IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

CRI 2009-463-82

JAMES EVANS PALMER
Appellant

v

NEW ZEALAND POLICE
Respondent

Hearing: 28 October 2009

Appearances: B Foote for the Appellant
L Owen for the Respondent

Judgment: 4 November 2009 at 5:30 p.m.

JUDGMENT OF WOODHOUSE J

This judgment was delivered by me on 4 November 2009 at 5:30 p.m.
pursuant to r 11.5 of the High Court Rules 1985.

Registrar/Deputy Registrar

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Solicitors:
Mr B Foote, O'Sullivan Clemens, Solicitors, Rotorua
Ms L Owen, Gordon Pilditch, Office of the Crown Solicitor, Rotorua

[1] On 30 July 2009 Mr Palmer was sentenced to 18 months imprisonment on a charge of causing loss by deception: Crimes Act 1961, ss 240(d). The maximum penalty is 7 years imprisonment: s 241(a). The essence of the allegation was that, with his partner and co-accused, Gaybreille Hallett, Mr Palmer fraudulently used an EFTPOS card to obtain a total of $10,200. At the same time Mr Palmer was sentenced to a concurrent term of 12 months imprisonment for burglary and 6 months imprisonment for unlawfully taking a bicycle. He was also ordered to pay reparation of half the sum involved, $5,100.

[2] Mr Palmer has appealed against the sentences. He contends, in particular, that the sentence of 18 months imprisonment was manifestly excessive and that, in any event, a sentence of home detention should have been imposed. In support of these principal contentions he says that a starting point of 2 years for the principal offence of causing deception by loss was too high; there was a failure by the Judge to give adequate credit for guilty pleas and other mitigating matters; and there was a pronounced disparity between his sentence and that of Ms Hallett. For the credit card offence Ms Hallett was sentenced to 4 months community detention and 9 months supervision, and she was ordered to pay reparation of $5,100.

Facts

[3] The principal offence was the fraudulent use of the card between 30 October and 3 November 2008. The card was found by Mr Palmer, apparently when he was with Ms Hallett. Although he and Ms Hallett were unaware of the fact, the card was owned by an 81 year old with a poor memory. She had recorded her PIN number on the card. Mr Palmer and Ms Hallett then used the card over a period of five days to withdraw a total of $10,200 from the owner's bank account.

[4] The bicycle, worth $700, was unlawfully taken on 22 March 2009. Mr Palmer saw the owner leave it outside a shop. Mr Palmer rode off on it. He was followed by the owner and a bystander. They lost sight of him but found him again. By the time they found him, Mr Palmer had removed the wheels from the bike and was putting it into a friend's car.

[5] The burglary occurred in March 2009. Mr Palmer climbed a six foot fence into a site where a building was being demolished and stole scrap metal valued at $60.40.

Personal circumstances

[6] Judge Treston had a comprehensive pre-sentence report. Two significant matters dealt with in the report are Mr Palmer's drug addiction from an early age and its effect on his life, and efforts he had been making more recently to deal with his addiction and other problems in his life.

[7] Mr Palmer said that he started using morphine at the age of about 15. He had access to it because his grandfather used it when he was dying of cancer. Mr Palmer said that he has had a life-long addiction to heroin or morphine from the age of about 15. He is now 33.

[8] He said he had a period on a methadone programme between 2003 and 2005, but that ended when he received a sentence of imprisonment for a third or subsequent offence of driving while disqualified and driving with excess breath alcohol. When released he relapsed into drug use again, taking morphine, amphetamines, methamphetamine and other illegal drugs. He said that he also used alcohol regularly, at least when on the methadone treatment, consuming two to eight bourbon pre-mixed drinks on a daily basis.

[9] The pre-sentence report refers to steps that Mr Palmer had been taking to rehabilitate himself. Reference is made to letters received from independent agencies providing confirmation of this. At the sentencing hearing in the District Court, Mr Palmer's counsel provided the Judge with nine letters or reports from various agencies or doctors providing confirmation of steps taken by Mr Palmer to address his drug and alcohol problems, and to address domestic problems he has also had since about 2005.

[10] There was a letter from Lakes Methadone Treatment Service recording that Mr Palmer had commenced a further course of methadone treatment in May 2009. The letter records:

> [Mr Palmer] has engaged fully in the programme, attending all of his appointments and has adhered to the rules of treatment. We have been impressed by his motivation to make positive change in his life, to address his issues regarding addiction and to accept all offers of assistance to make this possible. He has been present and co-operative on all interactions and I believe he is making a genuine effort to improve his life.

