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IN THE COURT OF APPEAL  
CRIMINAL DIVISION

[2023] EWCA Crim 1542  
CASE NO 202302594/A2



Royal Courts of Justice  
Strand  
London  
WC2A 2LL

Wednesday 6 December 2023

Before:

LADY JUSTICE WHIPPLE DBE

MRS JUSTICE McGOWAN DBE

HER HONOUR JUDGE MORELAND  
(Sitting as a Judge of the CACD)

REX

V  
TERRENCE DAVID BAILEY

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MR A JAMES (Solicitor Advocate) appeared on behalf of the Appellant.

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**J U D G M E N T**

LADY JUSTICE WHIPPLE:

*Introduction*

1. The appellant was sentenced by HHJ Waddicor, at Lewes Crown Court on 4 July 2023, to a total term of 42 months' imprisonment for three counts of non-residential burglary. He pleaded guilty at the first opportunity. He now appeals with leave of the single judge.

*Facts*

2. During the early hours of the morning, on 10 May 2023, the appellant entered the Co-op store in Fairlight Road, Hastings, by smashing the window using a donkey kick. The appellant and another male climbed through the window and then smashed three safes stealing £5,930 (count 1). In the early hours of the morning on 15 May 2023, the appellant again smashed a window using a donkey kick, this time at the Co-op in High Street, Horam. He then entered with another male, the safe was broken into and £1,170 was stolen (count 2). On 19 May 2023, the appellant used a concrete slab to smash a window of the Co-op store in Devonshire Road, Bexhill. He and another male entered and stole £8,800 from the tills (count 3). None of the cash was recovered. There was further loss to the Co-op in the cost of repairs as well as the loss of earnings. The total loss was just under £22,000.
3. The appellant has 37 convictions for 102 offences between 20 January 2000 and 19 September 2018. These included 40 theft and kindred offences, of which there were 15 non-dwelling burglaries and two burglaries of dwellings, the most recent of which was a non-dwelling burglary for which he received 26 weeks' imprisonment on 13 March 2015.

### *Sentencing Remarks*

4. In her sentencing remarks the judge recited the facts. She referred to the appellant's previous record as "truly shocking" but noted the gap between 2015 and 2023 when the appellant had been free of convictions. She noted the appellant's explanation that he wanted to turn his life around and to protect his son from following his father into a life of crime but he had gone wrong by following his brother into crime; his brother had drug debts and the appellant had been threatened in connection with those debts and his brother's criminal lifestyle. She had regard to the pre-sentence report. She concluded that an immediate custodial sentence was required. She put each individual offence into category B1, with a starting point of 1 year within a range of high-level community order to 2 years' custody. She said she had to bear in mind the principle of totality. She adjusted the notional sentence after trial to 21 months to take account of the aggravating features, notably the appellant's very poor criminal record. Then she deducted one-third for the guilty plea which meant that the sentence on each offence was 14 months. She then imposed that sentence of 14 months on each count to be served consecutively. That added up to a total sentence of 42 months.

### *Grounds of Appeal*

5. In grounds of appeal settled by Mr James, who represented the appellant at sentencing and on this appeal, two grounds are advanced: (i) insufficient reduction was made to the total sentence, with reference to the principles set out in the Totality Guideline; (ii) the sentence was too long, taking into account the personal mitigation of the appellant.

### *Discussion*

6. In our judgment, there are two difficulties with the sentence imposed in this case. First, there was personal mitigation which was not fully reflected in the sentence. Accepting

that the appellant had an awful record for offending, it is also the case that he had before these convictions managed to remain free of offending for 8 years. For a man of 36 and a prolific past offender, that, in its own way, constitutes some positive mitigation. His change of life-style coincided with the birth of his son, with whom he lives, together with his partner and her daughter from another relationship. They have a settled life in a two-bedroom flat in Hastings. He paid the rent with his wages from reinstating tarmac after fibre optic cables had been installed. He also has a 15-year-old daughter from an earlier relationship. The judge's notional sentence after trial did not reflect the improved recent history for this appellant. That in itself would not be a basis to allow this appeal because the judge's notional sentences fell within the range open to her.

7. The second difficulty, however, is that the judge, although referring to totality, did not appear to have applied a discount to reflect totality. She was entitled, of course, to impose consecutive sentences for these three distinct offences, but the totality guideline warns against simply adding together notional single sentences which approach, according to the guideline, makes it "impossible to arrive at a just and proportionate sentence".
8. This offending took place in close temporal sequence and involved similar offences carried out in a similar way. It was important for the court to consider totality and, if the individual sentences were not reduced to reflect totality, to apply a global reduction at the end of the process to reflect it. However it was done, the sentence needed to be just and proportionate overall. The judge did not reduce the sentence in any discernible way in order to reflect totality. We think that was an error which led to the sentence, overall, being manifestly excessive.
9. We therefore quash the sentence.

10. It falls to this Court to re-sentence, bearing in mind the principles we have discussed. We take the start point of 1 year under the guideline for each count. We note the aggravation of previous offending but also note the improved recent history and other personal mitigation. We consider that an upwards adjustment to 18 months on each count is sufficient to mark the aggravation and the mitigation. That is our notional sentence after trial on each count. The appellant is entitled to one-third credit for his guilty plea. The resulting sentence is one of 12 months on each count. We stand back and consider totality and apply a further reduction on 2 months on each count. Our sentence is this: a term of immediate imprisonment of 10 months on each count, each to be served consecutively to the other to arrive at a total of 30 months' imprisonment.

11. This appeal is allowed.

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