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IN THE COURT OF APPEAL
CRIMINAL DIVISION
NCN: [2023] EWCA Crim 1036
Case No: 2022/03414/A4



Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 1st September 2023

B e f o r e:

LORD JUSTICE MALES

MR JUSTICE HOLGATE

MR JUSTICE HILLIARD

R E X

- v -

MARLON WINSTON GOLDING

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Mr S Gardiner appeared on behalf of the Applicant

J U D G M E N T

Friday 1st September 2023

LORD JUSTICE MALES: I shall ask Mr Justice Holgate to give the judgment of the court.

MR JUSTICE HOLGATE:

1. On 26th October 2022, in the Crown Court at Snaresbrook before Her Honour Judge English, the applicant pleaded guilty to two counts of possessing a prohibited firearm, contrary to section 5(1) of the Firearms Act 1968 (counts 1 and 2), possessing a firearm without a certificate, contrary to section 1(1)(a) of the Firearms Act 1968 (count 3), and possessing ammunition without a certificate, contrary to section 1(1)(b) of the Firearms Act 1968 (count 4). On the same date he was sentenced to concurrent terms of 7½ years' imprisonment on each of counts 1 and 2, to a concurrent term of 6 months' imprisonment on count 4, and to a consecutive term of 18 months' imprisonment on count 3. Thus the overall sentence was one of 9 years' imprisonment.

2. The applicant now applies for an extension of time of 27 days in which to renew his application for leave to appeal against sentence following refusal by the single judge. We will consider the arguability of the proposed appeal before deciding whether to grant the necessary extension of time.

3. On 6th May 2022 two workmen went to 67 Orange Grove, Leytonstone to carry on fixing some fencing separating the gardens of number 67 and number 65 (the applicant's address). The day before they had told the applicant that they might need to access his garden. He had said that that would be fine. At about 10.30 am one of the workmen entered the applicant's garden to move a wheelie bin. As he did so, he saw a black pistol lying on the ground where the bin had been. He picked it up and realised that it was real when a bullet fell out of the chamber of the gun. He put the gun and the bullet on top of the bin and told his colleague

who took a photograph of it.

3. The female occupant of number 67 told the applicant about the gun. He came out into his garden, picked up the gun and bullet and said, "I'll take that", using part of his dressing gown to handle them. He told the workmen to forget what they had seen. The applicant then went to the front door of number 67 and went into the garden with the occupant. The applicant told the workmen not to report what they had found and asked them to think about what would happen to his children if he (the applicant) were to be sent to prison. He raised his voice. He offered to pay thousands of pounds not to report their finding. The workmen said that they had already contacted their office. He said that he would replace the gun with a toy replica. One of the workmen said to the applicant that he had until 11:30 am to get a plastic gun because he was worried about what the applicant might do and they needed to leave safely. As soon as the applicant went off, the workmen packed up and left to report what had occurred to the police.

4. At about 11.10 am the applicant parked his Volkswagen Tiguan in a road about a three minute drive from his home. About 20 minutes later he walked away using his mobile phone. At 12:15 pm he returned on foot to the vehicle and put a large object in the boot before again leaving on foot. At 12:38 pm, a black Range Rover Evoque, registered to the applicant's partner, pulled up behind the Tiguan. The applicant got out of the passenger side and opened the boot of the Tiguan before returning to the Range Rover, which was then driven away.

5. The police identified the applicant as living at number 65 and that he had a previous firearms conviction. They seized his Volkswagen Tiguan and searched it. There was a boxing punch bag in the boot area, inside the stuffing of which was a towel wrapped around a pistol which contained three unspent 0.36mm auto rounds. There was a further black pistol, a magazine holding one round, and a sawn-off double-barrelled shotgun (count 3).

6. Count 1 related to a converted 9mm Walther PK380 self-loading pistol and a suitable detachable magazine. The gun's serial number had been obliterated. It was originally manufactured as a multipurpose blank, tear gas, flare launching pistol. When produced, it would have had a partially obstructed barrel to prevent the discharge of bulleted cartridges. The gun's original partial bore obstructions had been removed, leaving an unobstructed barrel. The barrel length and overall length were prohibited. The gun was in working order, firing 9mm cartridges with lethal potential.

7. Count 2 related to a converted 9mm calibre multi-purpose, self-loading pistol. Manufacturer markings had been obliterated. The gun's original partial bore obstructions had been removed, leaving an unobstructed barrel. The barrel length and overall length were prohibited. The gun was in working order. Using the magazine containing one round and 9mm blank cartridges, the gun had lethal potential.

8. Count 3 related to a 12 bore double-barrelled shotgun. The gun's barrels and wooden stock had been crudely shortened in length. It was found to be in working order and had lethal potential.

9. Count 4 related to the three rounds of bulleted cartridges found with the first pistol. Their length had been shortened to fit inside a magazine for blank-firing, multi-purpose guns with lethal effect. They contained live ammunition.

10. On 6th May 2022, police went to the applicant's address and arrested him. In interview he answered "No comment" to all questions asked.

11. The applicant had nine previous convictions for ten offences, spanning from January 2000 to April 2014. The last conviction included offences of possessing a prohibited firearm,

a handgun, and ammunition without a certificate, for which he received a sentence of 7½ years' imprisonment.

12. There was no pre-sentence report before the Crown Court, and we confirm that no such report was then or is now necessary.

13. In relation to the definitive guidelines it was common ground that the firearms in counts 1 and 2 were type 1 weapons, and that in count 3, a type 2 weapon.

14. In her sentencing remarks the judge noted that the present offences were committed 12 to 13 months after the expiry of the sentence in 2014. The applicant had not learnt anything from that experience and continued to have no regard for the safety and lives of others. The offences involved not just one but two prohibited weapons and a sawn-off shotgun. This represented a gross escalation in the applicant's offending behaviour.

