

Neutral Citation Number: [2010] EWCA Crim 2515

No: 200905742/D4

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

Tuesday, 12th October 2010

B e f o r e:

LORD JUSTICE RICHARDS

MR JUSTICE GRIFFITH WILLIAMS

HIS HONOUR JUDGE ROOK QC

(Sitting as a Judge of the CACD)

R E G I N A

v

JACK HARRIS

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(Official Shorthand Writers to the Court)

Mr J Tucker appeared on behalf of the **Appellant**

Miss S Cavander appeared on behalf of the **Crown**

J U D G M E N T

(As Approved by the Court)

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25. MR JUSTICE GRIFFITH WILLIAMS: This is an appeal against sentence by leave of the single judge.
25. Following a plea of guilty to an offence of possession of cannabis with intent to supply, the appellant was sentenced on 31st July 2009 in the Crown Court at Bristol to a community order for 12 months, with a curfew requirement of 3 months and a supervision requirement.
25. There followed confiscation proceedings under the Proceeds of Crimes Act 2002 ("the Act"). On 2nd October 2009, in those proceedings, His Honour Judge Ticehurst, who was not the sentencing judge, found that the appellant had benefited from his criminal conduct in the sum of £71,008.22, the realisable amount was £1,038.22 and so he made a confiscation order in that amount. He ordered that that be paid within 28 days with a period of one day's imprisonment in default.
25. The appeal against sentence is limited to the order made in the confiscation proceedings.
25. The Act makes provision for the making of confiscation orders against those found to have a criminal life-style. There is no issue that by reason of his conviction of a drug trafficking offence, contrary to section 5(3) of the Misuse of Drugs Act 1971, the appellant is deemed to have a criminal life-style (see section 6(4) and section 75(2) of the Act). The court was accordingly required to decide whether he had benefited from his general criminal conduct. As to that the burden is on the Crown to prove, on the balance of probabilities, both the benefit and the amount of that benefit. To prove the benefit from general criminal conduct the Crown can rely on the statutory assumptions in section 10 of the Act. These are, in so far as they are relevant to the facts of this case (i) that any property transferred to the defendant at any time in the 6 years ending with the date when proceedings for the offence were started against him (ii) any property held by him at any time after the date of conviction and (iii) any expenditure incurred by him at any time in the 6 years ending with the date when the proceedings for the offence were started were, in each instance, obtained by him as a result of his general criminal conduct.
25. It is important to stress that in respect of the expenditure assumption, it must be for the Crown to prove, on the balance of probabilities, that there has been any expenditure before that assumption applies. If the Crown discharge that burden, it is for the defendant to show why the assumptions are incorrect or that there would be a serious risk of injustice if the assumptions were not made in the case.
25. In the confiscation proceedings the Crown relied on the statement of information dated 28th July 2009, served pursuant to section 16(1) of the Act of Alan Chivers, a financial investigator. In that statement Mr Chivers particularised legitimate sources of income for the periods 2003 to 2008 in the sum of £32,000 net of tax. There is no challenge to the conclusion by His Honour Judge Ticehurst that the legitimate sources of income totalled some £34,000 because there were to be added to his legitimate earnings certain payments of Job Seekers Allowance and the like.

25. Mr Chivers identified unexplained cash credits to the appellant's bank account in the previous 6 years (in fact between 29th October 2007 and 3rd April 2009) totalling £790. He identified £1,038.22 p in cash which had been found in the possession of the appellant at the time of his arrest.

25. Of the appellant's expenditure incurred after the relevant date Mr Chivers stated:

"The Defendant Harris detailed that he has a serious drugs habit and that he smokes half an ounce of Cannabis a day, maybe more. He states he pays £140 per ounce for his Cannabis. Therefore using the Defendant's usage figures this costs him at least £70 per day, so £490 per week and £25,550 per year. The relevant period in this case of 6 years however to be fair to the Defendant who is 22 years old the Prosecution have only calculated this back to his 18th birthday up to the date of his arrest ie 4 years and 2 weeks which would give the total expenditure for this period as £103,180.

As the source of the above monies has not been identified, then in accordance with Section 10(4) of the Proceeds of Crimes Act 2002 the court shall assume that the money has come from the defendant's criminal conduct unless:-

a the assumption is shown to be incorrect.

or

b there would be a serious risk of injustice if the assumption were made."

25. On the statutory assumptions the total benefit was said to be £105,008.22. It was accepted that the only available amount was the £1,038.22 found at the time of the appellant's arrest in his possession.

25. In his response served pursuant to section 17 of the Act the appellant said that he could not recall the sources of the bank credits without access to his bank statements. He accepted that the cash found at the time of his arrest was the benefit of his criminal conduct and asserted that his admissions about his cannabis use should not be relied upon to support the assumption as to his expenditure because, he said, he had lied to the police in an attempt to persuade them that all the cannabis found in his possession was for his personal use and because the admissions were contradicted by his subsequent guilty plea to the offence of possession with intent to supply. He did not give evidence or call other evidence in the confiscation proceedings.

25. In his ruling His Honour Judge Ticehurst said this as to the two contentious issues (4C to E):

"In a very brief statement in response to the financial statement prepared by Mr Chivers, the defendant, firstly, raises concerns about the cash credit to his bank account of £790. At the time of his statement he did not have these vital statements covering the extensive period of time and says that

it cannot be expected for the defendant to recall such credits without copies of the full bank statements so they can be compared with other documentation before explanation can be provided. He asked for four copies of the bank statements relied upon by the Financial Investigation Unit in order to comply with the confiscation timetable. Copies of those bank statements were provided to the defendant, but he has chosen not to give any evidence or any indication as to where £790 cash paid into his bank account came from. He has not displaced assumptions of the Crown ask me to make that that derived from his criminal activity and criminal life-style."

25. As to those unexplained cash credits Mr Tucker accepted, in this court, that as no evidence was called on the appellant's behalf, there was no evidence to rebut the Crown's case and to rebut the assumption, and so he cannot criticise that part of the ruling as being either unreasonable or wrong. His Honour Judge Ticehurst said (5C to 6A):

"The defendant contends that the prosecution should not be able to rely on what he said during his police interview as his subsequent guilty plea to possession with intent to supply was a clear acceptance that he had lied in his police interview in an attempt to persuade the police that all of the cannabis was for his personal. It seems to me that the defendant wants it both ways. He wanted to say to the police in his interview, 'The cannabis was for my own personal use. Do not therefore, please, proceed or prosecute me for possession of cannabis with intent to supply it'. Having then indicated by his plea that he had been dealing cannabis, he then wishes to say to the court, 'Please don't find the assumptions against me, or rely upon the assumptions against me, that this was cannabis that I had bought for my own personal use because I want to rely on my plea of guilty to possession with intent to supply'. I am afraid I find no favour with those submissions. The law, it seems to me, is clear. The defendant has pleaded guilty to an offence, which is why there are the confiscation proceedings. He has benefited from his criminal life style. As a result of that, I am asked to make a certain assumption; namely, that his financial benefit is that which the Crown has calculated and is arising from his use of cannabis over the years. I have to not apply those assumptions, however, if the assumption is shown to be incorrect. The defendant has chosen to give no evidence to me and there is no evidence, therefore, to displace such assumption.

In his submission, Mr Tucker says that there would be a serious risk of injustice if the assumption were made and says that for a young man of previous good character to have a benefit figure of £103,180 against him for the rest of his life is draconian and a serious consequence. I am afraid that is a consequence of the law and a consequence of the defendant's behaviour."

25. On the issue of expenditure Mr Tucker submitted that the Crown has failed to prove

that any expenditure incurred by the appellant at any time after the relevant day was met from property obtained by him as a result of his general criminal conduct. Alternatively Mr Tucker submitted that if the Crown has proved such expenditure, there was no evidential basis for concluding that it had been incurred over the 6-year period, or for any lesser period and certainly not for any period since his 18th birthday.

25. Mr Tucker submitted that the expenditure could not be assumed to have been incurred and the Crown's reliance to prove the expenditure on the appellant's admissions that he had a cannabis habit, whereby he smoked half an ounce or more of cannabis a day and bought cannabis in large quantities, spending some £900 a time, was "cherry picking", because it ignored the fact that the central tenet of the applicant's position in interview was the factually inaccurate one, that the drugs found in his possession on his arrest were for his personal use. Mr Tucker submitted further that, on the balance of probabilities, it was more likely that the assertion in interview that he was smoking such a large amount of cannabis every day was an exaggeration to explain the large amount of cannabis found on him rather than an honest description of his cannabis use. He submitted also the admissions were contradicted by the appellant's guilty plea to the offence of possession with intent to supply.
25. In our judgment, the learned judge was entitled to conclude that the appellant's admissions provided evidence from which it could be inferred that expenditure had been incurred by him in the relevant period and met from property obtained by him as a result of his general criminal conduct.
25. It is trite law that a confession is likely to be true and so without evidence to the contrary the learned judge was entitled to act upon the appellant's admissions against interest. As we have already said, the appellant did not give evidence but he relied or sought to rely upon his response, to which we earlier referred, and upon submissions made by counsel on his behalf. We stress that those matters are not and cannot be evidence. Similarly, his plea of guilty did not rebut any inference from those admissions, in the interview of the 21st April. The plea of guilty was no more than an admission that at the date of his offending he intended to supply the cannabis found in his possession.
25. In the decision of this court in R v Dellaway [2001] 1 Cr App R(S) 77, Lord Woolf CJ, giving the judgment of the court, said this at paragraph 12:

"... in our judgment the judge was right to make the assumption under subsection (3)(b) of the section to which we have just referred. He had no discretion as to whether to make that assumption under subsection (3)(b) if the facts gave rise to the inference that he had paid at least £28,600. This is a perfectly proper inference to make, as a matter of common sense, in the case of the appellant. In relation to a large quantity of drugs of this sort, approaching the matter on the balance of probabilities where there is no alternative credible explanation, the inference is obvious: money would be required to pay for the drugs. Those who traffic in the drugs trade do not normally extend credit or trust to others involved in a criminal enterprise of this sort. The argument advanced by Mr Rose that it

was not proper for the judge on the balance of probabilities to come to the conclusion that this was a case where there had been expenditure by the appellant falling within section 4(3)(b) is one which does not stand up."

It seems to this court that those observations apply with equal force to the facts of this case. The learned judge was perfectly entitled to have regard to the appellant's admissions as to his drug habit and as to cost of that drug habit, and in the accordance with the approach approved in Dellaway to have concluded that there must have been expenditure, within the terms of section 10(3) of the Act.

25. Once the judge was so satisfied and was satisfied that the third assumption was not displaced, he had to determine the level of that expenditure. We observe that the approach taken by the financial investigator, Mr Chivers, in the passage from his report to which we have referred earlier, that the relevant period in the case is 6 years, an approach which the learned judge would appear to have adopted was entirely wrong. The third assumption makes no such provision.
25. In his interview the appellant did not say for how long he had had the cannabis habit which he described or for how long he had been expending so much money on it. Whilst Mr Tucker takes issue with the conclusion, he does not take issue with the calculation of expenditure of that drug habit at £70 a day. But he did submit that there was no evidence as to how long that habit had been maintained and his submission, in short, was that what the appellant told the police in that interview under caution on 21st April 2009 was no more and no less than a snapshot of his cannabis habit and the cost of his cannabis habit at that time.
25. We cannot agree with that submission. While we accept Mr Tucker's submissions that there was evidentially no ground for concluding that there had been expenditure over a 6-year period, or over the period from the appellant's 18th birthday, we have concluded there was evidence from which a judge, properly directing himself, could properly have concluded that there was expenditure over a 12-month period.
25. We have so concluded for these reasons. First, reading the appellant's interview as a whole, it must be inferred that he was describing a drug habit of some duration. Secondly, there was evidence which, in this court, has not been challenged of the five cash credits to the appellant's bank account in the 12 months before these proceedings. Thirdly, there was the £1,038.22 found in his possession at the time of his arrest.
25. Those matters, viewed together with the evidence of weighing scales and dealer's lists found by police officers when they searched the appellant's home lead us to the conclusion that the proper inference in this case is that the benefit was for a period of no more than 12 months.
25. As to the quantum or value of that benefit, applying the figures provided in Mr Chivers' report, it follows that there was expenditure from general criminal conduct in that 12-month period of £25,550. To that figure there must be added the cash credits of £790, the cash found in the appellant's possession of £1,038.22, producing a figure of £27,328.22. There falls to be deducted from that figure the legitimate sources of

income of the appellant during the 12-month period, which we derive from Mr Chivers' report in the sum of £5,325.50. That produces a net figure of £22,002.72.

25. From those conclusions it follows that this appeal must be allowed to this limited extent. We quash the benefit figure of £71,008.22 and substitute for it a benefit figure of £22,052.72. The realisable amount remains the same in the sum of £1,038.22 and the confiscation order in that amount remains the same.