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Neutral citation No. [2024] EWCA Crim 101

IN THE COURT OF APPEAL
CRIMINAL DIVISION



CASE NO 202304506/A3

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday, 31 January 2024

Before:

LORD JUSTICE DINGEMANS
MR JUSTICE CHOUDHURY
THE RECORDER OF REDBRTIDGE
HER HONOUR JUDGE ROSA DEAN
(Sitting as a Judge of the CACD)

REFERENCE BY THE ATTORNEY GENERAL UNDER
S.36 OF THE CRIMINAL JUSTICE ACT 1988

REX
V
ORIS TOMNEY

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MR N HEARN appeared on behalf of the Attorney General
MR G GILBERT appeared on behalf of the Offender

J U D G M E N T

LORD JUSTICE DINGEMANS:

Introduction

1. This is the hearing of an application on the part of His Majesty's Solicitor General for leave to refer a sentence which the Solicitor General considers to be unduly lenient.
2. The respondent is Mr Otis Tomney, a 41-year-old man. On 14 September 2023 after a trial at Portsmouth Crown Court, Mr Tomney was convicted of an offence of burglary which had occurred on 26 November 2021. He was then remanded in custody. On 7 November 2023 before His Honour Judge Melville and a jury, and after a trial again at Portsmouth Crown Court, Mr Tomney was convicted of two offences of possession of a controlled drug of class A with intent to supply and having a bladed article. Those offences were committed on 29 December 2020.
3. Some short time later on 24 November 2023, His Honour Judge Melville sentenced Mr Tomney to two years' imprisonment suspended for two years with a thinking skills program and a 20-day rehabilitation activity requirement.

The grounds

4. The grounds on which this Reference are brought are effectively that it was wrong not to apply the minimum term for burglary, the judge was wrong to find that the offending fell within Category 1B of one of the guidelines, and was wrong not to sentence Mr Tomney to immediate imprisonment. On behalf of Mr Tomney it is submitted that the judge had heard Mr Tomney give evidence at a trial, had seen that notwithstanding his appalling criminal record he had finally at the age of 41 become drug free, and was on the road to rehabilitation and that the best way to protect the public would be to maintain the sentence which the judge passed.

5. Given those parameters of the Reference it is not necessary to say very much about the circumstances of the offence.

The drugs offence

6. On 29 December 2020, which was the possession with intent to supply, a vehicle being driven by Mr Tomney and which contained a male passenger was stopped by police officers. Mr Tomney and his passenger were searched. Mr Tomney had 156 wraps of crack cocaine and 163 wraps of heroin. He was also in possession of cash in the sum of £510 and in the rear of the vehicle there was a meat cleaver. He was arrested and interviewed and he denied any knowledge of the cocaine or heroin. He said that he had purchased the car two weeks previously and there were items already in it including the meat cleaver.

The burglary offence

7. On 26 November 2021, Mr Tomney gained access to a residential property in Portsmouth. He was disturbed by the occupier and fled. He was later identified by DNA analysis. He was arrested and interviewed and made no comment.

The sentencing hearing

8. Mr Tomney has been a life-long drug addict and has committed the usual offences that go with that lifestyle. He has 31 convictions for 120 offences. The vast majority of his offending was acquisitive offending. He had a large number of burglary convictions as a juvenile. As an adult his previous convictions included 18 convictions for burglary. His two most recent convictions for burglary were 18 August 2016 and 2 December 2011. He has had every disposal known to the criminal justice system. For the burglary in 2011 he received 42 months' imprisonment, which did not stop him offending again and receiving the 28 months' imprisonment for his offending in August 2016.

9. At the time of the offences he was in receipt of benefits and on drugs and living at his father's address. He has two children who live with his maternal grandmother and a daughter who lives with a former partner.
10. A pre-sentence report was obtained for the sentencing exercise. This showed that Mr Tomney had told the report writer that he had been in possession of the drugs as he had recently stolen them from a drug dealer, which was the account he gave at trial, which was obviously false. In relation to the burglary offence he told the report writer that he did not accept he had entered the house to steal but had been looking for a friend, which was also the account he gave at trial and was also equally false. Indeed Mr Tomney showed sufficient insight to agree with the report writer that both explanations were implausible.
11. Most significantly, however, Mr Tomney told the report writer that following a conviction in April 2023 before East Hampshire Magistrates' Court where he had been ordered to pay compensation of £1,000 and released, he had engaged with the Recovery Hub in relation to his longstanding drug abuse and he had begun to receive a monthly opioid blocker injection. There are some for whom that works and some for whom it does not work, but happily for Mr Tomney it did work. He said that at the time of his remand into custody following his conviction for the burglary offence he had been clean and as a consequence did not require any medication in custody. The report writer noted that Mr Tomney said he had decided that he needed to change and sort his life out and that he was too old to continue with his lifestyle, which again shows some developing insight. Mr Tomney also told the report writer he had been diagnosed with a borderline personality disorder and suffered long term depression but there was no medical information to support that. The report writer identified that Mr Tomney posed a

