Neutral Citation No. [2023] EWHC 2185 (SCCO)

Case No: T20210841

SCCO Reference: SC-2023-CRI-000038

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 24 July 2023

Before:

COSTS JUDGE LEONARD

R
v
SMILEY

Judgment on Appeal under Regulation 29 of the Criminal Legal Aid (Remuneration) Regulations 2013

Appellant: **EBR Attridge LLP (Solicitors)**

This Appeal has been dismissed for the reasons set out below.

COSTS JUDGE LEONARD

1. This appeal concerns whether, under the Graduated Fee provisions of Schedule 2 to The Criminal Legal Aid (Remuneration) Regulations 2013, the Appellant is due a cracked trial fee or a trial fee. The issue turns upon whether, for the purposes of the 2013 Regulations, a "Newton Hearing" (a fact-finding hearing for sentencing purposes, which is treated as a trial under the Regulations) took place.

2. The relevant Representation Order was made on 24 September 2021. The 2013 Regulations apply as in force at that date. Schedule 2 at paragraph 1 provides the following definitions:

> '"cracked trial" means a case on indictment in which—
>
> (a) the assisted person enters a plea of not guilty to one or more counts at the first hearing at which he or she enters a plea and—
>
> (i) the case does not proceed to trial (whether by reason of pleas of guilty or for other reasons) or the prosecution offers no evidence; and
> (ii) either—
> (aa) in respect of one or more counts to which the assisted person pleaded guilty, the assisted person did not so plead at the [first hearing at which he or she entered a plea; or
> (bb) in respect of one or more counts which did not proceed, the prosecution did not, before or at the [first hearing at which the assisted person entered a plea, declare an intention of not proceeding with them; or
>
> (b) the case is listed for trial without a hearing at which the assisted person enters a plea…
>
> … "Newton Hearing" means a hearing at which evidence is heard for the purpose of determining the sentence of a convicted person in accordance with the principles of R v Newton (1982) 77 Cr App R 13…'

Background

3. The Appellant represented Jay Smiley ("the Defendant") before the Crown Court at Wood Green. The Appellant has claimed a trial fee on the basis that a Newton hearing took place. The Determining Officer concluded that the correct payment was for a cracked trial.

4. The Defendant was charged with the possession and supply of class B drugs. On 23 February 2023, after he had pleaded guilty, the Crown refused to accept his proposed basis of plea in relation to supply. The remaining matter in dispute was whether he had supplied only to friends or to others as well.

5. Counsel's attendance note for the day shows that he warned the Defendant that, on the available evidence, if there were to be a Newton hearing he could lose the factual argument and with it, some of his credit for pleading guilty. Counsel tried inviting the Judge, HHJ Aaronberg KC, to consider whether there was a public interest in holding a Newton hearing, given that the basis of plea tendered was not far removed from the Crown's case and the range of sentence available to a sentencing judge, and submitted that the case ought to be resolved without the need for the Defendant to give evidence.

6. Hearing those submissions, the Judge however queried what the Defendant's explanation could possibly be for messages found on his phone and suggested that the defendant would benefit from further advice. Counsel gave such advice, and when the case was called back on later in the day he was able to tell the court that the Defendant's position had changed and that he now accepted that he had supplied to others. The judge required a Pre-Sentencing Report and the case was adjourned.

Submissions

7. The Appellant relies upon *R v Makengele* (SC-2019-CRI-000072, 6 January 2019) in arguing that it does not matter that the case was not listed for a Newton hearing or that no evidence was called. As in *R v Makengele*, says the Appellant, there were extensive submissions by the Crown and the Defence as to category and role and the judge's findings were essential in determining sentence.

Conclusions

8. In *R v Robert John Newton* (1983) 77 Cr. App. R. 13, the Court of Appeal identified the three forms of what is now known as a "Newton Hearing". The disputed facts may be put before the jury for a decision; the judge may hear evidence and then come to a conclusion; or the judge may hear no live evidence but instead listen to submissions from counsel and then come to a conclusion.

9. On the wording of the 2013 Regulations in isolation, it might appear that live evidence must be heard for a hearing to qualify as a Newton hearing. In fact, if reference is made to the principles of *R v Newton*, to which they expressly refer, it becomes apparent that such is not the case.

10. What is essential, however, is that there has been a fact-finding exercise for the judge to carry out. What distinguishes this case from *R v Makengele* is that whilst the judge made some observations about the evidence, he was not actually called upon to make a finding of fact.

11. Defence counsel did indeed make submissions about a Newton hearing, but they were submissions about whether such a hearing should be held at all. With a little guidance from the judge and some sound advice from counsel, a Newton hearing, which could have had an adverse outcome for the Defendant, was avoided.

12. Such submissions as were heard from the Crown were made after the possibility of a Newton hearing had been disposed of. They were quite limited, and made in relation to the sentencing guidelines (in relation to which the Crown and the Defence did not disagree).

13. For those reasons, this appeal is dismissed.