APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 13
HCA/2017/000571/XC

Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LORD MENZIES

in

APPEAL AGAINST SENTENCE

by

ASHLEY WHITEFORD

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: CM Mitchell; Faculty Services Limited, Edinburgh for Bridge Litigation, Glasgow
Respondent: M Hughes, AD; Crown Agent

9 January 2018

[1] The appellant Ashley Whiteford pled guilty at a trial diet at the sheriff court at Ayr on 21 August 2017 to a charge of possessing diamorphine, a Class A drug, on one day in September 2016 with intention to supply it to others in contravention of section 5(3) of the Misuse of Drugs Act 1971. The maximum street value of the drugs recovered was £6,780. Having obtained reports, on 14 September 2017 the sheriff sentenced her to 42 months

imprisonment. The appellant now appeals to this court against that sentence as excessive. On her behalf it was accepted that the offence required a custodial disposal but it was submitted that the sentence of 42 months was excessive.

[2] The appellant is aged 36 and before sentence she looked after her two children aged 5 and 9. She has one analogous previous conviction in 2010 for breach of the Misuse of Drugs Act for which she was sentenced to 32 months imprisonment. She has not offended since then. Before us it was argued on behalf of the appellant that she had committed this offence because she was placed under pressure and she had mental health difficulties which rendered her vulnerable. It was pointed out that she had been out of trouble for the last 7 years and that she had weaned herself off drugs use. Moreover her children will be adversely affected by such a long period of custody, and there is no indication in the sheriff's report that he has considered the possibility of applying a discount to reflect the plea of guilty which was tendered one week before the trial diet. Despite the fact that this was raised as an issue in the Note of Appeal the sheriff gives no comment about this to explain his positon on discount in his report to this court.

[3] We should at the outset express some concern about the way in which the sheriff has approached the plea in mitigation. The appellant instructed the solicitor acting on her behalf to give an explanation for her possession of these drugs from which she then departed. However, the sheriff tells us that she continued to assert through her solicitor that the drugs which had been recovered by the police had only been in the dwelling house for 10 minutes before the search commenced. The sheriff goes on in his report to state that he did not accept the appellant's contention that the drugs had only been in her house for 10 minutes before the police arrived to search the house. He said this is completely at odds with the information given by the police to the sheriff who granted the search warrant, which was to

the effect that the appellant had been dealing diamorphine from the locus for several weeks before the search took place. He goes on to say "the appellant struck me as a person who would lie through her teeth to any extent which she thought necessary to minimise her involvement in this crime."

[4] We are concerned that these observations of the sheriff and the way in which he has approached the plea in mitigation run contrary to the longstanding guidance of this court, which has been most recently summarised in two cases on appeal, namely, the case of *Andrew Sinclair* v *HM Advocate* [2017] HCJAC 88 and *Anthony Stewart* v *HM Advocate* [2017] HCJAC 86. We refer in particular to paragraph [9] of the Opinion of the Court delivered by Lord Brodie in *Anthony Stewart* in which the court referring to the Opinion of the Court in *McCartney* v *HM Advocate* 1998 SLT 160 observed:

> "We are immediately persuaded that the sheriff erred in his rejection of the mitigation offered in respect of charge 2 which was the most serious of the charges to which the appellant pled guilty. As is made very clear in the recent case of *Ross*, a sentencing judge is not bound to accept the veracity of what is advanced by way of mitigating circumstances, even where it is not inconsistent with a guilty plea and where it is not challenged by the Crown, but if the judge considers an account to be implausible or if he doubts its veracity for any other reason then as a matter of fairness and procedural propriety he must so advise the accused and afford the accused the opportunity to establish what he asserts by way of proof in mitigation. If the judge does not do that, and the proffered mitigation is not manifestly absurd, then he will usually be obliged to proceed on the basis that what has been put forward in mitigation is true: *McCartney* at 162."

It does not appear to us that the sheriff in this case has followed the guidance in *McCartney*.

[5] We also consider that there is force in the last two points advanced on behalf of the appellant, namely, the adverse effect on the children and the absence of any expression of a discount to reflect the plea of guilty. It is a necessary part of the matters to which a sentencer requires to have regard to consider the possible consequences of any particular sentence on children who may be affected. The sheriff states in his report to us that he took

account in the present case of the effect that 42 months imprisonment may have on the appellant's children but he does not expand or elaborate on this statement. It does not appear to us that he has attached much, if any, weight to this factor. He should have done so. Moreover, the sheriff in his report does not address the issue of any discount which might fall to be applied to reflect the plea of guilty, albeit that this was tendered at a very late stage at, or very shortly before the trial diet itself. Given the lateness of the plea it might have been open to the sheriff to apply no discount at all, or to apply a minimal discount. However, the matter having been specifically raised in the Note of Appeal, it was in our view incumbent on the sheriff to address this point in his report.

[6] Having regard to these factors, and to the fact that the time libelled for this offence was only one day, we consider that the sentence of 42 months selected by the sheriff was indeed excessive. We will therefore quash that sentence and substitute a sentence of 30 months imprisonment, that being discounted from a starting point of 33 months to reflect the plea of guilty.