medium risk of re-offending and a medium risk of harm. The report writer noted the progress in relation to drug addiction and suggested that Mr Tomney would benefit from a number of programs and activity requirements which could be attached to a non-custodial sentence and might even lead to Mr Tomney getting a job and finally making a contribution to society.

12. The sentencing judge was provided with a lengthy letter from Mr Tomney which expressed his remorse and described his previous inability to address drug offending. It was submitted by the prosecution that domestic burglary fell under Category 1B but that the minimum term provisions of three years applied under section 314 of the Sentencing Code which meant that a sentence of at least three years had to be imposed upon Mr Tomney unless the judge decided that pursuant to section 314 of the Sentencing Act (as it then read) there were particular circumstances which relate to any of the offences or to the offender which would make it unjust to do so. The prosecution also submitted that the two possession with intent to supply class A matters fell into Category 3 and they submitted that Mr Tomney had a significant role.
13. At the sentencing hearing, there was a sentencing note provided on behalf of Mr Tomney which invited the court to find that there was a Category 3 lesser role. A Category 3 significant role has a starting point of four years six months and a Category 3 lesser role has a starting point of three years' custody.
14. The judge looked at all matters and then when sentencing said it would be unjust to impose a minimum term for the burglary offences "in the light of everything I have read". It is fair to say that this was a very cryptic remark and that if a judge is going to find that it is unjust to impose a minimum term it would be helpful to have more detail.
15. That said, we have looked at all the material and seen what the judge has had the

opportunity to see. The judge said that for the burglary offence that fell within Category 1B with a starting point of two years. The judge found that the drug offence was significant to lower and noted the respective starting points of three and four-and-a-half years. The judge observed he could pass consecutive sentences but decided that he would impose a suspended sentence. It is apparent from the judge's reasoning that he would have been looking at an aggregate sentence of about four-and-a-half years' custody but the sentence he imposed was two years' imprisonment suspended for two years and that was the sentence there.

Reference dismissed

16. So far as this Reference is concerned, the real question before us is whether it was unjust to activate the three-year minimum period and whether the judge was not just lenient but unduly lenient in reducing a sentence of four or four-and-a-half years to two years, given the particular circumstances and mitigation available to Mr Tomney.
17. So far as the question of whether it was unjust in the particular circumstances to impose the sentence of three years' imprisonment on Mr Tomney, the drop down box on the offence-specific guidelines identifies that relevant considerations include whether there is a realistic prospect of rehabilitation which the court can consider. The court is of course mandated also to consider whether the public are better protected by the sentence that was imposed rather than a sentence the type of which has not caused in the past Mr Tomney to stop his offending.
18. In our judgment, in the particular circumstances of this case, the judge was entitled to find that the particular circumstances which relate to the offender made it unjust to impose a sentence of three years. The circumstances were that at the age of 41, having been a drug addict since his teen years, the appellant had finally stopped taking drugs and

had addressed his drug offending. In those circumstances, in our judgment the judge was entitled to conclude that the public would be better protected by the sentence that the judge imposed, namely a suspended sentence suspended for two years (which will provide a very strong incentive for Mr Tomney to remain drug free and continue his rehabilitation) rather than immediate custody where, with the period of four-and-a-half years that would have been imposed, there was at least a reasonable prospect that Mr Tomney would continue to revert to continuing his drug habit.

19. In all these circumstances we grant leave for the Reference because it is plain that the judge's explanation about why it was unjust to impose the three-year minimum term was insufficient. We also find that the sentence was lenient because but for the particular circumstances of a real prospect of rehabilitation and the mitigation that was therefore available for that particular reason to Mr Tomney, the sentence would have been four-and-a-half years and not the two years that was suspended. In the event we dismiss the Reference because we consider that the public is likely to be better protected by the sentence that was imposed by the judge and Mr Tomney's continued rehabilitation than a sentence of immediate imprisonment.

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

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