Regina
v
Neil David Thursby

Court of Appeal Criminal Division

[2019] EWCA Crim 958

Before: Mrs Justice Simler DBE and The Recorder of Nottingham (His Honour Judge Dickinson QC) (Sitting as a Judge of the Court of Appeal Criminal Division)

Thursday 23rd May 2019

Representation

Miss G Turudija-Austin appeared on behalf of the Appellant.

Judgment

Thursday 23rd May 2019

Mrs Justice Similer:

I shall ask the Recorder of Nottingham to give the judgment of the court.

The Recorder of Nottingham:

1. This is an appeal against sentence brought with the leave of the single judge. We say at the outset that we are grateful to Miss Turudija-Austin for the clarity of her submissions, both in writing and orally this morning.

2. On 18th February 2019, in the Crown Court at Oxford, following a committal for sentence, the appellant, Neil Thursby, was sentenced to a total of fifteen months' imprisonment as follows: for breach of a Sexual Harm Prevention Order, six months' imprisonment; and for failing to comply with notification requirements, six months' imprisonment concurrent. A suspended sentence of nine months' imprisonment was activated in full and ordered to run consecutively.

3. The background is that on 15th December 2016, for offences of making indecent images of children, the appellant was sentenced to nine months' imprisonment, suspended for 24 months. It was a requirement of the suspended sentence order that the appellant should participate in the internet sex offender treatment programme and participate in up to 25 rehabilitation activity requirement sessions. The notification requirements applied automatically. The default term was ten years. However, the appellant was also made subject to a Sexual Harm Prevention Order without limit of time. The effect of this is that the notification requirements will apply indefinitely, unless and until the Sexual Harm Prevention Order is revoked.

4. The subsequent guidance of this court means that it is unlikely now that a Sexual Harm Prevention Order will be made, in a case such as this, without limit of time: see, for example, *R v McLellan; Bingley [2017] EWCA Crim 1464* .

5. In late January 2018, the appellant changed his mobile phone – not just a replacement handset, but a new number. This meant that the police officers responsible for supervising the appellant were unable to contact him. It is a requirement of the Sexual Harm Prevention Order that the appellant must notify the Public Protection Officer within three days of coming into possession of a smart phone or other device capable of accessing the internet. A police officer spoke with the appellant on 3rd February 2018. The appellant said that his mobile phone had been stolen. He had yet to replace it, he said, but planned to do so once he had the money. He promised to inform the police of his new number as soon as he had it.

6. The appellant was lying to the police. He already had a new handset and number. He did not contact the police either in the next few days or at all. As a result, the appellant was arrested on 22nd March 2018. He had in his possession two mobile phones which he had failed to bring to the attention of the police.

7. An important part of the notification requirement is that the appellant should keep the police informed of where he was living. At the time of his arrest in March 2018, the appellant was living at the youth hostel in Oxford. On release from police custody, he was not permitted to return to the hostel. The appellant then gave his address as Central Backpackers in Oxford. He did stay there until April 2018, but not after that.

8. By September 2018, the appellant had still not notified the police of his change of address. He was re-arrested on 27th September 2019. He told the police that he was sleeping rough, but outside a gym of which he was a member and where he could wash himself and his clothes. No reason was advanced by the appellant for his failure to co-operate with the police under both the Sexual Harm Prevention Order and the notification requirements. The only sensible conclusion is that he no longer accepted the need to comply.

9. It is important to note, as counsel has emphasised, that no improper material was found on the appellant's mobile phones. Nor has his breach of the notification requirements led to harm to any other person.

10. Considering the definitive guideline for breach offences and allowing full credit for the guilty plea, the judge imposed sentences of six months' imprisonment for the two new offences, to run concurrently. No complaint is made as to this. In principle, the new offences attracted consecutive sentences, being different in nature and time. However, the judge had well in mind the principle of totality. As we have indicated, the judge activated the suspended sentence in full, to run consecutively. The new offences were committed respectively in the third and final quarters of the two year term of the suspended sentence. The pre-sentence report confirmed that the appellant had completed the internet sex offender programme and the one-to-one offending behaviour work as part of the rehabilitation activity requirement days. His response to supervision was described by the single word "satisfactory".

11. On 29th October 2018, towards the end of the two year suspended sentence, the appellant was dealt with for breach of the requirements of the order. This concerned the failure to keep an appointment, for which five further rehabilitation activity requirement sessions were imposed. There has been no repetition of the original offending.

12. The sentencing guidelines for breach offences assist also as to the approach to sentence for breach of a suspended sentence on conviction for further offences. The first consideration is the nature of the new offences. This is divided into four categories which, in descending order, are as follows: (1) multiple and/or more serious new offences; (2) new offence similar in type and gravity to the offence for which the suspended sentence order was imposed; (3) new offence less serious than original offence, but requires a custodial sentence; and (4) new offence does not require a custodial sentence.

13. From the transcripts available to us it is not apparent that the judge was referred to the guideline for breach of a suspended sentence order. The guideline is not referred to in the sentencing remarks. The judge was entitled to conclude that this case fell into the first category, that is, multiple new offences. This is a case of two offences, different in time and nature. In such circumstances, the guidelines indicate that the appropriate penalty is "full activation of the original custodial term". The judge was entitled, in principle, to activate the suspended sentence in full. The judge had in mind the total sentence. As we have indicated, the judge could have imposed consecutive sentences for each of the new offences. The total term of fifteen months' imprisonment is stern, but not manifestly excessive.

14. Since the judge did not expressly apply the guideline, we have considered the alternative, namely, that this case, considered in the round, comes within the second category, that is "new offence similar in type and gravity to offence for which suspended sentence was imposed". The Sexual Harm Prevention Order and the notification requirements are there to help prevent repetition of the original offending. The guideline provides that where the second category of breach applies, and where there has been medium to high level compliance with the suspended sentence order, the penalty to be considered is "activate sentence but applying appropriate reduction to original custodial term, taking into account any unpaid work or curfew requirements completed". We add that similar consideration should be given to any other completed requirement, such as those imposed in this case.

15. The appropriate reduction is a matter for the sentencing judge, as seems just on the facts of the case. Considered in this way, the suspended sentence should have been activated as to six months only. However, ultimately, this does not assist the appellant. The judge did have in mind totality, because he imposed concurrent sentences for the two new offences. As we have indicated, in principle consecutive sentences would not have been open to challenge, although no doubt the individual terms would have been shorter. Had the judge imposed consecutive terms for the new offences of, say, six months' imprisonment and three months' imprisonment respectively, and then activated the suspended sentence, reduced to six months' imprisonment, the total sentence would have been the same and there would have been no arguable appeal.

16. For those reasons, this appeal is dismissed.