

Banks on Sentence

Sentencing Alert No 174

15 Nov 2017

Burglary

Persistent burglars

R v Spence 2017 EWCA Crim 904 D pleaded to burglary of a dwelling house. He burgled a house in the day when the occupants were at work and gained access by smashing a back window. D took a substantial amount of jewellery, including diamond necklaces and earrings which had belonged to the home-owner's grandmother. Electrical items were also taken. The value of the stolen goods was just under £10,000 and the damage to the property was around £11,000. D was aged 54 at the time of sentence and was a prolific burglar with 80 previous convictions at 34 sentencing hearings. He had been released from prison roughly four weeks before this offence took place and was subject to a 28-day recall to prison. In those circumstances and given the number and length of his previous convictions, the Judge said the harm was far outside the norm and he would sentence outside the guidelines. Held. This was a Category 2 offence, but the aggravating factor of the offence being committed whilst on licence and D's dreadful record for domestic burglary entitled the Judge to elevate it to a Category 1 offence. This is not going outside the guidelines. It is using the steps in the guidelines to move to a different category when appropriate. That gives a 5-year sentence, so with full plea credit, **40 months**, not 5 years.

Perverting the course of justice

Interfering with evidence

R v Omayr and Rehman 2017 EWCA Crim 814 D pleaded, on the day of his trial, to perverting the course of justice. R pleaded to conspiracy to pervert the course of justice. At 10.15 pm, V, a pedestrian aged 25, was struck by a Porsche driven at high speed. V sustained serious head injuries and died the next day in hospital. The Porsche was driven by C, who fled the country and was killed in another car accident in Dubai thus avoiding arrest. Evidence showed that earlier in the day, before V was struck, the Porsche was in the possession of D, who handed it over to C. Later, the Porsche was seen with a BMW 5 Series driven by R. The cars were caught by CCTV on a petrol station forecourt and the Porsche drove off at speed. It hit V a few minutes later and left the scene of the collision. Six minutes later, R left the forecourt and drove directly to the collision site, slowing almost to a stop. He then turned around and drove back past the scene as assistance was being given to V. R drove off. At 10.30 pm, D, in a BMW 7 Series, was seen driving to a car park near a public house. The Porsche driven by C, now badly damaged, arrived at the same time. The Porsche was parked in a secluded area of the car park and C got into the BMW and both drove off, abandoning the Porsche. D took C to his home. C was on an electronic tag and he made it home only minutes before his 11 pm curfew. At this time, R arrived at the car park in his BMW. Three minutes after he left the car park, the Porsche exploded into flames. The police said later it had been rendered "forensically useless". Phone records showed a large number of messages between C and R. D had received one phone call from C. When interviewed, D denied all allegations and R made no comment. D was aged 32 years at the time of appeal and had a

previous conviction for money laundering. R was aged 28 at the time of appeal and had a number of previous drug-related convictions. Most notably, in 2007, R had a previous conviction for failing to stop after an accident when he had no driving licence or insurance. D's pre-sentence report said that he had employment in a family business and seemed to show genuine remorse. R's report said he did not appear to regard himself as playing a part in the wider impact of the offence. The Judge accepted that although D was aware that C had left the scene of a serious road accident, he was not aware of the consequences for V in the way that R was. D also had no prior knowledge of the decision to set fire to the Porsche. Held. The underlying offence was very serious. The destruction of the Porsche successfully destroyed vital evidence. There was a need for deterrence. D was rather less involved than R. However, his actions did enable C to avoid apprehension at the scene and to be in a position where he could disappear by the following day. The Judge found R was well aware of the gravity of what had happened. For D, we start at 18 months and with 10% plea credit, **16 months** not 27 months. For R, we start at 4 years and with 25% plea credit, **3 years** not 45 months.

