

**Neutral Citation Number: [2016] EWCA Crim 2062**

**No. 2016/04848/A2**

**IN THE COURT OF APPEAL**

**CRIMINAL DIVISION**

**Royal Courts of Justice**

**The Strand**

**London**

**WC2A 2LL**

**Thursday 15<sup>th</sup> December 2016**

**B e f o r e:**

**MR JUSTICE WYN WILLIAMS**

**and**

**MR JUSTICE SWEENEY**

**R E G I N A**

**v**

**CHRISTOPHER BOTTING**

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(Official Shorthand Writers to the Court)

**Mr L Mackay** appeared on behalf of the Appellant

**J U D G M E N T**

**(Approved)**

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Thursday 15<sup>th</sup> December 2016

**MR JUSTICE WYN WILLIAMS:**

1. On 3<sup>rd</sup> October 2016 in the Crown Court of Maidstone before Mr Recorder Nicklin QC the appellant was sentenced to a term of ten months' imprisonment for an offence of making dishonest representations for the purpose of obtaining social security benefits.

2. In summary, the appellant claimed to be entitled to disability living allowance at the higher rate when that was not the case. He had been convicted earlier by a jury of this offence following a trial presided over by the Recorder.

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

4. The appellant's offending began on or about 31<sup>st</sup> March 2010. On that date he completed a form claiming to be entitled to disability living allowance at the higher rate. Apparently he was already in receipt of disability living allowance, but the purpose of the new claim was to obtain benefit at the highest possible rate. In the form which he completed, the appellant made many false statements relating to his mobility and state of health. The substance of those statements was set out in full in the sentencing remarks of the Recorder, and we use his description as a convenient summary:

"In the form submitted in support of his claim [the appellant] stated among the following things: 'I cannot bend over and use the aid of a stick to walk ten metres from the front door to the car if it is a good day. I cannot go out on my own. It has now got to the point where I am unable to walk a very short distance without discomfort and I now accept that a wheelchair is my only option if I want to get out. I cannot get up as I have no strength in my

right arm and have no way of bending to help myself. In the last eight to nine months the constant pain has become so intense that I am in pain all of the time and my mobility is so much more hard than I cannot even walk around the supermarket but stay in my car. I have also noticed that lifting my legs to go up or down stairs or steps is a problem. I cannot stand for long periods of time without leaning against something. I cannot lift anything as my hands shake and I drop things. I cannot raise my arms above my head, I have given up my hobby', which was explained in his evidence as including gardening."

5. That picture contrasted sharply with evidence which came into the hands of the prosecution from the appellant's neighbour, a Mr Wilson. Mr Wilson had begun to suspect that the appellant was wrongly claiming benefits. Accordingly, from time to time throughout the period between March 2010 and January 2013 Mr Wilson video-recorded the appellant carrying out many activities. Those video-recordings gave the lie to the claims that we have just summarised. We take one example only. The video showed the appellant gardening extensively. It was essentially on the basis of Mr Wilson's video recordings that the appellant was convicted by the jury.

6. The total sum obtained by the appellant as a consequence of his fraudulent statements was approximately £15,000. That sum was accumulated over approximately three years. By the date of sentence the appellant had repaid about one-third of the £15,000.

7. It is also to be observed that the prosecution accepted that the appellant was entitled to benefits at a certain level. However, there was no information before the Recorder as to the amount the appellant might have claimed quite legitimately, and that remains the position.

8. At the date of sentence the appellant was aged 52. He had no previous convictions. He was

suffering from significant ill-health. He suffered from Crohn's disease and deafness, both of which were permanent conditions. He had also developed a stone in his kidney, which had required an operation to insert a stent into the kidney. At the date of sentence a further operation in respect of the kidney was planned.

9. Before the sentencing exercise was concluded there was discussion between counsel as to the appropriate categorisation of the offence within the Definitive Guideline issued by the Sentencing Council. The judge accepted that which both counsel submitted, namely, that the offence was one which fell within category 4B of the appropriate guideline. That means that the appropriate range of sentence was a medium level community order to 21 months' imprisonment. The starting point sentence within the relevant 4B guideline, based upon a loss of £30,000, is 36 weeks' imprisonment.

10. There can be no doubt that the judge was correct to conclude that there were factors which increased the seriousness of the offence. They were the length of time over which the fraud had been in effect and the fact that the offending was fraudulent from the outset. The indictment specified that the appellant had committed the fraud on one occasion in March 2010, but Mr Mackay, who pursues this appeal on behalf of the appellant, was frank enough to tell us that it had emerged during the course of the proceedings that the fraudulent representations were made on at least one further occasion, probably in 2011.

11. Those were the features which increased the seriousness of this offending. However, there were a number of other considerations to be taken into account. First, there was the amount of the loss. It was very significantly lower than the amount upon which the starting point in the guideline is based. Further, as we have said, approximately one-third of the loss had been repaid.

Second, there was the strong mitigating factor that the appellant had no previous convictions. Third, there was the true state of his health which, as we have said, was a significant feature at the time of sentencing.

12. In our judgment, had the judge balanced those competing aggravating and mitigating features appropriately, the sentence to be imposed would have been less than the starting point sentence specified in the guideline.

13. The Recorder's differing view seems to have been arrived at by the following process of reasoning. His view was that such were the aggravating features in this case that, notwithstanding the powerful mitigation which we have described and which he accepted, he thought that the appropriate starting point sentence for a man who was fit and able was twelve months' imprisonment. Because of the appellant's various ailments, the Recorder reduced his sentence to ten months. In reaching his conclusion it is at least possible that the Recorder took account of the way in which the appellant had conducted his defence at the Crown Court. The single judge described it as "deplorable". We concur. However, it was not a reason to increase the sentence above that which was appropriate. The effect of the defence run, as is accepted by Mr Mackay, is that there could be no credit for a guilty plea; that states the obvious. More importantly, perhaps, there could be no credit for genuine remorse. It is also at least possible that the Recorder considered that the guideline itself was unduly generous to persons committing offences of the type in question. Again, if that was a factor in this case, it should not have been.

14. As we have said, we cannot see how a sentence above the starting point in the guideline was justified in this case.. Had the appellant been fit and able-bodied, we would have concluded that the appropriate sentence was eight months' imprisonment. The Recorder felt that a discount of

two months, to reflect the hardship which the appellant suffers or will suffer in prison by virtue of his disabilities, was justified. We see no reason to depart from that aspect of the Recorder's reasoning. Accordingly, giving effect to the disability which the appellant suffers, we have concluded that the appropriate sentence in this case would have been one of six months' imprisonment.

15. Accordingly, we quash the sentence of ten months' imprisonment and substitute a term of six months' imprisonment.