



[2023] EWCA Crim 1405

Case No: 202000726 A4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM
Birmingham Crown Court
Mr Recorder J MacAdam

T20190904

Date: 27/11/2023

Before :

LADY JUSTICE ANDREWS DBE
MRS JUSTICE MCGOWAN DBE
HHJ FLEWITT KC

Between :

JUSTAS BIEKSA

Applicant

- and -

REX

Respondent

Mr David Martin-Sperry for the Applicant

Hearing dates: 11 November 2022

Approved Judgment

This judgment was handed down remotely at 10.30am on 27.11.2023 by circulation to the parties or their representatives by e-mail.

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Mrs Justice McGowan DBE:

1. On 14 November 2019 in the Crown Court sitting in Birmingham the applicant pleaded guilty to a number of offences and on 28 January 2020 he was sentenced to a total term of 9 years imprisonment made up as follows:
 - i) Being Concerned in the Supply of Class A Drugs (Fentanyl, contrary to s4(3)(b) Misuse of Drugs Act 1971) to a term of 9 years,
 - ii) Being Concerned in the Supply of Class B Drugs (Ethyl-Hexedrone, contrary to s4(3)(b) Misuse of Drugs Act 1971) to a term of 4 years and 6 months, concurrently
 - iii) Being Concerned in the Supply of Class A Drugs (Fentanyl, contrary to s4(3)(b) Misuse of Drugs Act 1971) to a term of 6 years, concurrently,
 - iv) Fraudulent Evasion of a Prohibition of a Class B Drug (contrary to s170(2) Customs and Excise Management Act 1979) to a term of 4 years 6 months, concurrently,
 - v) Fraudulent Evasion of a Prohibition of a Class A Drug (contrary to s170(2) Customs and Excise Management Act 1979) to a term of 6 years concurrently.
2. He applies for an extension of time of 2 years and 95 days in which to renew his application for leave to appeal against sentence and a Representation Order following refusal by the Single Judge. Until this hearing he sought to pursue a ground not previously considered by the Single Judge, for which he would need the leave of this court. He is represented by Mr. Martin-Sperry, who did not appear below. We are grateful to him for his assistance in this matter.

Facts

3. On 5th July 2017, the applicant joined a forum on the dark web called Dream Market, using the name UKchemSale. He was offering to supply ethyl-hexedrone, a Class B Drug. Visitors could purchase this drug by clicking on the product they wanted and purchasing the drugs using Bitcoins. He was offering next day, worldwide delivery.
4. The National Crime Agency was monitoring the site. On 22nd August 2017, UKchemSale listed four drugs for sale: Carfentanyl Crystals (Class A), Fentanyl HCL Crystalline (Class A), Furanyl-Fentanyl FuF (Class A) and Ethyl-Hexedrone Crystals (Class B). Officers made a test purchase of 250 milligrams of fentanyl from the site at 3:15pm on 22nd August 2017. The NCA officers paid US \$100 in Bitcoins. At 4:04pm that day, UKchemSale sent a message confirming the order had been accepted. The parcel containing the drugs was dispatched and it was received on 25th August 2017. It had been sent using Royal Mail. The parcel was tested and found to contain 213 milligrams of fentanyl citrate, a Class A controlled drug. Officers were able to track the parcel through the postal system back to the sender. The parcel had been posted at a post office in Northampton on 24th August 2017, at about 3:50pm.

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CCTV footage was obtained from the post office and the male shown posting the parcel of fentanyl was identified as the applicant.

5. That footage showed the applicant posting three other packages on the same day. The packages were believed to contain controlled drugs, this was supported by customer reviews left on the UKchemSale site the following day.
6. On 30th August 2017, a parcel arrived at the East Midlands Airport. It had been sent from China and was addressed to Stu Perry, 57 Victoria Road, Northampton. The parcel was intercepted by UK border force officers. The contents were tested and gave a positive reading for a psychoactive substance called dichlorobenzaldehyde. It contained 52.8 grams of benzylfentanyl (not a controlled substance) and 6.71 grams of dichlorethyl cathinone, a Class B drug. It also showed traces of fentanyl citrate. The delivery address was a house which had been divided into a number of separate dwellings. No one of the name Stu Perry resided at the address. After the package had arrived, the applicant made contact with one of the residents, a Mr Kubicki. Mr Kubicki's role was to take delivery of the parcel and pass it on to the applicant. The applicant's phone contained a text message which read, "Stu Perry, China".
7. On 6th September 2017, a Royal Mail card was posted at 57 Victoria Road by an officer from the NCA. The card gave instructions that the parcel could be collected from the local depot the following working day. The depot was monitored by NCA officers but nobody attended. Phone records, showed that on the day the card was left, Mr Kubicki had made three attempts to call the applicant. He then sent a text which read, "Ring me. Important". Later that day, a black Saab, arrived at 57 Victoria Road, driven by the applicant. He was seen to meet Mr Kubicki outside the address and the following day, the applicant made a series of phone calls to Parcel Force and Royal Mail. When the applicant was arrested on 14th September 2017, that Royal Mail delivery card was found in the glove box of his car.
8. On 11th September 2017, UKchemSale posted on the Dream Market saying, "Happy to announce fentanyl HDL is back in stock. This is the same batch and quality as we had before". There were again a number of favourable ratings and reviews posted from other users.
9. On 13th September 2017, the applicant's wife left the family home and was seen post four parcels in a post box before continuing on her journey. The NCA were able to retrieve the packages from the post box. The packages were addressed to recipients in the UK, Germany and the USA. They were inspected and each package was found to contain fentanyl, weighing 750, 710, 560 and 550 milligrams respectively.
10. Officers went to the applicant's home on 14th September 2017. He was arrested at 9:15am. UKchemSale was online and sending messages up to that time but the site then went offline. At the time of his arrest, UKchemSale had received 52 customer reviews following purchases, including one which said it was their fifth successful order and referred to this batch "as good as the last".
11. The applicant's home was searched. Officers found two laptop computers in the applicant's bedroom. One was encrypted and had a mobile dongle attached containing a prepaid unregistered SIM card. The search also recovered drug testing kits, electronic scales, envelopes and packaging similar to that used for the test purchase

