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IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT LEICESTER

HHJ STEVEN EVANS T20237027 & 33JJ1090923

CASE NO 202402462/A2

[2024] EWCA Crim 1204

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 3 October 2024

Before:

LORD JUSTICE WARBY

MR JUSTICE MARTIN SPENCER

HIS HONOUR JUDGE DREW KC
(Sitting as a Judge of the CACD)

REX

V

LEIGHTON FINDLEY

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MS V ROSE appeared on behalf of the Applicant.

MR C PEMBRIDGE appeared on behalf of the Crown.

J U D G M E N T

LORD JUSTICE WARBY:

1. This application for leave to appeal raises two short points about the sentencing of those who are under 18 years of age at the time of the offending and when convicted.
2. The applicant is Leighton Findley. He was born on 17 September 2005 and is therefore now aged 19. On 13 March 2022, at the age of 16, he was one of three men who robbed a taxi-driver of coins, keys and a wallet. One of the other men was the applicant's father, Kelvin Findley. On 28 April 2023, by this time aged 17, the applicant was party to the theft of a Volkswagen T-Roc car from outside the home of a Ms Poxon. In May 2023, the applicant took part in two overnight burglaries at commercial premises. The first involved the theft of items valued £3,894. The second burglary, committed the following night, involved the theft of a speaker, two drills and a pressure washer, those items together being worth about £280.
3. On 19 July 2023, in the Crown Court at Leicester, the applicant pleaded guilty to the robbery. On 13 September 2023, four days before his 18th birthday, he pleaded guilty to the theft and the two non-dwelling burglaries which had been charged on a separate indictment.
4. He was sentenced on 26 January 2024, by which time he was 18 years old. On each count the judge passed concurrent community orders for 3 years with three requirements: 20 days of rehabilitation activity requirement, 150 hours' unpaid work, and a 3-month curfew from 10.00 pm to 5.00 am. A surcharge order was made in the sum of £95. Three further counts on the second indictment were ordered to lie on the file on the usual

terms.

5. On 5 July 2024, the applicant's solicitors filed an application for leave to appeal against sentence on the single ground that the sentence passed was wrong in principle because the applicant was under 18 at the date of conviction and for that reason could not lawfully be subjected to a community order. On 6 August 2024, an application was made for an extension of time for seeking leave to appeal. The solicitors explained that the ground of appeal had not been recognised at the time of sentence but only became apparent later, in the course of breach proceedings brought against the applicant. It was in the course of research ahead of a hearing listed for 14 June 2024 that counsel had identified the relatively recent case of *R v Sweeney (Thomas)* [2024] EWCA Crim 382, which made clear to counsel that the sentence was unlawful for the reason we have mentioned.
6. The Registrar has referred the application to the Court.
7. We have some sympathy with the sentencing judge. A Prosecution Sentencing Note identified the range of sentencing options for this applicant as embracing a community order. The pre-sentence report made an express recommendation that the court should impose a community order with rehabilitation activity requirement and unpaid work, which is what the judge did, whilst adding a curfew requirement.
8. However, the legal position is clear and uncontroversial. As the prosecution has acknowledged, section 202(1) of the Sentencing Act 2020 provides that a community order is available to a court before which an offender is convicted if, and only if, two

conditions are satisfied: (a) the offender is aged 18 or over when convicted and (b) the offence is punishable with imprisonment by that court. Here the second condition was met but all the guilty pleas had been entered before the applicant reached the age of 18. A community order was not a lawful sentencing option.

9. We are therefore satisfied that the ground of appeal is well founded so that the interests of justice require us to grant the necessary extension of time. We do so. We grant leave to appeal and we quash each of the community orders imposed below.

10. The Registrar has drawn attention to a second error. The surcharge order was made in the sum appropriate to an offender aged 18 or over at the time of the commission of the offence, who was sentenced to a community order. Not only was a community order unavailable in this case, the offences were all committed before the appellant (as he now is) reached the age of 18. The surcharge order must also therefore be quashed.

11. We turn to the appropriate disposal.

12. For the appellant Ms Rose submits, and the prosecution accepts, that the appropriate order in this case was a youth rehabilitation order. We see why and, as will appear, we agree, but we think it necessary to provide some explanation.

13. The robbery was a serious one involving the use of a weapon to threaten the victim. The appellant's father was sentenced to 7 years and 2 months' imprisonment for his *leading role* in that offence. That sentence was aggravated by the father's long criminal record

and other offending. The appellant, by contrast, had played his part in the robbery at a young age, at a time when he had no previous convictions. Even so, his offending clearly crossed the custody threshold. The judge assessed his role in the robbery as meriting a sentence, after reduction for his age and his guilty plea, of 29 months' custody and concluded that further consecutive sentences of 4 months and upwards would have been justified for the theft and the burglaries. The judge however took the exceptional course of passing a non-custodial sentence. He did so having taken account of the unusual circumstances of the case.

