IN THE HIGH COURT OF NEW ZEALAND
GISBORNE REGISTRY

CRI-2009-416-000002

AARON JAMES ROY WHITE
Appellant

v

NEW ZEALAND POLICE
Respondent

Hearing: 26 February 2009

Appearances: J G Krebs for Appellant
R J Collins for Respondent

Judgment: 27 February 2009 at 11:30 am

JUDGMENT OF COURTNEY J
ON APPEAL AGAINST SENTENCE

This judgment was delivered by Justice Courtney
on 27 February 2009 at 11:30 am
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar
Date…….

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[1] In June 2008 District Court Judge Adeane sentenced Mr White on a number of charges. He imposed concurrent sentences in respect of a series of offences committed in late 2006. There is no appeal in respect of those sentences. Cumulatively upon those sentences, however, the Judge imposed concurrent sentences of four years imprisonment for two burglary offences committed in May 2008. These are the subject of the present appeal.

[2] The burglaries were of residential dwellings in the same street. He forced entry into both dwellings. In the first he took property to a value of over $5,000 including a new laptop computer and video camera. In the second he took property to a lesser value including an Ipod. Police were called by neighbours. Following a car chase (the subject of a separate charge of dangerous driving) Mr White was apprehended and the property recovered from the vehicle. At the time of these offences Mr White was at large, having breached his bail in relation to the 2006 offences by failing to appear at trial.

[3] In sentencing the Judge classified Mr White as:

> …a recidivist or habitual burglar addicted…to the temptation to plunder other people's property for his own benefit…

[4] The Judge took a starting point of three-and-a-half years on each charge which took in as an aggravating feature Mr White's previous extensive history of burglary offences. He then allowed a reduction of six months in recognition of the guilty plea.

[5] Mr Krebs, for Mr White, submitted that the Judge erred in:

a) Giving undue weight to Mr White's previous convictions and in particular failing to recognise the fact that most of the convictions related to the period prior to 1998;

b) The Judge did not give sufficient weight to positive matters raised by the Probation Officer's report;

c) The Judge did not give sufficient weight to psychological issues and there was no psychological report.

[6] The main thrust of the appeal was the Judge's characterisation of Mr White as a recidivist or habitual burglar. Mr White had 53 prior convictions for burglary. However, the Judge's sentencing notes do not reflect the fact that 47 of those convictions were entered prior to November 1998, when Mr White was aged 20. Mr White is now 29 years old and since 1998 his rate of offending has significantly reduced with only the following convictions for burglary: one in 1999, three in 2001 and one in 2004. Mr Krebs submitted that the spread of convictions and his period without any such offending as warranting closer attention. I accept this submission. The Judge did take a very harsh approach to Mr White and it is clear that this was driven significantly by the number of previous convictions. But that fact alone does not tell the whole story and I consider that the level of offending over recent years did warrant some recognition.

[7] Mr Krebs also submitted that the Judge should have given more weight to the pre-sentence report which disclosed some domestic stability; he has a partner and young baby as well as two daughters from a previous relationship. He has undertaken some vocational training and is reported to have been a good employee in recent times. He was assessed as being at moderate to high risk of re-offending though with the possibility of that assessment being reduced if Mr White was to address the contributors to his offending such as alcohol. I note, however, that the Judge did refer to the probation report and to the positive aspects of it so I do not accept that there was any error in that sense.

[8] Mr Krebs also submitted that the Judge failed to take account of any underlying mental health issues that might partially explain the offending and has produced to me for the purposes of the appeal a letter from Te Korowai-Whariki, the capital and coast DHB mental health service, referring to a previous diagnosis of anxiety, depression and impulsive personality traits and the fact that he is receiving medication that should reduce his impulsivity. In fairness to the Judge, I do not think that the way in which this issue was raised in the pre-sentence report should have alerted the Judge to any greater significant mental health problems. The

probation report referred briefly to the perception by Mr White's partner that he suffered from depression and used alcohol for that reason. Further, the letter from Te Korowai-Whariki tends to suggest personality disorder type issues. Whilst these matters may be helpful to assist in understanding the offender better, they are of limited assistance to a sentencing judge in the context of this type of offence which clearly had a significant element of premeditation.

[9] I accept that the Judge made an error only in failing to consider the spread of Mr White's convictions. Mr Krebs says that, as a result of that error, the sentence was too high. However, Mr Collins says that regardless of any error, the sentence was within the appropriate range and should not be reduced.

[10] Both counsel agreed that the proper approach to determining an appropriate sentence for Mr White is that taken in *R v Columbus*[1] (decided soon after Mr White was sentenced) which would require identification of a starting point as that is understood in *R v Taueki*[2] namely a sentence that would reflect the actual circumstances of the offending with a subsequent uplift to reflect aggravating features and any previous convictions with any discount for a guilty plea to be applied after that.

[11] The offences in this case both involved burglaries of residential dwellings with forced entry. The summary of facts make it clear that Mr White had not embarked on random opportunistic offending. There was obviously a degree of premeditation in the selection of the houses and the forcing of entry into them. I consider that two years would have been a reasonable starting point for each offence. From that there had to be an uplift to reflect Mr White's bad previous record. It is true that, going by his previous convictions, Mr White has "slowed down" his rate of offending over the past several years. But it is also clear that he has not given up burglary. It seems to me from the information I have that Mr White is a person who is slowly forming better, more stable habits, but is still inclined to lapse into his old ways, most probably as a means of making money when he needs it. Whilst I accept that the Judge erred in not considering the spread of the convictions more carefully, a

[1] [2008] NZCA 192
[2] [2005] 3 NZLR 372

sentencing Judge faced with this kind of history was bound to impose a reasonably substantial uplift. Further, any uplift would have to take into account the fact that he committed these offences having already breached his bail conditions in respect of earlier offending. This aspect is as significant in terms of contributing to the uplift as the previous convictions. I think that an uplift of one year is therefore reasonable.

[12] At this point it is apparent that the three-and-a-half years adopted by the Judge was excessive. This brings me to the reduction for the guilty plea. In relation to the reduction given in this case for the guilty plea Mr Krebs submitted that it was insufficient. However, Mr Collins submitted that it was a fair discount, given that Mr White was effectively caught "red-handed". There is no set level of discount for a guilty plea and where, as here, an offender is caught "red-handed" a guilty plea is worthy of a discount but not a significant one. I consider that a discount of six months would have been appropriate, giving a final sentence of two-and-a-half years.

[13] I therefore allow the appeal. The sentence of three years imprisonment is set aside and substituted with one of two-and-a-half years.

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P Courtney J