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Neutral Citation No. [2022] EWCA Crim 1650

IN THE COURT OF APPEAL

CRIMINAL DIVISION



CASE NO 202202409/A1

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 2 December 2022

Before:

LORD JUSTICE DINGEMANS
MR JUSTICE JOHNSON
THE RECORDER OF LIVERPOOL
HIS HONOUR JUDGE MENARY KC
(Sitting as a Judge of the CACD)

REX
V
NICOLA STEWART

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MR A MAJUMDAR appeared on behalf of the Appellant

J U D G M E N T

LORD JUSTICE DINGEMANS:

1. This is the hearing of an appeal against a sentence of three years and six months which was imposed on the appellant for possession of heroin with intent to supply.
2. The circumstances of the offence were that in the early hours of 13 December 2016, so nearly six years ago, the appellant, then aged 46, had been driving a silver Vauxhall motorcar which was stopped by the police in Hitchin, North Hertfordshire. The police subsequently searched the vehicle and found 28 wraps of heroin (count 1), three wraps of crack cocaine (count 2), a small quantity of cannabis (count 3) and some Subutex (count 4) which was a prescription medication issued to a Mr Stephen King. The heroin weighed 3.69 grams and the crack cocaine 0.51 grams. The appellant was thereafter arrested by the police and in interview answered no comment.
3. The appellant was then bailed to attend the police station on 10 March 2017 but failed to return. The appellant was arrested on 14 February 2020 in possession of four bottles of Methadone, only one of which had been lawfully prescribed to her. The proceedings relating to the 2016 offences were re-started and on 17 March 2020 the appellant pleaded not guilty at a pre-trial preparation hearing. A trial date was set for 22 January 2022 but the appellant did not appear and a bench warrant was issued. We were told this morning that the solicitors then acting on behalf of the appellant had made contact on a mobile phone and spoken to a male who had promised to pass on a message but the appellant said the message had not been passed on. In any event the appellant surrendered on 26 January 2022 and was thereafter remanded in custody.
4. On 2 May 2022 in the Crown Court at St. Albans, following a trial, the appellant was convicted of supplying a class A drugs (the heroin) and possession of the other drugs, so that was possession of the crack cocaine, possession of the cannabis and possession of the

Subutex.

5. On 29 July 2022 the appellant was sentenced. There was available to the court a report from Dr Rothermel who worked as an independent forensic psychologist dated 18 July 2022 and a pre-sentence report. The writer of the pre-sentence report had seen the report from Dr Rothermel. It is apparent that the report from Dr Rothermel was based on an interview with the appellant in prison some six years after the offence. Dr Rothermel stated that a current diagnosis of a mental health condition with residual traits of schizophrenia fitted with her assessment results and also stated that her view was that at the time of the offence the appellant was suffering from schizophrenia and drug dependency. Tests had indicated an unspecified personality disorder. The appellant was reported in the pre-sentence report to have been diagnosed with schizophrenia since 2008. The writer of the pre-sentence report considered that the appellant's thinking and behaviour had been impacted by her drug use and mental health issues and the pre-sentence report recorded that the appellant, who had been remanded in custody for six months pending trial and sentence, had expressed herself willing to engage with drug services in the community and had taken steps to address her drug addiction in custody. Mr Majumdar, who appears on behalf of the appellant and to whom we are grateful for his written and oral submissions, has updated us that the appellant continues to make progress addressing her previous drug addiction.
6. The judge found that the offence of possession with intent to supply was a Category 3 offence because it involved street dealing with a significant role. It was a significant role because the dealing allowed the appellant to obtain a car, showing some awareness of the scale of the operation. Street dealing is Category 3 and the sentencing guidelines for which Mr Majumdar has drawn attention says the court should consider all offences

involving supplying directly to users as at least Category 3 harm and make an adjustment from the starting point within that category considering the quantity of drugs in the particular case.

7. A Category 3 significant role has a starting point of four-and-a-half years' custody with a range of three-and-a-half to seven-and-a-half years. So far as mitigation was concerned, the judge referred to Dr Rothermel's report and the fact that the guidelines provide that culpability might be reduced if there is sufficient connection between the offender's impairment or disorder and the offending. The judge noted that the appellant's inconsistent evidence at trial of her drug habit had been given but was persuaded to accept Dr Rothermel's view that there should be a downward adjustment but not such as to reduce culpability from a significant to lesser role.
8. As already indicated, the appellant was then sentenced to the three years six months' imprisonment for the possession of the class A drug (heroin) with intent to supply. No separate penalty was imposed for the offence of possession of the class A drugs (the three wraps of cocaine), the possession of the class B drug (cannabis) and possession of the class C drug (Subutex).
9. Sentence was overlooked for the admitted failure to surrender to custody under the Bail Act. The matter was subsequently referred to the judge who recorded again that there should be no separate penalty but it does not appear that this was done in accordance with the slip rule. We therefore record for the purposes of the record that the sentence for the failing to surrender under the Bail Act should be met with no separate penalty.
10. The grounds of appeal set out in the written advice were that: (1) the judge's starting point was too high when taking into account the quantity of heroin; (2) the judge placed too much weight on the appellant's previous convictions from 2013 as an aggravating

feature; and (3) the judge did not give sufficient weight to the factors reducing seriousness, particularly (but not exclusively) demonstration of and willingness to take steps to address drug addiction and mental health condition. In writing there was also a complaint that the judge ought to have taken account of the lengthy delay in this case. Permission to appeal was refused in that respect and that was not renewed before us.

11. So far as the grounds are concerned, the starting point taken by the judge was not entirely clear in the sense that the judge simply referred to Category 3 significant role and gave the starting point and range in relation to that. The judge did not appear to make any adjustments to the four-and-a-half years starting point or did not share any adjustment that was made. There were 28 separate wraps of heroin, which is not a particularly small amount for street dealing, and in any event once the judge had taken into account the aggravating and mitigating features, the judge came right to the bottom of the range which was for Category 3A. It is therefore impossible to say that the judge's approach to the starting point was wrong.

12. So far as the second ground of appeal is concerned, in our judgment the judge did not place too much weight on the appellant's previous convictions. The appellant had before the relevant convictions seven convictions for 13 offences committed from 20 August 1993 to 25 November 2020. There were 10 relevant previous convictions for drug offences. These included offences in 2013 for possession of heroin and cocaine with intent to supply. The conviction from 2013 was only three years before the relevant offending and it was for the same offending, namely supplying class A drugs. Experience and evidence establishes that class A drugs destroy lives and spread misery in society, and it is apparent that the appellant has been a dealer of drugs for a period of time.

13. So far as the third ground of appeal is concerned, in our judgment the judge did give proper weight to the mitigating factors of the appellant's mental disorder and indeed her late attempts to address her drug habit. The judge reduced the sentence to the lowest level of the range for this offence. It might be noted that properly read the report from the psychologist relied essentially on the appellant's account for the diagnosis and conclusion of the mental disorders, but it is right to acknowledge that the judge who heard the trial accepted those conclusions. The judge took these matters into account.
14. So far as the fourth ground, which was not pursued before us, we have considered it but in our judgment the judge was not right to give a further discount for delay. The appellant did not surrender to bail. The appellant may have been living openly but this does not excuse her failure to comply with her obligation to report to the police station, which failure was added to by the failure to attend the first trial date with all the disruption that such non-attendance causes. The judge did not increase the sentence to take into account the failure to surrender. In those circumstances, we consider that there was no justiciable ground of appeal in relation to these matters.
15. For all those reasons, and notwithstanding the very helpful submissions from Mr Majumdar, we dismiss the appeal.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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