Neutral Citation [2016] IEHC 619

THE HIGH COURT

[2016 No. 115 JR]

BETWEEN

SCOTT PURDUE

APPLICANT

– AND –

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 8th November, 2016.

I. Key Issue Arising

1. Was the learned District Judge correct in law to suspend part of Mr Purdue's sentence of detention on condition that he (i) not partake of any alcohol, and (ii) not leave County Kildare without the consent of the Probation Service, with whom Mr Purdue was then liaising?

II. Facts

2. At Dun Laoghaire District Court, on 15th December, 2015, Mr Purdue, then a minor, pleaded guilty to a number of offences, *viz*. (1) theft (of sports gear at Dundrum Shopping Centre) contrary to the Criminal Justice (Theft and Fraud) Offences Act 2001, (ii) possession of a knife contrary to the Firearms and Offensive Weapons Act 1990, (iii) disorderly behaviour at the Square Shopping Centre, Tallaght, contrary to the Criminal Justice (Public Order) Act 1994, and (iv) failing to comply with a Garda direction contrary to the Criminal Justice (Public Order) Act 1994. Notwithstanding that he was then just 17 years old (he turned 18 years of age on 14th February, 2016), Mr Purdue had already amassed a remarkable ten convictions, seven of them for theft. He also had the benefit of two prior suspended sentences, imposed at Blanchardstown District Court in December, 2013 and January, 2014.

3. In all the circumstances the learned District Judge imposed a sentence of three months' detention in respect of the theft, with a portion thereof suspended on specified conditions. It is those conditions that have led to the within application for an order of *certiorari*. They included a requirement that Mr Purdue (i) not partake of any alcohol, and (ii) not leave County Kildare (to which his concerned parents had removed him to get him away from what they perceived to be a 'bad crowd' with whom Mr Purdue had fallen in) without the consent of the Probation Service, with whom Mr Purdue was, it appears, then separately liaising – though counsel for Mr Purdue asserted that this was not so.

4. It is accepted in principle by counsel for Mr Purdue that a custodial sanction was merited in all the circumstances arising and thus that the imposition of a sentence of three months' detention was within the jurisdiction of the District Court. The learned District Judge's decision to suspend a portion of the prison sentence is also conceded by counsel for Mr Purdue to have been *intra vires*. However, it is contended that the conditions attached to the suspension were in excess of jurisdiction, being, it is alleged, gratuitous, punitive and arbitrary.

III. Statutory Basis for Sentence Imposed

5. Section 99 of the Criminal Justice Act 2006, provides, inter alia, as follows:

> *"(1) Where a person is sentenced to a term of imprisonment (other than a mandatory term of imprisonment) by a court in respect of an offence, that court may make an order suspending the execution of the sentence in whole or in part, subject to the person entering into a recognisance to comply with the conditions of, or imposed in relation to, the order.*
>
> *…(3) The court may, when making an order under subsection (1), impose such conditions in relation to the order as the court considers –*
>
> > *(a) appropriate having regard to the nature of the offence,*
> >
> > *(b) will reduce the likelihood of the person in respect of whom the order is made committing any other offence,*
>
> *and any condition imposed in accordance with this subsection shall be specified in that order.*
>
> *(4)In addition to any condition imposed under subsection (3), the court may, when making an order under subsection (1) consisting of the suspension in part of a sentence of imprisonment or upon an application under subsection (6)* [which subsection is not relevant to the within application], *impose any one or more of the following conditions in relation to that order or the order referred to in the said subsection (6), as the case may be:*
>
> *(a) that the person co-operate with the probation and welfare service to the extent specified by the court for the purpose of his or her rehabilitation and the protection of the public;*
>
> *(b) that the person undergo such–*
>
> > *(i) treatment for drug, alcohol or other substance addiction,*

(ii) course of education, training or therapy,

(iii) psychological counselling or other treatment, as may be approved by the court;

(c) that the person be subject to the supervision of the probation and welfare service."

6. Writing of s.99 in his learned text, *Sentencing Law and Practice* (3rd Ed., Round Hall, 2016), 659, Professor O'Malley observes as follows:

> *"Despite the apparent latitude afforded by s.99, courts must exercise considerable judgement, not to mention realism, when deciding on the conditions to be imposed in any case. When imposing suspended sentences, courts will naturally be anxious to include conditions that will minimise or reduce the risk of re-offending. Yet they should be equally careful not to set the offender up for a fall, so to speak, by imposing conditions that are not strictly necessary and that the particular offender is unlikely fully to observe. Suspended sentences, like conditional discharges, should be subject only to conditions that are lawful, rational, and non-arbitrary. Conditions should conform, first and foremost, with the principle of legality; they should be clearly expressed and indicate precisely what the offender is required to do or refrain from doing. A requirement, for example, that the offender must stay away from the centre of Dublin for a year would scarcely comply with this standard."*

7. The court notes in passing that there is no complaint of vagueness in the within application. Rather, it is contended that the impugned conditions are arbitrary, irrational and unlawful.

