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No. 2019/01093/A3
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 15th May 2019

B e f o r e:

MR JUSTICE JEREMY BAKER

and

SIR KENNETH PARKER

REGINA

- v -

CARL DERRILL DAVIES

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Mr Ieuan Rees appeared on behalf of the Appellant

JUDGMENT
(Approved)

Wednesday 15th May 2019

MR JUSTICE JEREMY BAKER:

1. On 28th February 2019, in the Crown Court at Swansea, the appellant, Carl Davies, pleaded guilty to an offence on indictment of doing an act tending and intended to pervert the course of public justice (count 1) and a related summary offence of driving without insurance. A sentence of six months' imprisonment was imposed upon count 1. No separate penalty was imposed for the summary offence, save that the Recorder made an order of disqualification from driving.

2. The offences had been committed during the eighteen month operational period of a suspended sentence of 23 weeks' imprisonment imposed on 23rd February 2018 in the Crown Court at Merthyr Tydfil in respect of offences of possession of a Class A controlled drug and possession with intent to supply a Class B controlled drug. The Recorder activated the suspended sentence in full and ordered the period of 23 weeks to run consecutively to the period on indictment, making a total period of six months and 23 weeks' imprisonment. Thereafter, the order of disqualification from driving was announced as being for a period of one year, together with an extension of half of the custodial term.

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

Facts of offences

4. The circumstances of the offence on indictment were that on 1st May 2018 the appellant was stopped whilst driving a motor vehicle after he overtook a police vehicle at speed. He gave his name as Paul Davies and tested positive for cannabis in a roadside drugs test. He was arrested and conveyed to custody where a blood sample was taken from him. Whilst at the police station

he confirmed that his name was Paul Davies. He was released under investigation. The blood sample was subsequently analysed and it was found that he was over the permitted limit, having both 2.8 micrograms of cannabis and 800 micrograms of diazepam per litre of blood.

5. A postal requisition was issued and in due course Paul Davies, who is in fact the appellant's brother, attended at the magistrates' court. He denied that he had been stopped by the police and tested for drugs.

6. The police then arranged for a DNA analysis of the blood sample to be carried out. When the DNA database was searched, it was found that the sample matched that of the appellant. He was arrested. He admitted in interview that he was the person whom the police had stopped and that he had given the false name of his brother.

7. Unfortunately, due to the delay which had been caused as a result of the appellant's actions, the prosecution were unable to prosecute him for the offence of driving whilst unfit through drugs.

Circumstances of the appellant

8. The appellant is 46 years of age. He has an extensive history of offending over the last 30 years. His previous convictions include offences of burglary, offences involving public disorder and violence, and, more recently, further offences involving dishonesty and drugs. A wide variety of sentences have been imposed upon him, including periods of both suspended and immediate custody.

Sentencing exercise

9. In his extremely brief sentencing remarks, the Recorder described the fact that the appellant had sought to implicate his own brother for the driving offences as being despicable, and imposed the sentences upon him.

Grounds of appeal

10. Mr Ieuan Rees, who appears on behalf of the appellant this morning as he did in the lower court, does not seek to challenge the sentence imposed in respect of the offence on the indictment. His criticism is limited to the fact that the Recorder activated in full the suspended period of custody. He points out that by the time the appellant was being dealt with by the Recorder in February 2019, almost a year had elapsed since the imposition of the suspended sentence in February 2018. Moreover, the appellant had completed almost all of the rehabilitation activity requirement which had been imposed upon him as part of the suspended sentence order. Whilst Mr Rees does not suggest that the Recorder was not entitled to activate the suspended sentence, he submits that it should not have been activated in full but only in part.

Analysis

11. Undoubtedly the offence on indictment was a serious offence which crossed the custody threshold and, given the history of the appellant's previous offending, undoubtedly merited the sentence which the Recorder imposed. Not only did the appellant's action in falsely providing the name of his brother have the effect of potentially placing his own brother at risk of wrongful conviction, but it also had the effect of enabling the appellant to escape conviction for driving whilst unfit through drugs.

12. The statutory provisions which govern the question as to whether and to what extent a suspended sentence should be activated as a result of the commission of a further offence during the currency of its operational period, are to be found in paragraph 8 of Schedule 12 to the Criminal Justice Act 2003, which provide:

"(2) The court must consider his case and deal with him in one of the following ways —

- (a) the court may order that the suspended sentence is to take effect with its original term unaltered,
- (b) the court may order that the sentence is to take effect with the substitution for the original term of a lesser term.
- (ba) the court may order the offender to pay a fine of an amount not exceeding £2,500,
- (c) in the case of a suspended sentence order that imposes one or more community requirements, the court may amend the order by doing any one or more of the following —
 - (i) imposing more onerous community requirements which the court could include if it were then making the order,
 - (ii) subject to subsections (3) and (4) of section 189, extending the supervision period, or
 - (iii) subject to subsection (3) of that section, extending the operational period,
- (d) in the case of a suspended sentence order that does not impose any community requirements, the court may, subject to section 189(3), amend the order by extending the operational period.]

