Neutral citation number: [2019] EWCA Crim 928

No: 201901338/A4
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 11 April 2019

B e f o r e:

LORD JUSTICE FULFORD

MR JUSTICE SWEENEY

MR JUSTICE DINGEMANS

R E G I N A
v
NICHOLAS BURKE

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Mr A Thompson (Solicitor Advocate) appeared on behalf of the **Applicant**

J U D G M E N T
(Approved)

1. LORD JUSTICE FULFORD: On 11 March 2019, in the Crown Court at York, the applicant pleaded guilty to a single offence of doing an act tending and intended to pervert the course of public justice contrary to common law. He had indicated that guilty plea at the first opportunity when he first appeared at the Magistrates' Court.

2. On 4 April 2019 he was sentenced by His Honour Judge Hickey, by way of what was described as a deterrent sentence, to 2 months' immediate imprisonment. The Registrar has referred his application for leave to appeal against sentence to the Full Court.

3. The background facts can be stated extremely shortly. On 18 February 2018 a police officer used a device to capture evidence of the speed at which the applicant's BMW vehicle was travelling on Greengales Lane between Weldrake and York. The officer believed from what he had seen that the applicant's car was travelling in excess of 60 miles per hour (the speed limit for that road). Two attempts were made to assess the speed of the BMW but the measurement could not be made due to the interference of a laser jammer that had been installed in the vehicle.

4. On investigation of the applicant's vehicle the officer's suspicion that a jamming device of this kind had been fitted was found to be correct. When confronted the applicant immediately admitted his responsibility for fitting the device, and said in interview that he had taken this step because he drove for his work and he was worried, due to the miles that he covered, about accruing points on his licence.

5. A community impact statement was before the court which had been prepared by Andrew Tooke. In that statement Mr Tooke outlined that in 2011 the North Yorkshire

Police invested in the use of a mobile safety camera van in order to assess the visibility and impact that the presence of this van may have on road traffic collisions. The van was used in order to reduce road traffic collisions by enforcing a range of road traffic offences such as speeding, unlawfully using a mobile phone and failing to wear a seat belt. As a result of the deployment of the van there had been a notable reduction in fatal and serious collisions in North Yorkshire. However, since the introduction of the vehicle (now some significant time ago) the North Yorkshire constabulary had detected "an increasing number of vehicles fitted with laser jamming devices".

6. We observe that, although the use of these devices by members of the motoring public is clearly serious and investigations take time and divert scarce resources, the suggested increase in the use of laser jamming devices is not explained, either as to the extent of the increase or the scale of the problem. Indeed, we are told by counsel that it was suggested to the learned judge that there had been very few of these cases, something of the order of three during the preceding 12 months, and that no similar cases were waiting to go before the courts.

7. The applicant is now aged 46 and has not previously appeared before the court. He has two endorsements for speeding on his licence: the first is from November 2017, therefore before this offence, when he was found to be driving at 74 miles an hour in a 50 mile per hour zone on the M1 and the second was after this offence, on 10 October 2018, when the applicant was driving at 45 miles per hour in a 30 mile per hour zone. He was in work at the time of this offence, having been with the same company in the motor trade for over two decades. He has, from the outset, expressed clear remorse for what has happened and he resigned his post shortly after he was charged with this offence.

8. A number of character references included observations by his general practitioner. The author of the pre-sentence report assessed him as posing a low risk of re-offending and as a low risk of serious harm. It was highlighted that the applicant was worried about going to prison and, in the view of the author of the report, custody would clearly act as a punishment and a deterrent for others, although he assessed the applicant as being suitable to be managed within the community and, in those circumstances, a community disposal, with an unpaid work requirement was proposed.

9. The judge delayed passing sentence until 4 April, in order to receive a transcript of a decision of this court, on the 27 February 2019, presided over by the Lord Chief Justice in R v Michael Twizell [2019] EWCA Crim 356. The facts of that case bear very strong similarities to the instant application. On 21 January 2019 Twizell pleaded guilty, in the Crown Court at York, before the same judge as in this case, and was sentenced by him on 11 February 2019 to 3 months' immediate imprisonment. He faced a similar charge to the present applicant, having used a similar device in his car.

10. It is of note that the appellant in that case lied to the police in relation to having fitted the device and only admitted his guilt on the day listed for his trial. The court in Twizell outlined the approach that His Honour Judge Hickey took in passing sentence, in that he emphasised the seriousness of offences of this kind whilst balancing that against the good character of that defendant, the character references that he had read and the charity work which he was undertaking. Judge Hickey remarked, in that case, that the offence was serious and the sentence should have a deterrent element.

11. The court's conclusions were as follows:

i. "10. We have no hesitation in saying that the use of such jamming devices will amount to a serious offence, whether or not accompanied by other bad driving. These devices prevent the police from detecting the crime and hinder the important role of the police ... The judge was, in our view, entitled to conclude that the custody threshold was met. We do not regard the judge's reference to deterrence as going further than laying down a marker that the court will treat as serious those offences which seek to undermine the processes of justice, even where an offender has no previous convictions.

