

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LEED DISTRICTY REGISTRY
DIVISIONAL COURT

Leeds Combined Court
1 Oxford Row
Leeds LS1 3BG

Date: 12/03/2020

Before :

LORD JUSTICE DINGEMANS
MR JUSTICE STUART-SMITH

Between :

Karl Wilson
- and -
Crown Prosecution Service

Appellant
Respondent

Mr Smith (instructed by **DJMS Solicitors**) for the **Appellant**
The Defendant did not appear and was not represented

Hearing date: 12 March 2020

JUDGMENT
(Approved)

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LORD JUSTICE DINGEMANS (giving the judgment of the Court):

Introduction

1. This is an appeal by way of case stated in respect of the decision by the South Tameside Magistrates' Court dated 13 May 2019 refusing to allow the appellant, Karl Wilson, to change his plea of guilty to various breaches of a criminal behaviour order which was imposed on him. The case raises issues about the circumstances in which a defendant will be allowed to vacate his plea of guilty in the Magistrates' Court.

Factual Background

2. The facts are set out in the case stated by the magistrates. On 4 July 2018 at the South Tameside Magistrates' Court, Mr Wilson pleaded guilty to theft. He was sentenced to a community order, and an application for a criminal behaviour order was adjourned to a contested hearing on 22 August 2018. In the meantime, on 7 August 2018, Mr Wilson appeared in the Magistrates' Court for a breach of the community order. He admitted the breach and was fined. On 24 August 2018, Mr Wilson appeared again for a further breach of the community order. He admitted that breach and was fined.
3. On 22 August 2018, Mr Wilson did not attend the hearing when it was intended to decide whether to impose a criminal behaviour order, and the case was adjourned until 12 September 2018. Again, Mr Wilson did not attend and the case was adjourned to 6 November 2018. Again, on 6 November 2018, Mr Wilson did not attend and a criminal behaviour order was imposed with conditions, among others not to enter licensed premises, not to use threatening or intimidating words in a public place, not to use toilets in premises without permission and not to beg.
4. On 10 November 2018, Mr Wilson was arrested for a breach of the criminal behaviour order and brought to the Magistrates' Court. He was represented for the first time by Mr Smith, who was acting as duty solicitor, and Mr Smith gave Mr Wilson advice and Mr Wilson pleaded guilty and sentencing was adjourned to 21 November 2018.
5. It is apparent that Mr Smith had met Mr Wilson for the first time on 10 November 2018 and we were told by Mr Smith, who appears before us today and to whom we are grateful for his submissions, that Mr Wilson appeared to Mr Smith to be fully aware of matters. It is right to note that Mr Smith said in his submissions that it was awareness without, what he termed, conspicuous intelligence. However it is well known we are not able to go beyond the facts set out in the case stated for the purposes of forming our judgment.
6. In any event, to continue the chronology, on 12 November 2018, Mr Wilson appeared for a breach of the criminal behaviour order, and again pleaded guilty and was again represented by Mr Smith, and sentencing was adjourned to 21 November 2018. On 21 November 2018, Mr Wilson was again brought before the Magistrates' Court for a further breach of the criminal behaviour order, and a breach of a community order. It appears the breaches of the criminal behaviour order were all related to begging, and the breach of the community order was for a failure to attend appointments.
7. Mr Wilson pleaded guilty again, and on that date the community order was revoked and Mr Wilson was sentenced to a suspended sentence order for the breaches of the criminal behaviour order, which we were told was for a period of 12 weeks' imprisonment, suspended for a period of 12 months.
8. We should also record that on 22 November 2018, Mr Smith met Ms Lisa Haywood who was Mr Wilson's social worker, who reported issues about brain damage suffered by Mr

Wilson in the past.