Restraining order

Persistent offenders

R v Leigh 2017 EWCA Crim 1035 D was convicted of breaching his Restraining Order. In September 2012, D was made the subject of a Restraining Order. It prevented him from contacting V or her daughter, directly or indirectly, or entering the road in which they lived. D visited V's house at 2 am and banged on the door repeatedly. He was ignored but he returned in the afternoon on four occasions over a 4-hour period. Police attended and D appeared to be intoxicated and was verbally aggressive to the officers. D was aged 44 at the time of the appeal and had a poor criminal record involving some 26 offences. He had breached this Restraining Order four times previously, receiving a 12-month prison sentence for the last breach. The breaches came only a month after D was released from prison. V lived in fear of D and suffered from panic attacks and psoriasis caused by stress. She had to change her route to and from work to avoid any unwanted attention from D and had suffered severe psychological harm which was continuing. He had once been given a Hospital Order. D's pre-sentence report showed that he had no intention of engaging with the probation service or in seeking assistance for what was then suspected to be a serious mental health problem. From D's repeated abusive behaviour throughout the trial, the Judge was satisfied that D was a man with a frightening demeanour. He said he would sentence outside the *Breach of a Protective Order Guideline 2006*. There was no psychiatric report at the time of sentencing. A report had since been obtained and it highlighted a significant past psychiatric history. D suffered from a schizo-affective disorder. After sentence, he was admitted to a secure psychiatric unit and medication was prescribed. The report said that D's condition was treatable at present in hospital and eventually with close monitoring in the community. Held. The Judge was entitled to move substantially higher than the starting point (26 to 39 weeks' custody for more than one breach). The persistent breaches of the order are at least in part attributable to D's medical condition. **2 years**, not 3.

Sex Offending: Assault

Touching of naked genitalia

Att-Gen's Ref 2017 Re French 2017 EWCA Crim 1207 D pleaded to sexual assault. D and V were friends and V obtained a job at D's place of work, where they became colleagues. They also developed a friendship which sometimes meant that after work V would drive D to her flat and they would share a meal. D would sometimes stay over in a sleeping bag on the sofa whilst V slept in her own room. On one such occasion they were watching television together when V dozed off. She woke to find D's hand inside her underwear touching her vagina. V drove him home and later texted him saying what he had done was 'not cool'. D replied with an apology and said he would stay away from V. She said he didn't have to stay away but needed to think of them as friends and nothing more. The next day V was encouraged to contact the police by a friend, which she did. In interview, D said he had woken up with his hand on her thigh, which he removed, and that was the incident to which the text messages referred. D had no previous

convictions. In a victim personal statement V said that the incident had affected her greatly. She had trouble eating and sleeping. Her colleagues at work seemed to side with D and she lost her job. She won her job back after a tribunal but the company expected her to continue working with D and so she resigned. She felt it was unfair that she had lost her job because of D's behaviour. D was of good character. A pre-sentence report spoke of D's remorse and D said he had 'misread the signals'. He admitted putting his hands down V's shorts. The report also noted that D had five adult children from previous relationships and had just moved in with a new partner. The author noted there was no pattern of offending and that D did [appear to be] an individual without deviant sexual thinking. The Judge said that the fact the offence took place in V's home and that she lost her job through no fault of her own were aggravating features. He said the offence was a "moment of madness" on D's part. Held. The Judge failed to reflect upon the aggravating features and upon the victim personal statement. With 10% for the late plea, **11 months** suspended and a requirement for 50 hours' unpaid work, not 6-month community order with a curfew.

Supply of Class A drugs

Defendant aged 17

R v Murray 2017 EWCA Crim 299, 2 Cr App R (S) 8 (p 49) D pleaded (full credit) to two counts of making an offer to supply cocaine, and possessing ecstasy and cannabis with intent. The first two counts were committed when D was aged 17. Police searched his home on an unrelated matter and found two mobile phones containing text messages that suggested involvement with purchasing £750 worth of cocaine and then offering to supply high-purity cocaine. D was arrested, interviewed and released. The second two offences were committed when D was aged 18 and on bail. Police stopped a car that was being driven erratically and the driver ran off, scattering packages of cannabis. D was in the back seat. Police searched his house and found 800 grams of cannabis (worth around £8,500), more than 2,000 ecstasy tablets (worth around £6,000) and set of scales. D was acting as a custodian to reduce a drug debt stemming from his dealing in cannabis. A pre-sentence report referred to D's heavy cannabis use starting from the age of 15 and that he had grown up in a household where significant drug dealing was 'an accepted way of life'. It was conceded that D did not have a leading role. Held. 3 years for the first set of offences was too long bearing in mind D's age. The 4 years passed for the second set of offences was not too long. Because of age and totality 4 years for the ecstasy and 1 year consecutive for the offering to supply counts making **5 years' YOI**, not 7.

Terrorism

Consultation paper

On 12 October 2017, The Sentencing Council published a consultation document about terrorism. It contains nine draft guidelines. One is for Explosive Substances (Terrorism only) offences. The rest apply to Terrorism Act 2000 s 11, 12, 15-18, 36B and 57-58, and Terrorism Act 2006 s 1, 2 and 5. The proposed starting points range from life imprisonment (35-year minimum term) to 1 year's custody. The consultation period closes on 22 November 2017.

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