(3) The court must make an order under sub-paragraph (2)(a) or (b) unless it is of the opinion that it would be unjust to do so in view of all the circumstances, including the matters mentioned in sub-paragraph (4); and where it is of that opinion the court must state its reasons.

(4) The matters referred to in sub-paragraph (3) are—

- (a) the extent to which the offender has complied with any community requirements of the suspended sentence order, and
- (b) in a case falling within sub-paragraph (1)(b), the facts of the subsequent offence."

13. The effect of these statutory provisions is that where there is a breach of a suspended sentence by the commission of a further offence, the court is obliged to activate the suspended sentence in full or in part unless it is unjust to do so in all the circumstances, including the extent to which the offender has complied with any community requirements of the suspended sentence order and the facts of the subsequent offence.

14. The Sentencing Council has provided guidance in its Breach Offences Guideline which sets out four different categories of situation depending upon the nature and seriousness of the new offence. Where the new offence is more serious than that for which the suspended sentence order was imposed or there is multiple offending then the guideline penalty is full activation of the suspended sentence order. Moreover, it is only in the second and third categories, where the new offence is either similar in type and gravity to the previous offence or is less serious than the previous offence, that the extent to which an offender has completed any unpaid work or curfew requirements of the suspended sentence order is to be taken into account, together with other factors such as the proximity of the breach to the imposition of the order.

15. These guidelines apply to all offenders aged 18 and older who are sentenced on or after 1st October 2018, regardless of the date of the offence. We consider that in relation to the first category of case, the omission to take into account the extent to which an offender has completed any unpaid work or curfew requirement of a suspended sentence order may reflect

some degree of variance with the position which has been established hitherto in this court, that there will generally be some reduction of the term of the suspended sentence if there has been a substantial degree of compliance with an unpaid work requirement (see *R v McDonagh* [2017] EWCA Crim 2193). The court is of course under a statutory duty to follow any relevant sentencing guidelines (see section 125(1) of the Coroners and Justice Act 2009). However, this is subject to the court being satisfied that to do so would be contrary to the interests of justice. Therefore, even under the new regime there may still be situations, albeit not the generality, where some degree of reduction may still be necessary to reflect the completion of unpaid work or curfew requirements if the court is satisfied that it would be contrary to the interests of justice not to do so.

16. In the present case we have no doubt, for the reasons which we have set out, that the offence on indictment of doing an act tending and intended to pervert the course of public justice was more serious than the offences in respect of which the suspended sentence was imposed. Accordingly, under the Sentencing Council's breach offences guideline, the guideline penalty is for full activation of the original custodial term.

17. On behalf of the appellant it is pointed out that the suspended sentence included a 20 day rehabilitation activity requirement and that to date the appellant has completed the SMART programme and that at the time of his appearance in the Crown Court at Swansea he was having one-to-one appointments with his supervising officer. On the other hand, we note that the offence which placed the appellant in breach of the suspended sentence occurred after a period of only about two months following the imposition of the suspended sentence order.

Conclusion

18. In these circumstances we consider that, despite the appellant's compliance with the rehabilitation activity requirement, the Recorder was not only correct to have activated the suspended period of custody, but to do so in full and order it to be served consecutively to the sentence for the offence on indictment and that it was not contrary to the interests of justice for him to have done so.

19. Although for the reasons we have given, the appeal will be dismissed, we would just seek to clarify that although the Recorder announced the period of disqualification from driving as being for a period of one year, together with an extension of half of the custodial term, the court recorded the disqualification as being for a total period of one year and 24 weeks, including an uplift under the Road Traffic Offenders Act 1988. Strictly speaking, although half of the custodial term is a period of 24½ weeks, as the extra weeks beyond the discretionary period of one year have been properly recorded as being an uplift, which is the correct terminology under section 35B of the 1988 Act, and as the guidance provided by this court in *R v Needham* [2016] EWCA Crim 455 allows for slightly more flexibility of calculation for an uplift, rather than an extension under section 35A, we shall simply confirm that the order for disqualification from driving is for a period of one year and 24 weeks, comprising one year's discretionary disqualification together with an uplift of 24 weeks under section 35B. Indeed, any adjustment to add the half week would have offended section 11(3) of the Criminal Appeal Act 1968.

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