9. On 5 December 2018, Mr Wilson was brought to the Magistrates' Court for a further breach of the criminal behaviour order, and committing the offence when subject of the suspended sentence. He entered pleas of guilty and was fined £40 for the breach of the criminal behaviour order, and £40 for breach of the suspended sentence order.
10. The pleas which it was sought to vacate were not immediately apparent from the case stated. It was clarified at today's hearing that it was the pleas of 10 November, 12 November, 21 November and 5 December 2018 which are the pleas which are sought to be vacated.
11. On 14 December 2018, Mr Wilson was brought to the Magistrates' Court for two further offences, or alleged offences of breaching the criminal behaviour order, and he pleaded not guilty. On 21 December 2018, Mr Wilson was brought to the Magistrates' Court for, again, further offences and he pleaded not guilty on that occasion. He was remanded into custody.
12. It appears that the not guilty pleas were entered on the basis of the information that Mr Smith had obtained from Ms Haywood. It was to the effect that Mr Wilson might have some difficulties in understanding the criminal behaviour order, and that in those circumstances Mr Wilson might have a defence to the breaches of the criminal behaviour order namely a reasonable excuse, on the basis that he had not understood the orders.
13. It was in these circumstances that on 9 January 2019 Mr Wilson applied to discharge the criminal behaviour order, and the application was adjourned until 14 February 2019. A mental health report was obtained from Dr Foster, a clinical psychologist, to assess Mr Wilson's ability to understand the terms of his current criminal behaviour order.
14. It might be noted, again going outside the terms of the case as drafted by the magistrates, that Dr Foster was therefore not a medical practitioner for the purposes of assessing fitness to plead, and was not instructed to assess that issue. It was apparent from Dr Foster's report, which Mr Smith very helpfully gave us, that she did not have access to the full medical records for Mr Wilson, was unable to complete the relevant intelligence test and relied, in part, on reports of Mr Wilson's social worker, Ms Haywood, who reported what she had been told by the prison. It was apparent that Dr Foster did not obtain that information herself from the prison.
15. On 14 February 2019, the magistrates, after a hearing, discharged the criminal behaviour order in light of the evidence in the mental health report from Dr Foster, and the outstanding breaches of the criminal behaviour order were dismissed on the invitation of the prosecution.

The hearing to vacate the plea

16. A verbal application was made to reopen the convictions and vacate the pleas of guilty. The application was adjourned to 13 March 2019. On 13 March 2019, Mr Smith gave evidence about the pleas of guilty. Mr Smith said, as indeed he has told us today and we have no reason to doubt, that he had no information of any of the difficulties suffered by Mr Wilson before meeting Ms Haywood, and that Mr Wilson had appeared to understand the charge and the effect of the guilty plea. It was only later that Mr Smith became aware of Ms Haywood as Mr Wilson's social worker, and it was Ms Haywood who informed Mr Smith that Mr Wilson might have underlying mental health issues and cognitive issues which were not readily identifiable.
17. It was submitted on behalf of Mr Wilson that a mistake had been made by Mr Smith to advise Mr Wilson to plead guilty, because Mr Wilson in effect said 'yes' to everything. If Mr Wilson was unable to understand his criminal behaviour order that might have amounted to a reasonable excuse for a failure to comply with the criminal behaviour order, meaning that he might have had a defence to the claims. We do not need to consider

whether this would have amounted to a defence, but it is apparent from Dr Foster's report that Mr Wilson did know that he should not beg, and that this would have been at least a difficult case to defend in light of the fact that Mr Wilson apparently knew of the terms of the criminal behaviour order, knew that he should not have begged and agreed that he had begged.

18. The Crown Prosecution submitted that no mistake had been made, and that relief should not be granted.

Refusal to Vacate the Plea

19. The magistrates recorded in the case that they had not found that a mistake had been made. They said that Mr Smith was able to take instructions from Mr Wilson and advise him accordingly. Mr Smith was in a position to make an assessment of Mr Wilson's capabilities, and the magistrates found that it was not appropriate nor in the interests of justice to reopen the case.

