IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NO 202203583/A3
[2023] EWCA Crim 528

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday 26 April 2023

Before:

LADY JUSTICE THIRLWALL DBE

MRS JUSTICE STACEY DBE

MR JUSTICE BENNATHAN

REX

V

MICHAEL JOHN HARRIS

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MR A TURTON appeared on behalf of the Appellant.

J U D G M E N T

(Approved)

1. MRS JUSTICE STACEY: On 2 December 2022 the appellant (then aged 48) appeared before the Crown Court at Teesside before HHJ Carroll and was sentenced to a total of 32 months' imprisonment for five offences of failure to comply with the sex offender notification requirements on five occasions, contrary to section 91(1)(a) and (2) of the Sexual Offences Act 2003. He had been committed for sentence by the Teesside Magistrates' Court on 4 November 2022. The sentence was made up of 32 months for the first offence and 16 months consecutive sentences for each of the second to fifth offences. Leave to appeal was granted by the single judge.
2. The notification requirements had been imposed because of sex offences committed in 2011, when the appellant was aged 37. He was convicted of two offences of sexual activity, not including penetration, with a female child under 16 which occurred whilst he was working as a bus driver and had tried to kiss a 14-year-old passenger whom he had befriended, had touched her bottom, sent her text messages and followed her around her home village. He was sentenced to a 3-year community order and made subject to the sex offender notification requirements for a period of 5 years. The relevant requirements were that he must notify the police of any change in his name, of any address that he may reside at for more than seven days in one calendar year and details of any credit card or bank account.
3. In 2013 he committed two offences of failure to comply with the notification requirements for which he received a 12-month term of imprisonment. In January 2014, due to what was described as "concerning behaviour", he was made subject to a sexual offence prevention order ("SOPO") for a period of 5 years which was extended for a further 5-year period on 24 October 2018 as a Sexual Harm Prevention Order ("SHPO").

Under the terms of that order, he was subject to the same notification requirements of Part 2 of the Sexual Offences Act 2003. A breach of that order in 2017 was dealt with by way of caution. In 2018 he was sentenced to concurrent 12 months' terms of imprisonment for four failures to comply with the notification requirements.

In September 2019 he was again in breach of the notification requirements in four respects and sentenced to a 2-year term of imprisonment. Since his release from that sentence, his Offender Manager initially completed six successful management reviews at the address the appellant had registered as his permanent address. But enquiries were commenced following a number of failed visits and concerns about compliance. Those enquiries revealed five failures to notify the police as he was obliged to do under the requirements. For a period of 22 months he had failed to notify the police of both a bank account and a credit card. He had opened and used a Facebook account for 10 months as "Michael John" and an Instagram account for "Mikey J 1974" for 16 months. For a period of 10 months he had failed to register the address where he had stayed over at weekends with a new partner whom he had met on Facebook. His new partner did not have children, and there was no evidence that he had had any contact with any children through her although he had met her parents and various relations.

4. The appellant pleaded guilty to all five offences at the earliest opportunity. No pre-sentence report was ordered and none was necessary and is not necessary now. The custody threshold had been passed and a suspended sentence would not be appropriate.

5. The sentencing judge considered the Sentencing Council Guidelines and assessed culpability as falling within level A (the highest level) because there were persistent and long-term breaches of the notification requirements against a background of previous breaches. As to harm, the judge concluded that the facts of the offending fell into the

highest category of harm, level 1, because the police assessment was that there was a high risk which was aggravated by the non-disclosure of his past history to his new partner and her family. The judge described it as both a very high risk of harm and a very significant risk of distress. Under the Guidelines the starting point for category 1A is 2 years with a category range of 1 to 4 years. The judge decided to make concurrent sentences in accordance with the Totality Guidelines. For the first offence he increased the starting point to 4 years to reflect totality with the other offences and the previous convictions. He gave full credit for the guilty plea to reduce the sentence from 48 months to 32 months. For the remaining four offences he arrived at a sentence of 2 years from which he deducted 8 months reflecting a one-third for the early guilty plea, arriving at a finishing point of 16 months' imprisonment concurrent.

6. The appellant seeks to appeal the sentence on two grounds. Firstly, that it was wrong to conclude that this case fell into the highest category in the Sentencing Guidelines and that secondly, even within category 1A, too high a sentence was arrived at for the first charge.

7. There is no dispute that the appellant's culpability fell within category A. There was a long period of non-compliance which had started shortly after his release from custody, and the appellant had failed to notify a number of different areas: bank accounts, a registrable address and two social media accounts which had been set up with minor variations to the appellant's name. He had also failed to comply with his notification obligations in ten respects over the previous decade. There was no dispute that he well understood what was required of him.

8. As to harm, Mr Turton correctly observes that the appellant's new partner was understandably hurt to discover the appellant's history when the police informed her of it. She was shocked and disappointed as they had both agreed to be open and honest with

one another, they got on well and the relationship seemed to be blossoming. It was a genuine relationship that had been subsisting for 17 months by that stage. There is no evidence that the appellant had been in contact with children through his new partner in breach of the SHPO. It cannot therefore be said that the breach itself amounted to very serious harm or distress. Nor does the statement from the appellant's police staff offender investigator state that the police assess him as being at high risk. The statement merely records the facts of the non-notification.

9. The Guidelines state that in assessing the risk of any harm posed by a breach consideration should be given to the original offences for which the order was imposed and the circumstances in which the breach arose. The facts of the original offence 11 years earlier do not themselves lead to a conclusion of high risk. The issue is whether the fact of the history of previous convictions for non-compliance with the notification obligations give rise to an inference of high risk, since this was not a case where it could be said that the breach itself caused serious harm.

10. In mitigation, the appellant had explained that he did not wish to disclose the fact of the order to his new partner for fear that it would scare her off and indeed, when she was informed of it, it had exactly that effect.

11. This was a difficult exercise for the sentencing judge, who had limited information before him in what was no doubt a busy list. We conclude that there was no evidence from which he could conclude to the criminal standard that the breaches by the appellant risked very serious harm or distress. The harm therefore properly fell into category 2, not category 1. The starting point for category 2A offences under the Guidelines is 1 year, with a range of 26 weeks to 2 years' custody. The judge was right to note that the previous convictions, the period of non-notification and the fact of five separate offences

were seriously aggravating features and that there were no identified factors reducing seriousness or reflecting personal mitigation. However to arrive at a sentence (pre-guilty plea discount) of double the starting point of 4 years was manifestly excessive. To reflect all the circumstances of the case an increase from the starting point to 3½ years would be justified. It would take the sentence outside the category range, but would be justified on the facts and in particular the previous similar offences that had a deterrent effect. Full credit for the guilty plea at the earliest opportunity would reduce the sentence to 2 years and 4 months. We therefore allow the appeal, quash the sentence of 3 years for the first offence and replace it with a sentence of 2 years and 4 months. The sentences for offences 2 to 5 are unaffected.

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

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