**SHERIFF APPEAL COURT**

**[2019] SAC (Crim) 15**
**SAC/2019/000407/AP**

Sheriff Principal M M Stephen QC
Sheriff A Cubie

OPINION OF THE COURT

delivered by SHERIFF A CUBIE

in

SUMMARY APPEAL AGAINST SENTENCE

by

THOMAS LITTLE

Appellant

against

PROCURATOR FISCAL, PAISLEY

Respondent

**Appellant: Ogg, sol adv; Gilfedder & McInnes**
**Respondent: McFarlane; Crown Agent**

14 August 2019

[1] The appellant pled guilty at trial to a contravention of section 5(1)(a) committed on 5 February 2019. The reading was 70mcg of alcohol in 100ml of breath over the limit of 22mcg of alcohol in 100ml of breath. The plea was tendered at trial but nevertheless the sheriff allowed some discount from a disqualification of two years down to 21 months.

[2] The appellant had been stopped by the police at 8pm. His explanation of the alcohol reading related to a bout of drinking the night before which finished at 4am in the morning. To have such a significant reading at 8pm he must have consumed a very large amount of alcohol. The note of appeal raises matters which the sheriff indicates were not raised before him namely, his partner having a myriad of ailments and her eligibility for motability assistance, and the suggestion that the appellant would lose his employment if a disqualification was "significantly above the statutory minimum".

[3] There are two aspects to this appeal. The first relates to the length of the period of disqualification which was selected by the sheriff, and the second relates to the sheriff declining to give Mr Little the opportunity of participating in the drink drivers' rehabilitation scheme (DDRS).

[4] So far as the headline disqualification is concerned, the appeal was based on factors relating to the appellant's employment and caring responsibilities which, it was said, were not given appropriate weight by the sheriff. The purported effect on Mr Little's job remains for us speculative despite the additional time afforded to provide concrete information pending the hearing on this appeal, and we therefore find ourselves unable to take that into account as a compelling factor. In relation to the caring responsibilities, these are apparently being satisfactorily addressed and again there is no material before us which would justify interference with the sheriff's selection of the period of disqualification.

[5] We have looked at the period selected in the context of the case of *Jenkins* v PF Stranraer [2016] SAC (Crim) 14. We endorse the observation that the gravity of a drink driving offence should be measured in objective, absolute terms rather than by applying a formulaic calculation of the period of disqualification based on the ratio of the alcohol reading above the prescribed limit. The proper approach to sentence in a drink driving

offence is to consider the alcohol reading together with any aggravating and mitigating circumstances relating to the offence, such as the quality of the driving; and the offender, which must include consideration of his record or lack of record

[6] We find ourselves in the position that although the period of disqualification selected by the sheriff may be regarded as high, it is not in our view excessive given the reading; the surrounding circumstances, including the time of day, and the effect upon the appellant which must have been obvious to him. The appeal is accordingly refused so far as the period of disqualification selected is concerned.

[7] We think that there is much more force in relation to the criticism made of the sheriff's approach regarding the drink drivers' rehabilitation scheme. In *McDougall* v *Procurator Fiscal, Perth* 2016 SLT 65 Lord Carloway, as Lord Justice Clerk, said:

> "[7] So far as the [DDRS] course is concerned…Having regard to Anderson v HM Advocate, unreported, High Court of Justiciary, 5 February 2009 (see Morison: Sentencing Practice para M10.0021.02), Hayes v Procurator Fiscal, Glasgow, unreported, High Court of Justiciary, 6 July 2011 (XJ466/11) and Birell v Procurator Fiscal, Kirkcaldy, unreported, High Court of Justiciary, 8 October 2010 (XJ874/10), in a case of this type it would be appropriate for the sheriff to make an order allowing an offender to attend a course. …"

[8] In *Anderson* the appellant pled guilty to a drink driving offence where he had a reading just under twice the legal limit. He had been drinking the night before and had woken up in the morning and gone to an emergency call in connection with his work and security matters pertaining to his place of business. In delivering the Opinion of the Court Lord Wheatley said the following in relation to the DDR course:-

> "…..we have to say that we fail to understand the sheriff's reasoning as to why he thought the rehabilitation course was introduced. It seems to us that the case of someone who drives with more than the permitted amount of alcohol the morning after he has been drinking is an area which required education and consideration. In these circumstances there is absolutely no reason for refusing to allow the appellant to go on a rehabilitation course …."

[9] We adopt and commend the approach arising from *McDougall* and *Anderson*, an approach fortified by the Magistrates' Court Sentencing Guidelines produced by the Sentencing Council for Courts in England and Wales which state the following:-

> "In general, a court should consider offering the opportunity to attend a [drink driving rehabilitation] course to all offenders convicted of a relevant offence for the first time. The court should be willing to consider offering an offender the opportunity to attend a second course where it considers there are good reasons. It will not usually be appropriate to give an offender the opportunity to attend a third course."

[10] We do not regard it as necessary for an accused in the appellant's position to justify his attendance at the course. Attendance at such a course is, in our view, the appropriate course to be adopted in the first instance. Accordingly, we sustain the appeal to the extent of allowing the appellant's attendance at a drink driving rehabilitation course the effect of which will be a reduction of one quarter in the period of disqualification imposed, in the event that the course is successfully undertaken.