

APPEAL COURT, HIGH COURT OF JUSTICIARY

[2015] HCJAC 112
HCA/2015/3269/XJ

Lord Justice Clerk
Lord Brodie
Lord Matthews

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE CLERK

in

APPEAL AGAINST SENTENCE

by

BRUCE McDOUGALL

Appellant;

against

PROCURATOR FISCAL, PERTH

Respondent:

Applicant: S Collins, Solicitor Advocate; Capital Defence
Respondent: R Goddard AD; the Crown Agent

13 November 2015

[1] On 6 August 2015, at the Sheriff Court in Perth, the appellant pled guilty at an intermediate diet to a contravention of section 5(1)(a) of the Road Traffic Act 1988. On 3 September 2015, he was disqualified from driving for 3 years and fined £480. He was also ordered to pass "the prescribed test of further competence to drive" before regaining his licence.

[2] The appellant had been stopped by the police at 5.40am on 8 May 2015. He had a breath alcohol level of 52 micrograms in 100 millilitres, thus exceeding the limit of 22 micrograms by more than double. Significantly, he had an analogous previous conviction dated 20 May 2005. A 3 year minimum disqualification period therefore applied (Road Traffic Offenders Act 1988, s 34(3)).

[3] The appellant complains, first, that he ought not to have been required to pass the extended driving test. The sheriff explains that it had not been his intention to make such an order, but rather that he should simply re-sit the ordinary driving test. However, as the sheriff correctly observes, in terms of section 36(5) of the 1988 Act, where a person has been convicted of an offence involving obligatory disqualification, as is the case here, it is not competent to require a re-sit of the ordinary, as distinct from the extended, test. Had he understood this at the time, the sheriff says that he would not have imposed the requirement. In that respect, he refers the court to the Magistrates Court Sentencing Guidelines applicable in England and Wales, which recommend (para 16) that the discretion to order a re-sit should be exercised where there is evidence of inexperience, incompetence or infirmity, or where the disqualification is lengthy. None of these factors applied in this case.

[4] The second complaint is that the sheriff failed to make an order allowing the appellant to undertake the Vernon Manfield driving course, thus enabling him, in terms of section 34A(5) of the 1988 Act, to undertake a course which would lessen the period of disqualification. Again under reference to the Magistrates Court Guidelines (para 20), the sheriff notes that a court should consider affording an opportunity to attend a course to all offenders convicted of a relevant offence for the first time, or of attending a second, but not a third, course where there were good reasons for doing so. In this case, the sheriff explains that, although he was asked to consider granting an order of the type in question, he was not given any reasons for doing so.

[5] An order to pass a driving test, or the extended test, should only be made, unless mandatory, where there is material to demonstrate that the offence has resulted from inexperience, incompetence or infirmity, or where the disqualification period is a lengthy one. In this respect, the court repeats what was said in *Sweeney* v *Cardle* 1982 SCCR 10 and *Tariq* v *Carmichael* 1982 SCCR 488, to the effect that the power to order a test is not designed to be punitive. It is appropriate not only in cases of age, infirmity or where the circumstances of the offence are such that there was reason to suspect that the offending driver was not competent, but also where a long period of disqualification is imposed. The relevance of the length of disqualification, and whether the test ought to be undertaken, will depend upon the period of time during which the offender has held a driving licence.

[6] Given that the sheriff accepts that the order which he intended to impose was not competent, and that he would not have imposed an obligation to pass the extended test, the relative order here will be quashed. The appeal is allowed to that extent.

[7] So far as the Vernon Manfield course is concerned, the court was told that that particular course is not one which is now available locally. It was said that there are other courses, but the precise nature of these were not known. 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. Before he or she could do so he or she requires, in normal course, to be either aware of, or supplied with, sufficient information to enable the order to be competently made. The additional problem which this court has is that the appellant is not present. The court cannot make such an order without explaining certain things to him. Therefore, whilst expressing the view that

such an order would have been appropriate in this case, it cannot make one now. The appeal is refused to this extent.