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IN THE COURT OF APPEAL  
CRIMINAL DIVISION  
CASE NO: 201902971 B4



Neutral Citation No: [2021] EWCA Crim 165

Royal Courts of Justice  
Strand  
London  
WC2A 2LL

Thursday 4 February 2021

LORD JUSTICE DAVIS

MR JUSTICE WILLIAM DAVIS

HIS HONOUR JUDGE LODDER QC

REGINA

v

LEE McLOUGHLIN

Computer Aided Transcript of Epiq Europe Ltd,  
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MR MARCUS RICKARD appeared on behalf of the APPELLANT  
MR PATRICK DENNIS appeared on behalf of the CROWN

JUDGMENT

1. MR JUSTICE WILLIAM DAVIS: Lee McLoughlin is now aged 45. In August of 2016, for nine offences of possession of indecent images of children, he was sentenced to 10 months' imprisonment. By reason of that sentence he was subject to notification requirements for a period of 10 years. At the same sentencing hearing a sexual harm prevention order was made. In line with the notification requirements, the duration of that order was 10 years. One of the prohibitions was that he was prohibited from using any device capable of accessing the internet unless he made the device available for inspection on a request by a police officer.
2. On 27 July 2019, in the Crown Court at Canterbury, the appellant was convicted of two offences of failure to comply with notification requirements and two breaches of the sexual harm prevention order. In relation to the failure to comply with notification requirements, concurrent sentences of 1 year's imprisonment were imposed. In relation to the breaches of the sexual harm prevention order, concurrent sentences of 2 years' imprisonment were imposed, but they were ordered to run consecutively to the other term of imprisonment, thus making a total sentence of 3 years' imprisonment.
3. At the sentencing hearing the judge purported to vary the terms of the existing sexual harm prevention order. That is a matter to which we shall have to return, because he appeals against that part of the sentence by leave of the full court.
4. His appeal against the substantive sentence was the subject of consideration by the single judge. She refused leave to appeal, and Mr McLoughlin now renews his application.
5. We shall deal first with the facts in brief. There were two separate breaches of the notification requirements. The first requirement was that he was to notify the police if he stayed for more than 12 hours at premises where children lived. A second requirement was that he was to notify the police if he was away from his home address in Dover for more than 7 days.
6. For the summer months in 2018 Mr McLoughlin spent much of his time at the home of a lady called Sarah Piggini, who lived in Folkestone. She had young children of her own, and also a baby daughter, the father being Mr McLoughlin.
7. The prosecution evidence demonstrated that early in May of 2018 when the police visited Mr McLoughlin at his home in Dover, he was not in. Eventually he returned. The police saw that in his car was a baby's car seat. It was apparent that Mr McLoughlin was living then with Ms Piggini in Folkestone. Going forward to September 2018, the police, outside her home, saw Mr McLoughlin coming out with her and a child in a pushchair. Thus it was demonstrated, the police knowing none of this from anything that Mr McLoughlin told them, that he had not notified the police about either of the matters which he was required to.
8. The two separate breaches of the sexual harm prevention order occurred in October 2018. The first was on 8 October. The police went to Mr McLoughlin's address in Dover. He was not there. Contact was made by telephone. The police requested a meeting with him in order to inspect his internet devices in line with the sexual harm prevention order. Mr McLoughlin refused, and continued his refusal notwithstanding further contact later the same day.
9. He was arrested on 12 October 2018. He was interviewed and asked in particular about a laptop which the police had seen on previous visits to his home. Mr McLoughlin claimed he did not recall where it was, and notwithstanding visits to various addresses connected with Mr McLoughlin, the police were unable to find that laptop.