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package. The applicant also had an address label printer that was consistent with those that matched the recovered packages. Officers also recovered a pouch containing 12.3 grams of benzocaine.

12. The applicant was interviewed. He accepted responsibility but said he had been in debt and been acting under compulsion.

Sentence

13. The applicant pleaded guilty to all counts at a stage in the proceedings which reduced his sentence by 25%. No complaint is made about the level of credit allowed. The Recorder had a Pre-Sentence Report, letters written by, and in support of, the applicant and a medical report on the applicant's anxiety condition. He also had notes from the prosecution and defence on sentence.
14. The Recorder had evidence from an expert on the nature and quality of fentanyl. He accepted the evidence that fentanyl is a drug with a greater risk of addiction than heroin, pointing out that the applicant himself was a user. He rejected defence submissions that the distribution in this case amounted to no more than street dealing. He found that this was sophisticated operation which took advantage of the dark web to trade in quantities of drugs of high purity over a significant period of time. Further, payment was made through the use of Bitcoin. He placed this offending in category 2 and found that the applicant played a leading role.
15. The Recorder conducted a very careful sentencing exercise. He correctly identified the categorisation of the offending. He identified all the factors that mitigated that offending. He found that the applicant was unlikely to re-offend and had made real efforts towards rehabilitation by the date of sentence. He considered and applied the principle of totality and passed a longer term on count 1 and made all other terms run concurrently.

Grounds of Appeal

16. Counsel instructed at the hearing settled grounds of appeal based on the submission that the categorisation exercise was flawed and the resulting sentence was manifestly excessive.
17. The Single Judge refused leave to appeal on the papers. The applicant sought a lengthy extension of time in which to renew his application for leave based on a single new ground. *"The applicant relies solely on the sentence reduction that the Court of Appeal have from time to time advocated for the effects on prisoners during the Covid 19 pandemic"*.
18. The applicant was sentenced before the pandemic had begun. In any event, the case of ***R v Manning [2020] EWCA Crim 592*** was a case dealing with the imposition and effect of short sentences. Even if it had been decided at the time the applicant was sentenced the inevitable length of the term to be imposed would mean it would not have applied in his case.

Renewal Application

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19. Mr. Martin-Sperry accepts that the sentence was neither manifestly excessive nor wrong in principle. He does not seek pursue the application for leave in relation to the new ground drafted by the applicant himself. He accepts that the sentence was passed before the pandemic began. Nonetheless he reminds the court that at least some part of the sentence will be served under tougher conditions that the Recorder could have contemplated but accepts that this court could not hear a series of appeals from applicants sentenced before the pandemic.
20. He makes the point that as the case is now before the court we should look again at the length of the sentence imposed. He relies principally on the progress made whilst the applicant has been in custody. We have seen a number of references which demonstrate that the applicant has not simply behaved well whilst in custody but has made a positive contribution and had greatly assisted the staff and fellow prisoners in the health care wing. It appears that the Recorder correctly assessed him as someone unlikely to offend in the future. We have also read an impressive letter written by the applicant himself. Mr. Martin-Sperry recognises that the applicant was selling drugs on an international scale but maintains that he did not realise the extent of the harm that might be caused.
21. He invites the court to stand back, review the sentence and with a view to the public purse reduce the sentence by a modest amount. The submissions are that the applicant has been a model prisoner; that he has learned his lesson and served some of his sentence in lockdown conditions and because the matter has come before this court we should “look again”.

Discussion

22. This court will only interfere to reduce a sentence if it is wrong in principle and or manifestly excessive. *R v Waddingham (1983) 5 Cr App R (S) 66* at page 69 sets out the very familiar principle that this court will not review a sentence unless it is wrong or excessive it will not interfere because the applicant is making very good progress since the date of sentence.

“Our function essentially is to consider whether or not the punishment does fit these crimes. If the punishment is excessive, then we must clearly reduce it, but if the punishment, albeit severe, is appropriate to the serious nature of the offences, it would in our judgment be quite wrong for us to interfere merely because the man now realises how wrongly he has behaved and has shown a willingness to behave well in prison.”
23. The applicant has behaved extremely well since sentence was passed. Those are matters that may well affect his status as a prisoner. They are not matters which allow this court to review what was accepted to be a lawful and appropriate sentence.
24. In all the circumstances it is not necessary to consider the application for the lengthy extension of time to pursue this appeal. The applications must be refused.