8. Giving judgment in *Clarke v. Hogan* [1995] 1 I.R. 310, 313, Barron J., in the context of bonds to keep the peace, though the principles he identified appear to the court to be of equal application in the present context, observed as follows:

> *"What is done must be seen to be fair. What is fair in any given situation depends upon the consequences for the person adversely affected by the exercise of the power. Here, it may not in law be a punishment, but it would certainly be perceived as being such. For justice to be seen to be done, the judge should at the very least indicate that the evidence has led him or her to the view that binding to the peace might be an appropriate order and seek submissions."*[Emphasis added].

IV. Condition that No Alcohol Be Taken

9. Mr Purdue was sentenced on 15th December, 2015. He turned 18 years of age on 14th February of this year. There was no evidence before the District Court that Mr Purdue had consumed alcohol or had been intoxicated at the time the offences were committed. There was no evidence whatsoever before the District Court that alcohol use has ever featured in Mr Purdue's history. The imposition of the condition was, the court is advised, consistent with a general policy of the learned District Judge, perhaps based on her general experience of criminal cases coming before her, to impose alcohol-related restrictions when sentencing. But in this case there was simply no basis for the imposition of the alcohol-related restriction; it amounted to an ancillary punishment for which there was no basis in the evidence before the learned District Judge. The condition did not correspond to the particular circumstances of the offence or the particular personal circumstances of Mr Purdue, notwithstanding the observation of MacMenamin J. in *Gilligan v. Ireland* [2013] IESC 45, paras. 34–35, that:

> *"One of the hallmarks of the exercise of judicial discretion in sentencing…[is] the application of the overriding principle of proportionality….[I]t is well established that the distributive principle of punishment under our law requires that, in general, every sentence must be proportionate to the gravity of the offence, and take into account the personal circumstances of the offender….Here, the term 'proportionality' is used in the sense of the judicial task of striking a balance between the particular circumstances of the commission of the offence, and the circumstances of the offender to be sentenced."*

10. Having regard to the foregoing, it is clear that the portion of the sentence imposed by the learned District Judge and requiring that Mr Purdue abstain from alcohol cannot stand. The fact that the learned District Judge allowed the Probation Service to consent to Mr Purdue's consumption of alcohol does not suffice to save a sentence that, contrary to the obligations identified in cases such as *Clarke* and *Gilligan*, does not correspond in any way to the particular circumstances of the offences of which Mr Purdue was convicted or his particular personal circumstances.

V. Condition that Mr Purdue Remain in County Kildare

(i) Overview.

11. It appears that the learned District Judge imposed the condition that Mr Purdue remain in County Kildare, having regard to the fact that his parents had previously removed him there with a view to getting him away from the company of a 'bad crowd' with whom they perceived Mr Purdue to have fallen in with in Dublin. However, the learned District Judge heard no evidence and made no enquiry that would appear to offer justification for excluding Mr Purdue from all but one county in the State.

(ii) Statutory Provisions that Allow for Geographical Exclusion

12. Statutory provisions exist that allow for the exclusion of a person from a specified geographical area in cases concerning, *e.g.*, bail, harassment or domestic violence. So, s.6 of the Bail Act 1997 allows bail conditions "*as the court considers appropriate having regard to the circumstances of the case*", including, per s.6(1)(b)(i) "*that the accused person resides or remains in a particular district or place in the State*". Section 10(3) of the Non-Fatal Offences Against the Person Act 1997 empowers the court to order "*in addition to or as an alternative to any other penalty…that* [a]*…person shall not approach within such distance as the court shall specify of the place of residence or employment of* [another]*…person*". And the Domestic Violence Act 1996 makes provision for safety, barring and protection orders. The motive behind the bail provisions is to protect potential witnesses who might be vulnerable to intimidation. The provisions of the non-fatal offences legislation seek to safeguard vulnerable complainants. And safety, barring and protection orders seek to afford protection to family members by excluding a violent family member from the family home.