Application for Extension of Time

20. The case stated was received from the magistrates after an application had been made in time for the magistrates to state a case. The final case stated was ready on 24 June 2019. By Practice Direction 52E of the Civil Procedure Rules, at paragraph 2.2, the: 'appellant must file the appellant's notice at the appeal court within 10 days of the date of the case stated...' (52EPD.2).
21. The notice was not served within the period. It was served some 10 days late. It appears that the solicitor then dealing with the matter did not know of this time period, and assumed, wrongly, that the magistrates would send the case to the High Court.
22. We have power to extend time pursuant to the provisions of Civil Procedure Rules Part 3.1(2)(a). Having regard to the overriding objective and relevant guidance set out in *Denton v TH White* [2014] EWCA Civ 906, [2014] 1 WLR 3926 we should note the following factors, first, this was a serious breach, because it delayed the progress of the appeal. Secondly, there appeared to be no good reason for the breach, because it was a mistake made by legal representatives. Thirdly, as to all of the circumstances of the case, we recall that Mr Smith submitted that the appeal had been started in time, no prejudice had in fact been caused and he noted that there was in fact no attendance today by the respondent, and he submitted that it would be right to have regard to the merits of the case.
23. We consider that if Mr Wilson's pleas of guilty should be set aside because they were wrongly made, it would be right to extend time because the error was not Mr Wilson's error and these relate to pleas of guilty, albeit in the context of the Civil Procedure Rules. However, if we do not consider that the pleas of guilty should be set aside we will refuse the extension of time because, in all the circumstances of the case, it would not be a meritorious application. It is therefore necessary to consider the application on its merits.

Relevant Legal Provisions and Principles Relating to Vacating the Plea of Guilty in the Magistrates' Court

24. The power to reopen cases to rectify mistakes is set out in Section 142 of the Magistrates' Courts Act 1980. As far as these are material, this provides:
 '(1) A magistrates' court may vary or rescind a sentence or other order imposed or made by it when dealing with an offender if it appears to the court to be in the interests of justice to do so; and it is hereby declared that this power extends to replacing a sentence or order which for any reason appears to be invalid by another which the court has power to impose or make...

(2) Where a person is convicted by a magistrates' court and it subsequently appears to the court that it would be in the interests of justice that the case should be heard again by different justices, the court may...so direct.'

25. There are limitations on the exercise of these powers where there has already been an appeal. It is important to note that the overriding objective in the Criminal Procedure Rules is that criminal cases be dealt with justly, which includes acquitting the innocent and convicting the guilty, and dealing with the prosecution and the defence fairly – see the Criminal Procedure Rules Part 1.1.
26. When a defendant enters an unequivocal plea of guilty, the defendant is proved guilty according to law. The presumption of innocence ceases to apply. However, there is a discretion to permit a defendant to withdraw or vacate his plea of guilty. The discretion to allow a defendant to vacate his plea of guilty must be exercised judicially – see *R v Dodd* [1981] 74 Cr App R 50.
27. The Criminal Procedure Rules, at Part 25.5, makes provision for vacating a plea of guilty. The application to change the plea must be in writing, and explain why it is unjust for the guilty plea to remain unchanged, and to indicate what, if any, evidence the applicant wants to call. It is necessary to identify any proposed witness, and whether legal professional privilege is waived.
28. It is apparent from all the submissions that have been made before us that legal professional privilege has been waived, because all the explanations have been made by Mr Smith, effectively on behalf of Mr Wilson.
29. The discretion of Magistrates to permit the withdrawal of the guilty plea was considered in *South Tameside Magistrates' Court, ex parte Rowland* [1983] 3 All ER 689, where Magistrates refused an application to vacate a plea because they considered that the application was made in an attempt to avoid a custodial sentence.
30. In *R v Croydon Youth Court ex parte DPP* [1997] 2 Cr App R 411, McCowan LJ, giving the judgement of the Divisional Court, noted that the power in Section 142 of the Magistrates' Court Act 1980 was generally and correctly described as a 'slip rule' and should not be used in a situation beyond those akin to a mistake. The interests of justice include the interests of the defendant, as well as the court and the public. There was an interest that people who have pleaded guilty with the advice of counsel should continue to be regarded as guilty, and there should be certainty and an end to litigation.
31. There was further consideration of the circumstances in which a plea might be vacated in *Revitt & Ors v Director of Public Prosecutions* [2006] EWHC 2266 (Admin) [2006] 1 WLR 3172. In *Revitt*, two unrepresented defendants who had pleaded guilty before justices were not allowed to change their pleas because there was nothing to suggest that the defendants had not understood the elements of the offence, and the prosecution case disclosed the elements of the offence. There was some discussion about principles to be applied by the court, and it was noted that the jurisdiction to vacate a plea of guilty should be exercised sparingly and only in clear cases. The court would always have great concern if a plea of guilty was not intended or not to have been made, see *Revitt* at paragraph 16. Therefore, if the defendant could establish that he pleaded guilty without understanding elements of the offence, or without intending to admit that he was guilty of what was alleged, then it might be appropriate to allow him to withdraw his guilty plea, see *Revitt* at paragraph 17.
32. Legal representation may be a relevant factor. The difficulties facing a defendant wanting to change his unequivocal plea of guilty will be greater if there had been representation by experienced criminal representations, see *R v Drew* [1985] 1 WLR 914 at 932. The

