IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2023] EWCA Crim 397

No. 202203482 A3

Royal Courts of Justice

Wednesday, 22 March 2023

Before:

LORD JUSTICE WARBY

MR JUSTICE GOOSE

HIS HONOUR JUDGE LOCKHART KC

REX

V

KYLE ANTHONY STEVENS

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MR N ROBINSON appeared on behalf of the Appellant.

THE CROWN were not represented.

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JUDGMENT

LORD JUSTICE WARBY:

1 This is an appeal against sentence in a case of possession of indecent and pornographic images.

2 The appellant is Kyle Stevens, aged 24. On 29 September 2022 he pleaded guilty in the Crown Court at Bournemouth to three counts of possessing indecent photographs of children, contrary to section 160(1) of the Criminal Justice Act 1988, and one count of possessing extreme pornographic images, contrary to section 3(1) of the Criminal Justice and Immigration Act 2008. He was sentenced in the same court on 4 November 2022.

3 On each count the judge passed a three-year community order, concurrent, with a rehabilitation activity requirement, a programme requirement and 140 hours of unpaid work. He ordered the

forfeiture of the iPhone on which the images had been discovered, and the usual consequences of a conviction of this nature followed. First, having been convicted of an offence listed in schedule 3 of the Sexual Offences Act 2003, the appellant was required to comply with the notification provisions of that Act. Secondly, having been convicted of an offence specified in regulations under the Safeguarding Vulnerable Groups Act 2006, the appellant was liable to inclusion in the relevant list by the Disclosure and Barring Service.

4 No complaint is made of any of the matters which we have mentioned, nor is any issue taken with the judge's decision to make a Sexual Harm Prevention Order (SHPO), as he did. The challenge is to his decision to make an SHPO lasting as long as 10 years. The single ground of appeal is that in all the circumstances the duration of the order was manifestly excessive or wrong in principle.

The Facts

5 The brief facts of the case are that in April 2021, acting on a tip-off from the National Crime Agency, officers attended the appellant's home address where they arrested him and seized his iPhone. On the phone were found a total of 95 Category-A indecent images of children, 22 in Category B and 11 in Category C. All of them were moving images and all were in an accessible format. There were also 13 extreme pornographic images.

6 The appellant did not dispute possession of the images, but in interview he offered an explanation. He said he had two Twitter accounts, one of which was for everyday use and the other was used for looking at adult pornography. Someone had sent him a link and when he clicked on it what he called "dodgy stuff" had popped up, so he had closed the link. However, analysis of his phone showed that he had searched the internet for terms like "jailbait" and the latest images recovered had been downloaded in late March 2021, shortly before the appellant's arrest. Officers also recovered from the phone chats with others involving bestiality and a sexualised chat with someone who claimed to be 15 years of age.

7 The appellant in due course pleaded guilty at the plea and trial preparation hearing on a full-facts basis.

Sentencing information

8 As is common in cases of this kind, the appellant was of previous good character. Character references were provided by his mother, father and brother. A pre-sentence report said that he had now admitted viewing the images after clicking the link he was sent, but reported that he had difficulty accepting that his motivation was sexual. He was said to present as "an introverted isolated individual" who lacked insight into his own motivation and suffered from persistent low mood.

9 He was assessed as posing a medium risk of contact sexual re-offending, of internet re-offending and of causing serious harm to children, and a medium risk of harm to himself, but a low risk of harm to other adults. He accepted, however, that his actions were not victimless. He displayed a willingness and capacity to increase his awareness further. According to the report, he had completed an online course designed to achieve this. It was suggested that his insight was likely to improve under the guidance of a professional.

10 The recommendation was for a 36-month community order which required some unpaid work as ultimately imposed by the sentencing judge. The officer wrote as follows:

"The imposition of external requirements such as sex offender registration and the sexual harm prevention order which will allow for increased monitoring of his behaviour, including any online activity, if authorised”

would be valuable. But nothing was said about the duration of the SHPO.

