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IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT HARROW

MR RECORDER MICHAEL CAPLAN

CP No: 01QA1150924

CASE NO 202404035/A3

NCN: [2025] EWCA Crim 173

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday, 17 January 2025

Before:

LORD JUSTICE EDIS
MR JUSTICE LAVENDER
HIS HONOUR JUDGE LEONARD KC
(Sitting as a Judge of the CACD)

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MISS C DONOVAN appeared on behalf of the Appellant

APPROVED JUDGMENT

MR JUSTICE LAVENDER:

1. The appellant appeals, with leave granted by the single judge, against the sentence of 22 months' imprisonment imposed on him on 16 October 2024 in the Crown Court at Harrow for one count of burglary, to which he pleaded guilty in the Magistrates' Court.
2. The burglary was committed in the early hours of 8 June 2024 when the appellant entered a block of flats and tried various front door handles until one of them opened. He entered the flat, removed various items to the corridor and began to fill his backpack with other items. He did this until he was confronted by the two residents, one of whom called the police. The appellant returned the items and left. No violence was used or threatened and there was no evidence that the burglary caused any psychological injury or emotional or other impact.
3. The appellant was 39 at the time of the offence. He was addicted to crack cocaine. He had previous convictions for offences of handling stolen goods committed in 2019 and for non-dwelling burglary committed in May 2024, for which he was given a community order on 30 May 2024, only nine days before he committed the current offence. That was a 12 month community order, with a 120 hour unpaid work requirement and a 15 day rehabilitation activity requirement. The appellant failed to attend a number of meetings with his probation officer, starting on 7 June 2024, and was then in custody from 1 August 2024.
4. The recorder assessed the case as falling within the medium culpability category, category B in the offence-specific sentencing guideline. The recorder assessed the harm as falling within category 1 because the flat was occupied. The starting point for a category 1B offence was two years' imprisonment, with a range from one to four years.
5. The recorder identified as aggravating factors the appellant's previous convictions, the fact that the offence was committed at night and the fact that it was committed while the appellant was subject to the community order.
6. As for mitigating factors, the recorder was told that the appellant had been about to start a job, that he had taken steps to address his addiction before he was arrested and that he had expressed remorse for his offending.
7. The recorder said that he increased the sentence to three years by reason of the aggravating factors and then reduced it to 33 months before reducing it by one-third to 22 months by reason of the appellant's guilty plea.
8. In deciding whether or not to suspend the sentence, the recorder considered the factors listed in the guideline on the Imposition of community and custodial sentences and also prison conditions at present. On the one hand, he said that there was a compelling argument that appropriate punishment could only be achieved by immediate custody and that the appellant had a history of poor compliance with court orders. On the other hand, the appellant did not have strong personal mitigation and this was not a case in which immediate custody would result in a significant harmful impact on others. The recorder

did not revoke the community order and did not re-sentence the appellant for the burglary committed in May 2024. We are told that this was because the view was mistakenly taken that the community order, having been imposed by the Magistrates' Court, could only be revoked by the Magistrates' Court.

9. The grounds of appeal are that: the recorder should have placed the offence in category B2, with a starting point of 18 months' imprisonment; the recorder double-counted as a factor the fact that the offence was committed at night; the recorder should have given more credit for the mitigating factors; and the recorder should have suspended the sentence.
10. In relation to the categorisation of the harm in this case, it is submitted that only one factor placing this case in category 1 was present, whereas there were three category 3 factors, i.e. limited physical or psychological injury or limited emotional or other impact on the victim, nothing stolen or only property of low value to the victim (whether economic, commercial, cultural or of personal value) and limited damage or disturbance to the property. As to the alleged double-counting, it is said that the recorder referred to the offence being committed at night both when addressing culpability and when addressing the aggravating factors. As to mitigation, the complaint is made that, although the recorder recognised all of the mitigating factors when considering whether to suspend the sentence, when he was discussing the aggravating and mitigating factors he said that he could see little mitigation and he only reduced the sentence by three months by reason of the mitigating factors.
11. In relation to the question whether the sentence should be suspended, it is submitted that the recorder ought to have considered whether the appellant's dependence on drugs could have been addressed successfully by a community order.
12. Before considering the grounds of appeal, we observe that the appellant was fortunate that the recorder did not re-sentence him, as he should have done, for the burglary committed in May 2024. We do not have details of that burglary, but it was sufficiently serious to warrant a 120-hour unpaid work requirement as part of the community order. In accordance with the sentencing guideline on totality, the recorder should have considered the overall seriousness of the appellant's offending behaviour, which included both burglaries. As to categorisation, we consider that the recorder was entitled to place this offence either in category 1 for harm or at the higher end of the range for category 2. A significant feature of domestic burglary is the violation of the occupant's personal space and in the present case the occupants were not only present in the flat, they also had to confront the appellant. Moreover, it was that confrontation, and not any action on the part of the appellant, which meant that the appellant did not steal anything. The presence of the occupants in the flat outweighed the category 3 factors which were present.
13. As for the recorder's references to the fact that the offence was committed at night, we note that, when considering culpability, the recorder referred to the offence being committed at night as a reason why the appellant must have expected that there would be people in the flat. In any event, the fact that the offence was committed at night was not in itself a significant factor, either when considering culpability or when considering the

aggravating factors, when compared to the presence of the occupants in the flat and the fact that the appellant was subject to a community sentence when he committed this offence. Indeed, the fact that the appellant committed this burglary within nine days of being sentenced for another burglary was a significant aggravating factor which far outweighed the mitigating factors, such as they were. The recorder was entitled to say that there was little mitigation. Whatever efforts the appellant may subsequently have made to address his addiction, they did not prevent him from committing this burglary in order to feed his addiction.

14. The appellant cannot complain that he was given an immediate custodial sentence. He was given a non-custodial sentence on 30 May 2024 and he responded to the opportunity given to him on that occasion by committing a domestic burglary only nine days later, before he had done anything of substance to comply with the community order.
15. In order to avoid any misunderstanding, we will revoke the community order. Save for that revocation, for all of the reasons which we have given we dismiss this 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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