responsibility for a plea of guilty is that of the defendant. However, defence counsel has a duty to assist the defendant in deciding his plea, and may use forceful language to impress on the defendant the need for a particular course of conduct – see *R v Goodyear* [2005] 2 Cr App R 20.

33. The defendant must not be subjected to extreme pressure to plead guilty, and if there has been improper pressure to plead guilty, a defendant might be permitted to vacate his plea – see *R v Nightingale* [2013] 2 Cr App R 7. If incorrect legal advice has been given that a certain factual basis would not amount to a defence, the plea may be set aside, see *R v Surhaindo* [2006] EWCA Crim 1429. In these circumstances, the plea would have been entered into in circumstances amounting to a mistake, for the purposes of justifying a variation or rescinding of the plea of guilty under Section 142 of the Magistrates’ Court Act 1980.
34. The matters set out in paragraphs 26 to 33 above are principles to be applied by Magistrates when considering whether to permit the plea of guilty to be vacated. However, for an appeal against a refusal of Magistrates to permit a defendant to vacate a plea which has been refused by magistrates, it must be shown that they misdirected themselves in law, or failed to take account of matters to which they should have had regard or they exercised their discretion in an unreasonable manner, compare *Sheik* [2004] EWCA Crim 492 [2004] 2 Crim App R 13.

No Grounds to Show the Magistrates Were Wrong

35. In applying these principles to this case, we are unable to discern that there was any mistake in the plea of guilty made by Mr Wilson. There was and there is nothing to suggest that Mr Wilson was not fit to stand trial or to enter a plea of guilty.
36. It is right to note that Dr Foster, a consultant psychologist, noted that Mr Wilson was confused about reasons for some of the conditions in the criminal behaviour order, and had difficulty in remembering all of the conditions. This explains why the Magistrates discharged the criminal behaviour order going forward. However, this does not show that Mr Wilson was not able to make his pleas of guilty for the offence of breaching the criminal behaviour order, and the Magistrates were entitled to find that he knew about the prohibition on begging. Mr Smith was right to point out that the fact that the Magistrates discharged the criminal behaviour order meant that the defence of reasonable excuse for breach of the order might have had some possibility of success, but that is a very long way from saying that there was a mistake made in advising and entering the plea. On the contrary, properly analysed in the circumstances of this case, it seems clear that Mr Wilson received careful and appropriate advice on the materials available both then and now.
37. In these circumstances, there is nothing to suggest that the Magistrates’ finding that Mr Wilson was aware of the issues and was therefore properly advised to plead guilty is wrong. In our judgement, the Magistrates were right to refuse to permit Mr Wilson to vacate his plea of guilty.

Conclusion

38. We therefore refuse the extension of time, because for the detailed reasons given above we would have answered the question, “Were we correct to find that no mistake had been made that materially affected the administration of justice and therefore that it was not in the interests of justice to reopen the case under Section 142 of the Magistrates’ Court Act 1980?” by saying yes, the magistrates were right to find that no mistake had been made and to refuse relief.
39. The extension of time is therefore refused and the appeal is dismissed.

End of Judgment

Transcript from a recording by Ubiquis
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