15. The offence in count 1 involved category 2 harm because of the alarm caused to the workmen and the occupant of number 67, heightened by the applicant's demeanour when he tried to persuade them not to go to the police. In relation to culpability, given the number and type of weapons, compatible ammunition and antecedent history, there was more than sufficient evidence for the court to infer that the applicant either intended them to be used for a criminal purpose or was reckless as to whether they would be so used. Accordingly culpability fell within category A.

16. The offences were seriously aggravated by the previous firearms offences and the recent expiry of the relevant sentence. The judge then assessed the impact of the applicant's imprisonment on his family, including his mother and sister. However, she said that he had been well aware of their circumstances when he chose to commit the current offences and he

had failed to consider that impact himself. In any event, the judge struck the balance between the impact on the applicant's family and the need to protect the public from offences of this kind. That balance fell clearly in favour of the latter.

17. The judge accepted that the applicant was entitled to a credit of 25 per cent for his guilty pleas.

18. She then applied the totality principle by reference to the definitive guideline. In particular she referred to the principle that consecutive sentences may be appropriate where, in relation to offences of the same or a similar kind, the overall criminality would not sufficiently be reflected by concurrent sentences.

The Grounds of Appeal

19. We are grateful for the submissions of Mr Sebastian Gardiner, who appears *pro bono* on behalf of the applicant. In summary, he advances the following contentions:

1. In relation to counts 1 to 3 the judge erred in placing the offending in category A culpability, rather than in category B. There was insufficient evidence to conclude that the applicant would use the items for a criminal purpose or was reckless as to whether they would be so used.

2. In relation to counts 1 to 3 the judge erred in placing the harm in category 2, rather than category 3. In this case there was no, or a minimal, risk of alarm, distress, harm or death.

3. The sentences on counts 1 and 2, after allowing 25 per cent credit for the guilty plea, were manifestly excessive. The notional sentence after trial of ten

years' imprisonment on counts 1 and 2 was at the maximum level for those offences and was well outside the range for category 2A of six to eight years. The judge failed to weigh the mitigating factor of the applicant being the sole or primary carer for his mother against the aggravating features.

4. It was wrong in principle to order the 18 month sentence on count 3 to run consecutively. The offences arose out of the same "incident or facts" and the judge had already imposed the equivalent of maximum sentences before credit for the guilty pleas on counts 1 and 2.

20. In refusing leave the single judge said this:

"(1) The judge was entitled to conclude from 'the type and number of weapons discovered here, together with compatible ammunition and your antecedent history' that the category A feature of intending that the weapons (with compatible live ammunition) on counts 1 and 2 would be used for a criminal purpose, or being reckless as to whether they would be so used, was present.

(2) The judge noted that the members of the public involved in the discovery of the loaded weapon hidden in a public place were both caused alarm or distress. She had a witness statement from Keith Lawrence saying he himself was 'shocked' when the gun was found to be real and [a] bullet fell out of it, and the female neighbour who reported it to you was also 'shocked and was panicking', and you told him 'You haven't seen anything. Don't report it, it's nothing to do with you. Don't worry about it.' When he said he had to report it, you got 'agitated' and were 'shaking and sweating', raised your voice, and were two feet from him, with the result that 'he started to worry about what [you] could do' and played for time, so he could get away safely from you. This justified the judge in placing the case between category 1 (serious alarm/distress caused) and category 3 (no/minimal alarm/distress caused) and, therefore, in category 2.

(3) It followed that count 1, taken alone, fell in category A2 with a Guideline starting point of 7 years in a range of 6 to 8 years before plea. Since you were being sentenced for 4 offences and not one, a longer sentence was inevitable. The

judge also correctly identified the seriously aggravating factor of your previous relevant section 5(1)(aba) conviction after trial for possession of a handgun with ammunition for which you received a total sentence of 7 years 6 months in April 2014, from which you must have been released not much more than a year before the present offences. She noted 'gross escalation' in your offending, as well as the failure to respond to that previous sentence. The personal mitigation was of limited relevance since a long sentence was on any view inevitable and the impact on your family of losing your support was consequently unavoidable. It was also less relevant in circumstances where you had not been long out of prison so that your support cannot have been of long standing.

(4) The total sentence of 9 years (equivalent to 12 years before credit for plea) was not in these circumstances arguably manifestly excessive and the way in which it was structured to achieve that final sentence was in accordance with the principles of totality."

We entirely agree with the reasons given by the single judge.

21. On ground 1 we would add two further points. For the reasons given by the sentencing judge, this was undoubtedly a case where she was entitled to find that the collection of weapons were intended to be used for a criminal purpose, or involved recklessness as to whether they would be so used. In the circumstances of this case, when she came to the issue of harm, it was not a large step for the judge to infer that there was a high risk of death or of serious physical or psychological harm.

22. Secondly, we would additionally refer to the danger not only of the firearm in count 1 and the ammunition being left in the applicant's garden under a wheelie bin, but also the leaving of all the items in the boot of the applicant's car on a public street.

23. In relation to ground 4, the applicant's argument is deeply unattractive. It would be capable of repetition irrespective of the quantity of prohibited firearms being kept in a single location. That consideration does not mean that multiple offences of possession of prohibited

firearms, or their discovery on the same occasion, arise out of the same "facts or incident".

24. In our judgment, the overall sentence was properly constructed so as to reflect the applicant's overall criminality and was undoubtedly a just and proportionate sentence. Indeed, we would go further. The applicant would not have had any justifiable complaint if the overall sentence in this case had been somewhat higher.

25. Accordingly, for these reasons the application for leave to extend time in which to renew the application for leave to appeal against sentence is refused.

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

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