The Sentencing Remarks

11 In careful well-structured sentencing remarks, the judge summarised the key facts and explained the reasons behind those aspects of the sentence that are not challenged. When it came to the imposition of and SHPO, he said this:

"I make a Sexual Harm Prevention Order in terms of the draft provided on the digital case system. I make that for a period of ten years, that is to say until 3 November 2032. You will be subject to the notification requirements for a period of five years and what that means is this, you must notify the police of your address and any change of your address within three days of that happening, you must comply with the terms of the Sexual Harm Prevention Order. Were you to fail to comply with either order, you would be committing separate criminal offences which carry a sentence of up to 5 years' imprisonment."

12 This is all succinct and clear, but there was nothing said to explain why the judge had decided to impose a SHPO for 10 years rather than any other amount of time.

13 After the hearing the appellant's solicitors wrote to the judge seeking a reduction of the 10-year period to five years to mirror the notification period but this was refused by the judge.

The appeal

14 In support of the appeal, Mr Robinson, who appeared below as well as in this court, said the test for making an order is necessity, that is whether making the order in the terms proposed is necessary to protect the public from the identified risk of sexual harm. Although he accepts that the threshold for linking it all was met and that an order for five years to deliver the duration allowed by the statute was apt. Mr Robinson argued that anything more was excessive, and that an order for 10 years was disproportionate to the risk posed by the appellant and to the seriousness of the offences bearing in mind the mitigation.

15 Mr Robinson places particular emphasis on the risk assessments in the pre-sentence report, the likelihood of success of the community order, and the length of time for which the automatic notifications would continue to apply in any event. He relies also on the probation assessment of the appellant's character and the references provided by his family members.

16 In support of his submissions Mr Robinson has referred us to a number of decisions of this court, including R v Smith (Steven) [2011] EWCA Crim 1772 , [2012] 1 WLR 1316, [2012] 1 Cr.App.R (S) 82, R v Hammond (Paul Churchill) [2008] EWCA Crim 1358 and R v Beedle (Robert) [2019] EWCA Crim 1672 .

Assessment

17 Notification requirements and SHPOs are both important elements of the sentencing armoury in cases of this kind. They do, however, impose significant restrictions on the offender's freedom which need to be tailored, within the statutory framework, to the particular demands of case before the court.

18 The principles that emerge from the authorities we have mentioned include the following: (1) an SHPO should only be imposed if and to the extent of its terms, including the arrangements, are both necessary to protect against an identified risk of harm and proportionate to the nature and scale of that risk; (2) these issues should be the subject of careful consideration by the parties and judge; (3) having identified the appropriate period, the judge should give reasons for this decision on that issue; and (4) the appropriate period of an SHPO will be the same as the period for which the notification requirement needs to last; the two should be in line with one another.

19 On that last point we draw attention to the fact that by virtue of section 352 of the Sentencing Act 2020, an offender who is subject to the notification requirements of the Sexual Offences Act 2003 remains subject to those requirements until the SHPO is discharged. Putting that another way, the notification period is automatically extended to match the period of any longer SHPO.

20 In this case, these principles were not applied. There was, seemingly, no discussion about the duration of the order. It is certainly not apparent why the judge selected a 10-year period for the SHPO. He does not appear to have appreciated that the effect of the SHPO would be to impose a 10-year notification period. He mistakenly told the appellant that his notification requirement would last for five years. It may be that had the judge been alive to the true position he would at least have paused before imposing a 10-year SHPO. At any rate, we are satisfied that in doing that the judge fell into error.

21 This appellant had shown a degree of insight and some commitment to addressing the underlying reasons for his offending. There was reason to think that his understanding would improve in the short to medium term and that his risk of re-offending would reduce over time. In our judgment an SHPO was necessary, but the minimum period of five years was sufficient to cater for the risks posed by this appellant on the material before the sentencing judge. That period matched the statutory notification period. There was nothing in the facts of the offending, the appellant's antecedents, or the pre-sentence report to indicate a real need to go beyond that period. A 10-year period was disproportionate, and to that extent unnecessary.

22 We therefore, allow the appeal, quash that aspect of the order below, and substitute an SHPO in the same terms but for five years rather than 10.

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