Neutral Citation Number: [2024] EWCA Crim 1244

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Couts of Justice
The Strand
London
WC2A 2LL

ON APPEAL FROM THE CROWN COURT AT MAIDSTONE
(MR RECORDER RICHARD SMITH) [T20200225]

Case No 2024/01580/A1

Thursday 3 October 2024

B e f o r e:

THE VICE PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION
(Lord Justice Holroyde)

MR JUSTICE GARNHAM

MR JUSTICE SWEETING

R E X

- v -

ASHDEN WILLIAMS

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Miss C Donnelly appeared on behalf of the Applicant

Miss H Kaerger appeared on behalf of the Crown

J U D G M E N T

Thursday 3 October 2024

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

MR JUSTICE GARNHAM:

1. On 17 June 2021, following a trial in the Crown Court at Maidstone before Mr Richard Smith and a jury, the applicant (who was then aged 23) was convicted of an offence of being concerned in the supply of a controlled drug of Class A and of a failure to surrender to custody.

2. On 13 February 2023, before the same court, the applicant (who by then was aged 25) was sentenced to 50 months and four weeks' imprisonment respectively (less 118 days spent in custody on remand).

3. The applicant committed the offences during the 12 month operational period of two suspended sentences of concurrent terms of four weeks' imprisonment imposed on 8 August 2018 in the Crown Court at Central London for offences of theft. However, the suspended sentences were not activated on 13 February 2023.

4. The applicant had also been subject to an electronically monitored curfew. However, that fact was not raised by either party at the sentencing hearing. It only came to light when the prison were due to calculate the applicant's release date, at which point it was too late to re-list the case under the slip rule.

5. In accordance with *R v Thorsby and Others* [2015] EWCA Crim 1, the parties were asked to agree the number of days that the applicant had spent remanded on bail subject to a

qualifying curfew. Both parties agreed that the applicant had spent 285 days on curfew. If those days were indeed spent on qualifying curfew, 143 days should be deducted from his sentence in accordance with section 325 of the Sentencing Act 2020.

6. The defence submit that the applicant is entitled to have the 143 days deducted on the facts of the present case. The prosecution initially submitted that no days were monitored on a qualifying curfew as, first, the electronic monitoring device was never installed, and, second, the applicant breached the terms of the conditions on four occasions when technicians attended his bail address to install the device and on each occasion the applicant was not present.

7. The applicant applies for an extension of 470 days in which to apply for leave to appeal against sentence. The applications have been referred to the full court by the Registrar. Having considered the explanation for the delay offered by the applicant's solicitors, we extend time.

The Grounds of Appeal

8. There is no suggestion that the sentence was excessive in principle. The applicant seeks leave to appeal against sentence on the sole ground that the days spent on qualifying curfew should have been deducted from his sentence pursuant to section 240A of the Criminal Justice Act 2003 and section 325 of the Sentencing Act 2020.

Discussion

9. The applicant first appeared at Thames Magistrates' Court on 27 May 2020 and was remanded on bail, the conditions of which included a curfew between 1900 hours and 0700 hours. He subsequently appeared at Maidstone Crown Court on 24 June 2020 for his plea and trial preparation hearing, when he was again remanded on bail with the same conditions.

Following an application to vary bail by the defence, the curfew was removed on 8 March 2021. The relevant number of days that the applicant should have been subjected to curfew was 285. The application of section 325 of the Sentencing Act would have justified 143 days' reduction.

10. Reports from EMS (the company responsible for electronic monitoring) suggest that the electronic monitoring device was never installed and consequently no days were monitored on bail curfew. Evidence from the respondent further suggests that on three occasions the applicant was not present at the property during the operational period of his curfew, and on one occasion consent for monitoring equipment to be installed was withdrawn. The applicant should have been subject to breach proceedings. However, the officer in charge of the case was never made aware of these breaches because EMS sent the reports to the wrong police force.

11. The applicant submits that, following *R v Sothilingham* [2023] EWCA Crim 485, he is entitled to the days spent on qualifying curfew being deducted from this sentence. In *Sothilingham* the applicant had been released on bail subject to a qualifying curfew with electronic monitoring, but the equipment was never fitted. The court held that if there is a failure to put in place a robust process for deploying such electronic equipment, it would be illogical that the loss should lie at the door of the subject, rather than at the door of the state. The court concluded that on a true construction of the relevant sections, the applicant was entitled to the appropriate credit under section 325.

12. The respondent acknowledges that *Sothilingham* remains good law and that, accordingly, the Crown cannot claim, as a matter of principle, that the applicant is not entitled to the deduction simply because the equipment was never installed. However, the respondent submits that the present case can be distinguished from *Sothilingham* in that in the latter case

there was no evidence that the applicant was in breach of his curfew conditions.

13. Evidence has now come to light, which was not before the sentencing judge, that the applicant was in fact in breach of his curfew conditions. EMS attended the applicant's home on a number of occasions to fit the tag, without success. However, no breach proceedings were ever brought due to what was effectively an administrative error. Had breach proceedings been brought, it would no doubt have been argued that the applicant had deliberately evaded the electronic monitoring requirement.

14. Similar circumstances were considered by this court in *R v Barrie Hoggard* [2013] EWCA Crim 1024. The court was presented with information that was not before the sentencing judge, to the effect that the appellant had breached the terms of the qualifying curfew on a number of the relevant days. The court held that if there is a dispute as to the number of days that fell to be included in the deduction, then the prosecution must prove its case on the issue to the criminal standard.

15. However, the court went on to hold that if it was of the opinion that the resolution of that dispute, or part of it, would likely amount to the disproportionate use of time and expense then (without more) the dispute, or the relevant part of it, should be resolved in the defendant's favour and no deduction made from the number of days identified. The court is only likely to be of such an opinion if the number of days involved is relatively modest. In *Hoggard*, the net credit in dispute was four days, and the resolution of the dispute would have required an adjournment, the attendance of the prosecution and the likely calling of evidence. The court concluded that such further proceedings would be likely to amount to a disproportionate use of time and expense, and so the dispute was resolved in the appellant's favour.

16. The respondent concedes that in the present case the net credit in dispute appears to be three days, which on the application of section 325 of the Sentencing Act would amount to the deduction of two days. Whilst asserting that the prosecution is not, strictly speaking, precluded from claiming that the applicant is not entitled to the full deduction, the respondent concedes that it might be thought a disproportionate use of time and expense to resolve the dispute, where the disputed net credit is even less than it was in *Hoggard*.

17. We are grateful for the realistic stance adopted by the Crown on this matter. We are of the view that it would be disproportionate to resolve the dispute as to the number of days to be deducted. Accordingly, we extend time to apply for leave, we grant leave, and we allow the appeal to the extent that we direct that 143 days be deducted from the sentence to be served, in accordance with section 325 of the Sentencing Act 2020.