13. Notwithstanding that statute-law allows in some instances for orders excluding a person from a specified geographical area, the geographical and temporal limit of such orders must be tempered within the constraints imposed by the Constitution. Thus in *Ronan v. District Judge Coughlan and DPP* [2005] IEHC 370, bail conditions that required an accused to remain at all times within Ballyfermot, here in Dublin, and to observe certain curfew hours were quashed, Quirke J. observing, at p.4 of his judgment, that the conditions under consideration comprised "*an unwarranted, unlawful and unnecessary restriction upon and interference with the applicant's constitutional right to liberty*". On a related note, in *O'Raibheartaigh v. Judge Patricia MacNamara and DPP* [2014] I.R. 236, a case concerning a harassment exclusion order that imposed two exclusion areas for a period of three years, Baker J. refers, at 248, to the "*high standard of fair procedures*" required in the conduct of the hearing that precedes the issuance of such an order, quashing the order before her on the grounds that the defendant had insufficient opportunity to deal with the evidential and legal basis for the order.

14. The restriction on Mr Purdue's movements to the county of Kildare has no relationship to his likelihood of re-offending. It is, in truth, a most remarkable restriction on his constitutional right to liberty. The curtailment of liberty in the course of a suspended sentence can only rest upon its reducing the likelihood of an offender's committing another offence and of being appropriate to the nature of the offence, (Act of 2006, s.99(3) and (4)). Notwithstanding that Mr Purdue's parents considered their son to have fallen in with a 'bad crowd' hailing from some part of Dublin, there was no available evidence or information before the sentencing court by reference to which the impugned restrictions on liberty could reasonably be seen as appropriate to such offences of which Mr Purdue had just been convicted, let alone proportionate or necessary in reducing the likelihood of re-offending. Had there been some restriction on his returning to that part of Dublin where the 'bad crowd' hailed from, the respondent might have had a more stateable case as to the lawfulness of the sentence imposed. But that is to speculate as to the lawfulness of a sentence that was not imposed by the learned District Judge. Having regard to the facts at hand, and the law as considered above, the court cannot but conclude that the restriction of Mr Purdue to County Kildare represents an unnecessary, unwarranted, and unlawful restriction on, and interference with, his constitutional right to liberty. The fact that the learned District Judge was satisfied to allow the Probation Service to consent to Mr Purdue's departure from County Kildare on occasion does not, to the court's mind, suffice to save the sentence that was imposed from the just-stated conclusion.

VI. Acquiescence

15. It is suggested that Mr Purdue should be denied relief because of his agreement to the conditions recited on the suspended sentence bond. However, the alternative for Mr Purdue, then a 17-year old youth, albeit one with a substantial criminal record for various wrongs, would have been to accept an immediate three-month custodial sentence without any period of the detention suspended, a fearful prospect for anyone, let alone a teenager who had yet to attain adulthood.

16. In *Brennan v. District Judge Brennan and DPP* [2009] IEHC 303, Peart J. found that the District Court's imposition of a bail condition requiring an accused to remain within his residence at all times was *ultra vires*, observing, *inter alia*, in his judgment as follows:

> *"I am satisfied that the applicant is not precluded from seeking to quash the order made…simply because he decided to sign the bail bond which contained the house arrest condition. If he did not do so, he would have remained in prison, and it would be utterly unreasonable to deny him relief by way of judicial review because he decided to observe the house arrest condition. He should not be taken to have acquiesced in the condition by reason of having signed the recognisance."*

17. Similarly, in *Ronan v. Coughlan* [2005] 4 I.R. 274, Quirke J. rejected the DPP's submission that the engagement of the applicant with the order of bail amounted to acquiescence such that the discretionary relief of *certiorari* should be refused, observing, *inter alia,* that "*The order…profoundly interfered with the applicant's constitutionally protected right to liberty. It was not made in due course of law because it was unwarranted by any evidence and unjustified by any principle of law."*

18. The same conclusion as was reached by Peart J. in *Brennan* as to acquiescence to bail applies here as regards acquiescence to sentence. The same conclusions as were reached by Quirke J. in *Ronan* as to the order as to bail that was made there applies here as regards acquiescence to sentence. And, although it is not discernible from the judgements in *Brennan* and *Ronan* as to what age the applicants in those cases were, it seems to the court that any argument as to acquiescence would also in any event be diminished by reference to the fact that notwithstanding his many convictions, Mr Purdue was a minor at the time of sentencing.

VII. Conclusion

19. For the reasons stated above, the court will grant an order of *certiorari* quashing the following conditions of the suspended sentence, *viz.* that Mr Purdue not take any alcohol without the consent of the Probation Service in writing and that he not leave County Kildare without the consent of the Probation Service. Objection was also taken to the imposition of some form of curfew by the learned District Judge. However, no condition as to curfew is specified in the learned District Judge's order and thus, notwithstanding that there is reference to such a condition in the bail bond, in law it has no effect.

20. The court notes that Mr Purdue has recently commenced upon his adult life and would respectfully commend him to put the transgressions of his minority behind him, to cast away any friends who may have misled him, to cause less worry to parents who so clearly love him, and to live an honest and good life in the years now stretching before him.