying offence for the purposes of the statute. But the judge was entitled to say, as he did, that from 2008 onwards the appellant was at risk of a seven year minimum sentence and should have been aware of that.

32. In conclusion, although it might be said that the sentencing process had some blemishes, we cannot fault the judge's conclusions. He was right to conclude that the statute mandated a minimum sentence of seven years, minus 20 per cent. His sentence, after discount for the guilty plea was not wrong in principle, nor was it excessive.

33. Accordingly, the appeal is dismissed.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk