[2002] QCA 345

COURT OF APPEAL

McMURDO P
WILLIAMS JA
ATKINSON J

CA No 273 of 2001
CA No 121 of 2002

THE QUEEN

v.

DAVID JOHN PERRY

BRISBANE

..DATE 04/09/2002

JUDGMENT

THE PRESIDENT: The applicant pleaded guilty in the District Court at Brisbane on the 30th August 2002 to an assortment of charges on two indictments. The pleas of guilty on the first indictment were to one count of stealing, two counts of fraud with circumstances of aggravation, three counts of fraud, one count of attempted fraud, two counts of forgery and one count of breaking and entering premises and committing an indictable offence.

The applicant pleaded guilty on the second indictment to six counts of burglary, three counts of stealing, two counts of fraud with a circumstance of aggravation and two further counts of fraud without any aggravating circumstance. He pleaded not guilty to one count of armed robbery in company and two further counts of fraud with a circumstance of aggravation.

His robbery trial was adjourned until 3 September 2001 for hearing and his sentence in respect of the matters to which he had pleaded guilty on the first and second indictments were also adjourned.

On 3 September 2001 the applicant pleaded guilty to the armed robbery in company charge and that sentence was adjourned until 6 September 2001. On that date the applicant pleaded guilty to a further count on the second indictment of fraud with a circumstance of aggravation.

The applicant was then sentenced on all counts to which he had pleaded guilty. The sentence imposed was intended to be five and a half years' imprisonment for the armed robbery in company, the counts of burglary, break and enter and fraud with a circumstance of aggravation and two years imprisonment on the remaining counts.

The Judge made a minor administrative error because of an error on the front sheet of one indictment and mistakenly imposed a sentence of five and a half years' imprisonment on a count of attempted fraud instead of the count of break and enter. The penalty for the offence of attempted fraud is less than the sentence imposed. Regardless of the outcome of this application otherwise, that administrative error must be corrected.

On 31 March 2002, the applicant again appeared before the District Court and pleaded guilty to one count of attempted fraud and one count of fraud on a third indictment and to the charge of fraud with a circumstance of aggravation still outstanding against him on the second indictment.

He was sentenced to two years' imprisonment for fraud with a circumstance of aggravation and to six months' imprisonment on the remaining counts with a recommendation for post prison community based release on 12 August 2003. These sentences did not increase in any way the effective sentence imposed on 6 September 2001.

This application was listed for hearing before this Court on a prior occasion. The applicant had been represented by a barrister from Legal Aid Queensland. The applicant sent material to the Court which suggested that he may wish to apply for an extension of time within which to appeal against his convictions (effectively an application to set aside his pleas of guilty), and to raise fresh evidence about the conduct of his case at first instance. That application for leave to produce fresh evidence or to change his plea is not now pursued.

The applicant's sole contention is that the effective sentence of five and a half years' imprisonment with a recommendation for eligibility for post prison community based release is manifestly excessive in that insufficient weight was given to the applicant's pleas of guilty and his attempts at reform.

The facts constituting the offending are as follows: The first indictment involved 13 offences of dishonesty committed over a five month period between March and August 1999. The applicant stole an assortment of cheques and credit cards and used these to withdraw funds from various financial institutions causing a loss of $19,780.41. The facts of the offences contained in the second indictment are as follows.

The applicant stole the complainant's mail between September and October 1999 and cashed a stolen cheque from the mail for $9,308 using documents obtained through the theft. He attempted to purchase goods through a line of credit on an AGC

account in the complainant's name in February 2000. He purchased a mobile phone and completed an application for a service provider in the complainant's name causing the loss of $361.50 in unpaid calls.

He later opened a bank account in the complainant's name and drew two cheques on it totalling $7,000. He wrote four further cheques on that account, some of which were drawn upon successfully, causing a total loss of $6,884.76. On 14 April 2000 he burgled a residence and stole a large amount of property resulting in an insurance pay out of $14,534.02. He then used the burglary complainant's credit card details to pay a mobile phone account and a speeding ticket and to transfer funds to a TAB account. He committed a further four burglaries and stole property from those homes. He stole mail from two more complainants.

On 17 September 1999 the applicant and his wife visited his wife's former boyfriend and his wife, claiming $400 for a share of a car purchased during a relationship. The applicant demanded to be allowed into the garage, lifting his shirt to reveal a hard plastic pipe. He pushed his way into the home and demanded the stereo, again showing the pipe when resistance was offered.

He stole the stereo. He returned a few days later with a small stereo for which the complainant paid $250 but he then took the complainant's TV leaving a smaller television behind.

Property worth $26,338.26 remains unrecovered in respect of the offences on this indictment.

The offences in the third indictment involve the applicant setting up a false identity through an illegal scheme. Using those false details he attempted to obtain a subscription for a mobile phone account and successfully opened a bank account and obtained a credit card on that account. An amount of $1800 was misappropriated by him with that card.

The applicant was 35 years old at sentence. He was first convicted in 1985 of stealing and between 1985 and 1998 was convicted of a number of traffic offences including drink driving and also of two offences of wilful destruction of property. In 1996 he was sentenced to two years' imprisonment for indecent dealing with a child under the age of 12 with circumstances of aggravation and other associated charges.

In 1997 he was sentenced to three months' imprisonment for the offence of assault occasioning bodily harm. The applicant's counsel at sentence outlined the applicant's dysfunctional upbringing and his substance abuse from the age of 10 developing into a heroin addiction and amphetamine habit. He was on the methadone program at the time of sentence and it seems his offending revolved around his drug addiction.

Reports were tendered at sentence that suggested he had made some attempts at rehabilitation but whilst these offered some

hope for the future they did not suggest that his rehabilitation was immediately promising.

The applicant was to some extent cooperative with the authorities and should get significant credit for his pleas of guilty. His Honour recognised that, although not all the pleas of guilty were timely, allowance must be given for the applicant's cooperation and the administration of justice. His Honour also observed that property involving $77,000 had been taken and that $46,118.41 remained outstanding with no prospect of compensation.

The applicant is a mature man with a significant criminal history. Sadly his drug addiction has led him to commit a very large number of property offences over the two and a half years between February 1998 and June 2000. These offences had serious aspects to them which included stealing the mail of other citizens to commit fraudulent offences, six counts of burglary and an armed robbery in company with the concerning features of a vigilante home invasion.

The sentence of five and a half years' imprisonment with a recommendation for post prison community based release after two years adequately reflected the mitigating circumstances of the pleas of guilty. It was by no means manifestly excessive and nor did the Judge fail to give appropriate weight to the pleas of guilty and other mitigating circumstances especially where some of the offences were committed effectively whilst on bail.

I would refuse the application for leave to appeal against sentence but for the administrative error noted earlier. That requires that the application should be granted and the appeal allowed to the limited extent in respect of the 10 count indictment only by deleting the sentence imposed at first instance on count 10 and substituting a sentence of two years' imprisonment on that count.

I would otherwise confirm the sentences imposed at first instance.

WILLIAMS JA: I agree.

ATKINSON J: I agree.

THE PRESIDENT: That is the order of the Court.