12. However, it is notable that the judge did not apply the definitive guideline on the imposition of community and custodial sentences. We have taken into account the factors under the guideline which should be weighed in considering whether it is possible to suspend the sentence. We are persuaded that an immediate sentence of three months' imprisonment, after a guilty plea, was manifestly excessive in the light of the strong personal mitigation advanced to the judge and we take the view that this is not a case where appropriate punishment can only be achieved by immediate custody.

13. Were it not for the fact that the applicant spent around sixteen days in custody, we would have imposed a suspended sentence order with a curfew and a fine. Given, however, that the applicant has served sixteen days in prison, we will order the sentence to be suspended without other requirements or a fine.

14. We shall, therefore, grant leave. We will quash the sentence of three months' immediate imprisonment and substitute for it a sentence of three months' imprisonment suspended for two years."

15. In passing sentence in the instant case the judge highlighted the two endorsements to which we have referred on the defendant's licence, the instances when he was caught speeding. He stressed the strong mitigation that had been advanced, the immediate plea that had been made and the indications of it, and the effect for the applicant of losing his job. He went on to address the guideline relevant to these circumstances and expressed

his view that appropriate punishment could only be achieved by immediate custody.

16. The judge sought to distinguish the applicant's case from Twizell and he highlighted four matters:

    i. "First of all, the criticism was rightly made of myself that I did not apply the guidelines; I have applied the guidelines in this case. Secondly, I did not have an impact statement; I now have that from Officer Tooke. Thirdly, you have a record for speeding both before and after. Fourthly, when the Court of Appeal dealt with that case, the person involved had spent 16 days inside in custody."

17. We observe in relation to those suggested distinctions, first, that the impact statement from Mr Tooke (albeit clearly useful) does not, as we have already stressed, indicate that this kind of offending is prevalent within the relevant area. There may have been an increase but the extent of the increase and the baseline numbers were unaddressed by Mr Tooke. Second, although in Twizell the court's determination of the appropriate sentence was in part based on the 16 days that Twizell had served in prison, that was not a factor that contributed to the substitution of a suspended prison sentence. Instead, the 16 days served was simply relevant as to whether the court was going to impose other requirements or a fine on Twizell when they quashed the immediate sentence of imprisonment.

18. The judge stated that he wished a message to go out to those people that used devices of this kind that the court will treat these offences as serious because they undermine the process of justice even when the accused has no previous convictions. However, in the

Overarching Guideline on Seriousness (effective from 16 December 2004) the Sentencing Council sets out:

19. **"Prevalence**

20. 1.38 The seriousness of an individual case should be judged on its own dimensions of harm and culpability rather than as part of a collective social harm. It is legitimate for the overall approach to sentencing levels for particular offences to be guided by their cumulative effect. However, it would be wrong to further penalise individual offenders by increasing sentence length for committing an individual offence of that type.

21. 1.39 There may be exceptional local circumstances that arise which may lead a court to decide that prevalence should influence sentencing levels. The pivotal issue in such cases will be the harm being caused to the community. It is essential that sentencers both have supporting evidence from an external source (for example the local Criminal Justice Board) to justify claims that a particular crime is prevalent in their area and are satisfied that there is a compelling need to treat the offence more seriously than elsewhere.

22. The key factor in determining whether sentencing levels should be enhanced in response to prevalence will be the level of harm being caused in the locality. Enhanced sentences should be exceptional and in response to exceptional circumstances. Sentencers must sentence within the sentencing guidelines once the prevalence has been addressed."

23. For the reasons already set out in detail, there was no supporting evidence to justify the suggestion that the prevalence of this case locally was such that the sentence needed to send a message out to others who were minded to use devices of this kind. The report of Mr Tooke did not give any indication as to the frequency of this kind of offending and, as a consequence, it did not provide a justification for a deterrent sentence

24. In material ways this applicant had greater mitigation available to him than the appellant Twizell. The factors relied on by the learned judge to distinguish the present application from Twizell were, in our view, neither persuasive nor substantive. We do not downplay the seriousness of this activity, but a sentence of immediate custody, on

these facts and for this applicant of good character, was, in our judgment, manifestly excessive.

25. In those circumstances, the sentence of 2 months' immediate imprisonment will be suspended for 2 years and given the time served we do not make a suspended sentence order with a curfew and a fine.

26. We grant leave, we quash the sentence and we substitute a term of 2 months' imprisonment which is suspended for 2 years. Before departing from this appeal, we note that we have been told by Mr Thompson that the appellant intends to return to a position with another company similar to the one that he currently occupies. As a consequence, he will be in a position to spread the message within the motor trade that offences of this kind are serious and will, in all likelihood, result in a sentence of imprisonment.

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