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Neutral Citation No. [2023] EWCA Crim 1082

IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NO 202301360/A3



Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 28 July 2023

Before:

LORD JUSTICE DINGEMANS

MR JUSTICE JEREMY BAKER

SIR ROBIN SPENCER

REX

V

JOHN THOMAS EDDEN

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MR T CORNBERG appeared on behalf of the Appellant.

J U D G M E N T

LORD JUSTICE DINGEMANS:

Introduction

1. The appellant, who is a 46-year-old man, appeals against sentence of 4 years 6 months' imprisonment for a burglary which took place on 6 February 2023, and 18 months concurrent for attempting to commit a burglary again on 6 February 2023. The sentences were imposed on 24 March 2023 in the Crown Court at Newcastle. The appellant had pleaded guilty at the pre-trial preliminary hearing and was entitled to 25 per cent credit.
2. The issue on the appeal is whether the sentence for the completed burglary is manifestly excessive because the sentence was outside the relevant offence specific guideline from the Sentencing Council. We are very grateful to Mr Cornberg for his excellent written submissions and succinct and helpful oral submissions.

The factual circumstances

3. On 5 February 2023 the complainants, Mr and Mrs Porthouse, were at home with their two young children. They went to bed at around 9.00 pm. Mrs Porthouse was awoken by the sound of the dog barking just before 1.00 am the next morning. She went downstairs and saw that the security light had been illuminated and she saw an unknown male, who was the appellant, by her patio door attempting to prise it open with a shovel. She shouted for her husband and banged on the window, shouting for the appellant to get out of the garden. He ran away. No damage was caused to the door and the shovel was found in a neighbour's garden. That was the attempted burglary.
4. The appellant then moved down the street and went to another property. The complainant in that case was Mrs Kuhnel, who was 91 years old and lived alone. She had gone to bed at about 11.30 pm, with the property locked and secured. At about 1.30 am she awoke to use the bathroom and realised that there was a man standing beside her

bedroom cabinet next to the bedroom door. She initially thought it was her son and put on her dressing gown, by which point the male had disappeared. She went downstairs and found her dining room table upturned and a window smashed. She pressed her carer home button and reported the break-in. Her mobile phone had also been stolen. Blood was discovered on her sheets in the front bedroom and dining room and materials had been left at the address. Swabs of blood were taken and examined and there was a DNA profile matching the appellant's DNA. He was arrested at his home on 23 February 2023 and Mrs Kuhnel's phone was recovered from his address. He made no reply in interview.

The sentence

5. Victim personal statements showed that Mrs Kuhnel said that she felt vulnerable and scared and did not think she would ever recover from this. Mr Porthouse gave details of the devastating effect of the attempted burglary on the family.
6. The appellant was aged 45 at sentence. He had 16 convictions for 54 offences ranging from 1998 to 2013. He had 11 convictions for theft and other offences and in 2002 he was sentenced to 3 years' imprisonment for two offences of robbery and one of possessing an offensive weapon. In 2012, he was sentenced to a community order for one offence of a domestic dwelling burglary, and on 23 August 2013 he was sentenced to 10 years' imprisonment for aggravated burglary, committed on 10 July 2013, to which he had pleaded guilty, as well as to offences of possessing a knife and taking a vehicle without consent.
7. We do not have details of this offence, but it is apparent that it must have been a very serious matter and that the appellant must have been on licence at the time of this offending. His other convictions were mostly for driving offences.
8. The judge recorded that it was common ground that so far as Mrs Kuhnel's offence was

concerned it was a category B1 offence. Mrs Kuhnel's age and the fact that she lived alone meant this was category 1, and the judge found that there was some planning, in that it was not opportunist and that the appellant had used a tool to try to gain entry. The judge found aggravating factors for the offences were: it was at night; there were children in the Porthouses' house; and there was a level of psychological harm. The second offence was an attempted burglary and was committed the same night.

9. There was limited mitigation, in that the appellant had remained out of trouble for some 5 years since his release from prison. He had got a job, moved back to the north, but then had move back to the northeast to be nearer his family, and left the job. He had then been on benefits and had been sanctioned by the Benefits Agency for missing an appointment when in fact he had been in hospital as a result of a road traffic accident. Although the sanction was later removed, he had been unable to obtain any monies for food for 2 weeks.
10. The judge took a sentence, after trial, of 6 years, which he reduced to 4 years 6 months as credit for plea. The judge took a sentence after trial of 2 years for the attempted burglary reduced to 18 months as credit for plea and made that concurrent.

The appropriate sentence

11. As the appellant had been convicted of previous domestic burglary offences in April 2012 and August 2013, then pursuant to section 314 of the Sentencing Act 2020, the judge was obliged to impose an appropriate custodial sentence of 3 years. That applied unless the court was of the opinion there were exceptional circumstances not to impose it and credit for any plea would be limited to 20 per cent of 3 years. The burglary of Mrs Kuhnel's property was a B1 offence for the offence specific Guideline of burglary, was medium culpability B because there was some degree of planning or organisation

and he was equipped with a shovel. It was category 1 because persons were in the premises.

12. Category B1 has a starting point of 2 years and a range of 1 to 4 years. Statutory aggravating factors are previous convictions, having regard to the nature of the offence and their relevance. There was, as already indicated, a very relevant and serious previous conviction for aggravated burglary. Other aggravating factors for both offences were that there was a child at home for the Porthouses, the offence was committed at night, there was a vulnerable victim (Mrs Kuhnel) and the offences were committed while he was on licence.
13. There was limited mitigation, in the sense that the appellant had remained out of trouble for 5 years since his release from prison and he had got a job and he had moved then back to the northeast. He was, through no fault of his own, without funds because the Benefit Agency had wrongly sanctioned him.
14. A category B1 offence, as already indicated, has a range of 1 to 4 years. The judge was entitled to go to the very top of the range for the offence against Mrs Kuhnel before applying the 25 per cent discount for plea. The attempted burglary against the Porthouse family involved separate criminality and separate harm and might have justified a consecutive sentence of 3 years, even though it was an attempt. The judge was, however, entitled to increase the sentence on the count involving Mrs Kuhnel and to make the sentence concurrent for the count relating to the Porthouse, having regard to the Overarching Sentencing Council Guideline on Totality. The judge had to ensure that the overall sentence was proportionate and to take account of the mitigation. Having regard to what the judge must have done, although it was not expressed in the sentencing remarks, it seems that the judge must have taken an overall figure of about 7 years and

then discounted for mitigation and totality. That gave the sentence of 6 years before applying the 25 per cent discount.

15. Having calculated the sentence in this way, we consider that any adjustment to the sentence period that we could make would be minimal, and what is sometimes referred to as “tinkering”. In those circumstances, this was a severe sentence, but we are unable to say that it was manifestly excessive.

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