10. He was released from police custody. On 23 October 2018 there was a second breach of the order. The police contacted Mr McLoughlin by email, requiring access to his internet devices by 26 October. The applicant did not provide such access. He said that he was not subject to any time limits when the police made such a request.
11. Mr McLoughlin was convicted after trial. Therefore there is no issue of any credit for plea in his case.
12. The judge in sentencing applied the Sentencing Council guideline in force for both offences.
13. In relation to the failure to comply with notification requirements the judge first had to consider culpability. He placed the culpability in the category A, because, so the judge found, there was a long period of non-compliance. That view was clearly justified by the period of time over which Mr McLoughlin, on the evidence, had been residing with Ms Pigglin.
14. In relation to harm, the judge had to consider whether this was a case where there was the risk of very serious distress, or no real risk of distress, or somewhere in the middle. The judge concluded that the case fell somewhere in the middle, and therefore it was harm category 2. That gave a starting point of a year's custody.
15. As to the breaches of the sexual harm prevention order, the judge had to consider first, in terms of culpability, the degree of persistence of the breach. The judge concluded that, by reference to the fact that there were two quite separate occasions and on each occasion Mr McLoughlin was persistent in his refusal to give access to devices, that there was a persistent breach, thereby rendering it culpability A.
16. Just as with the guideline for failing to comply with the notification requirements, the issue is whether there was a risk of very serious distress, or no real risk of any distress, or somewhere in between. The judge, having heard all the evidence, concluded that the middle ground was an appropriate finding, and therefore placed harm in category 2. That gave a starting point of 2 years' custody.
17. That was the way in which the judge reached the sentences he did. Plainly in relation in particular to the breaches of the sexual harm prevention orders, these were two quite separate breaches, the second of which was committed after Mr McLoughlin had been arrested and interviewed about the first. The sentencing judge would have been entitled to order any sentence in relation to that second breach to run consecutively. In order to maintain a just and proportionate sentence, he did not do that. It follows that the judge's sentence was appropriate.
18. Mr McLoughlin put written grounds before the court, which we have read. In those written grounds he argued, first, that the police knew that he was living at the address of Ms Pigglin in Folkestone, therefore the period of non-compliance was not long, and it was wrong for there to be a finding of *high culpability*.
19. We consider that that fails to grapple with the nature of the offence of which he was convicted, which places upon him a responsibility to notify the police.
20. In relation to the breaches of the sexual harm prevention orders, with respect Mr McLoughlin seeks to argue matters of fact which must have been rejected by the jury. Had they not been he would not have been convicted.
21. He further argues that there was in fact no harm or distress caused by the breaches. He does not address in his grounds the concept of risk, which is, in most cases, as this one, the gravamen of the offence.

22. Mr McLoughlin appeared via telephone link before us, and we gave him a brief opportunity to address us on his renewed application for leave to appeal against the sentence. The only submission that he made directly in relation to the sentence imposed was that the judge had chosen the wrong category. For the reasons we have already given, we reject that proposition.
23. Much of what Mr McLoughlin was saying revolved around what he said was a denial of legal representation.
24. We have seen the transcript of the proceedings that took place in the Crown court about a month before trial when there was discussion as to representation. Mr McLoughlin at that stage was represented by counsel, instructed by solicitors, to whom a representation order had been granted. We observe that grant of representation in fact had been by way of a transfer because Mr McLoughlin had sought that transfer. The judge, in the course of that hearing a month before trial, came to the point where he told Mr McLoughlin that he had experienced counsel who could represent him, but if he did not wish for that to be the case then he (Mr McLoughlin) would represent himself. Mr McLoughlin, as he was entitled to do, took the latter option. He cannot now rely on that as in any way being a matter that affected the sentence. The judge applied the guidelines, and, as we have already explained, did so, in our view, entirely appropriately.
25. We return then to the variation of the sexual harm prevention order. The judge varied the prohibitions already existing in the order and added an additional prohibition. It is not necessary for us to set out those amendments and additions.
26. There was no power in the judge to make a fresh sexual harm prevention order upon the convictions sustained by Mr McLoughlin. The offences of which he was convicted are not listed in the relevant Schedules of the Sexual Offences Act 2003. Thus, the court sentencing him had no power to make a fresh sexual harm prevention order: see Hamer [2017] EWCA Crim 192.
27. For an existing sexual harm prevention order to be amended an application has to be made to the appropriate court for an order. The people who can make such an application are strictly defined within the Sexual Offences Act 2003. For our purposes, the relevant person is the Chief Officer of Police for the area in which the defendant resides. No such application was made. The judge, for what we can see were entirely understandable reasons given the way in which the trial had developed, in effect made the amendments on his own motion. He had no power to do so.
28. In the judgment of this court in Ashford & Others [2020] EWCA Crim 673, the court held that Parliament intended that a court should only have jurisdiction to vary an order if the application was made by one of the relevant persons.
29. In the later case of Rowlett [2020] EWCA Crim 1748, this court ruled that in the absence of such compliance, not only does the Crown court not have any jurisdiction to vary the order but neither does this court.
30. The relevant Chief Officer of Police can certainly apply to the Crown Court in Canterbury for a variation of the sexual harm prevention order; we are told that that is proposed.
31. It is not, of course, for us to comment on what the judge in the Crown Court should or should not do. All that we do is to quash the sexual harm prevention order in its amended and varied form, which means that the original sexual harm prevention order remains in force. To that limited extent this appeal is allowed.

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