14. These were, first, that the appellant had pleaded guilty to the robbery on the basis that he had been led astray by his father - a proposition that was not disputed by the prosecution. Secondly, the pre-sentence report identified him as a young adult who had not matured and had learning difficulties. Thirdly, and critically, a psychological report on the appellant went further and deeper, identifying a range of significant limitations and susceptibilities which the author assessed as playing a significant part in the appellant's offending. The judge attached considerable weight to this.
15. In addition, probation had assessed the appellant as posing a medium risk of reoffending whilst under the influence of his father but advised that this risk could be managed in the community and that he would benefit from interventions that would enable him to rehabilitate in the community. Fourth, the appellant had not only expressed a fear of receiving a custodial sentence but also said that he would engage with unpaid work.
16. It is in these circumstances that the judge stepped back from the custodial sentence that

would ordinarily have been passed for this offending. It is clear from the judge's sentencing remarks that the order he would have made, had he been aware of the limits of his powers, is a youth rehabilitation order. He was prioritising the aim of rehabilitating this young man.

17. The judge was however well aware of the risk that the appellant might breach the requirements imposed on him. He gave him the clearest warning that, if he did so, the court was likely to impose a custodial sentence of a length such as the judge had indicated.

18. The appellant did not live up to the judge's hopes and aspirations. We have already mentioned the breach proceedings that followed the judge's sentencing decision of 26 January 2024. An updated report from Probation tells us that the appellant breached his curfew on 5 February and failed to comply with his unpaid work requirement on 20 February. Those matters gave rise to breach proceedings in which the curfew requirement was removed and ten additional days of rehabilitation activity requirement were added, together with a residence requirement. The appellant is then said to have missed further unpaid work sessions and to have displayed unacceptable behaviour on multiple occasions during a home visit on 10 May. That led, it appears, to further breach proceedings which have been held in abeyance pending this appeal. The conclusion of the recent probation report is that the appellant's behaviour is "not consistent with an individual that is taking the order seriously or wanting to comply".

19. In addition, Probation have gathered further information about the appellant that leads

them to assess him as posing a high risk of harm towards his sister and a medium risk of harm to his mother.

20. All of this casts doubt on whether a non-custodial sentence is or will ultimately be an appropriate response to this appellant's offending. If the second set of breach proceedings had gone ahead, he might well have found himself in custody.
21. However, that is not a matter before us, indeed it is not one with which we have jurisdiction to deal. Further, as an Appeal Court bound by the provisions of section 11(3) of the Criminal Appeal Act 1968 we could not substitute a sentence that is more severe taken overall than the one passed in the Crown Court.
22. Our decision is therefore to substitute for the community order imposed in the Crown Court a youth rehabilitation order. We have considered carefully whether to depart from the approach of the sentencing judge to the duration of such an order. There are reasons why we might have done so. One is the fact that we know the appellant has spent something in the order of a month in custody on remand as a result of his initial breaches. We also have further information from probation and from counsel today which tells us, despite the unfortunate history of this matter, the appellant is now, as Ms Rose put it "primed" to benefit from supervision but it is suggested that a prolonged period of supervision might increase the risk of breach and therefore undermine the overall aim of the order.
23. We have reflected carefully on these competing considerations but have concluded that,

in all the circumstances and on all the information before us now, the appropriate order is a youth rehabilitation order for 3 years with a single requirement, namely a supervision requirement. It is common ground that that is an appropriate requirement with which this appellant might be expected to comply. Our view is that in order to give this appellant the best possible chance of achieving rehabilitation it will be more beneficial to have a longer period of supervision than the suggested period of 2 years which would start from the date of sentence in the Crown Court.

24. We therefore substitute on each count concurrent a youth rehabilitation order for 3 years with that single requirement. For the surcharge order, we substitute an order in the appropriate sum which is £22.

25. To that extent the appeal is allowed.

26. We do wish, in conclusion, to reiterate what the judge said to the appellant in sentencing. He said, "*The stakes are high for you*". We make it clear to the appellant, through his counsel, that he will be subject to the supervision requirement for the full duration of the order, that is to say until January 2027 and, if he breaches that requirement, there is a very real risk that the court will find itself driven to revoke the order and to pass a substantial custodial sentence instead.

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

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