[11] Mr Palmer has 42 previous convictions for a range of offences over an 8 year period from May 2001 to January 2009. Of most direct relevance to the appeal are a number of offences relating to property. As recorded by the Judge (at [6]): "There are five convictions for receiving, seven for obtaining a document, one for theft [and] one for forgery". These offences occurred over a period of approximately 16 months between October 2001 and February 2003. The sentences imposed were suspended sentences, supervision and community work. Apart from the current offending, there have been no property offences since Mr Palmer was convicted on 7 May 2003 for theft of property under $500 on 11 January 2003. A suspended sentence was imposed.

[12] There are a number of motor vehicle offences, some of a plainly serious nature because they resulted in imprisonment. The only prior sentences of imprisonment have been for driving offences.

District Court sentencing

[13] After summarising the facts of the offending, the Judge referred to some of the previous offences, including the property offences. He said that he accepted that the offences were largely caused by Mr Palmer's difficulties with drugs and his addiction problem.

[14] On the question of a possible sentence of home detention the Judge said:

> [8] You are (the probation officer who wrote the report repeats) remorseful about your offending and are motivated to address your issues and your risk of re-offending must be seen as contingent upon your

> commitment to do that. You want to continue on the methadone programme and become drug-free. Unfortunately, for you perhaps, an electronically monitored sentence is not appropriate because the only address you could give is that of your co-offender, and she is already serving that sentence there. But in any event, it seems that such a sentence may be inappropriate anyway because of the nature of the offending and its breadth and repetition.

[15] The Judge referred to the recommendation in the pre-sentence report for imprisonment with release programmes. The probation officer's recommendation of imprisonment appears clearly to have followed from the unavailability of a suitable home detention residence. That is reinforced by a supplementary report obtained for the purposes of this appeal. An alternative and suitable residence has been found and the amended recommendation is for home detention to that address.

[16] It is unclear from paragraph [8] of the sentencing notes whether Judge Treston would have given further consideration to home detention had there been a suitable residence. The only other part of his sentencing notes which appears, at least indirectly, to address this question is at [15] as follows:

> However, the aggravating features clearly outweigh the mitigative [sic] ones, and I cannot arrive at any conclusion other than the least restrictive outcome in your circumstances is for one of imprisonment.

It may be that the Judge was here weighing imprisonment against a sentence less restrictive than home detention, leaving home detention out of consideration for the reason already mentioned.

[17] Following paragraph [8], the Judge referred to the efforts being made by Mr Palmer to rehabilitate himself, to the victim impact report in respect of the taking of the bicycle, and to some of the important purposes of sentencing. He then said:

> [12] Of course, the least restrictive outcome must be the one that I adopt and there are issues of parity of sentence which must be looked at as well. But as I understand it, the second two charges (that is the theft of the bicycle and the burglary) were additional matters to those that your partner was involved in. This was serious offending in anyone's views. It was grave offending, I have got to say, and although the burglary is not one of the most serious ones that comes before the court, and you have not committed burglary before, it is a matter which must be placed into the melting pot.
>
> [13] By way of aggravation, even as your lawyer accepts, there was the fact that the offences were committed while you were still subject to a sentence, there was unlawful presence into the area for the burglary charge,

> there was the loss and harm caused to the victims, there was the elements of premeditation which must be taken into account and, of course, your previous convictions, to which I have already referred, must also be placed into consideration.
>
> [14] By way of mitigation, there are the pleas of guilty which you ha e entered, your expressions of remorse and the efforts which you have made to change your behaviour and rehabilitate yourself, some of which I have referred to.
>
> [15] However, the aggravating features clearly outweigh the mitigative [sic] ones, and I cannot arrive at any conclusion other than the least restrictive outcome in your circumstances is for one of imprisonment. When I consider the matters, I am of the view that the appropriate starting point for this bracket of offending, putting aside the initial submission that your counsel made as to time served, is one of two years imprisonment. Bearing that in mind, I deal with you in the following fashion and I give you such credit as I can for the matters that I have referred to.

The sentences were then imposed.

Discussion

[18] The first issue is the starting point of 2 years imprisonment. Ms Owen, for the respondent, submitted that the starting point of 2 years imprisonment was within the available range.

[19] Mr Foote referred me to a decision of Potter J in *Ip v New Zealand Police* (HC AK, CRI 2008-404-330, 10 February 2009). Mr Foote advised me that this decision was referred to Judge Treston. In *Ip* the Judge referred to starting points adopted in other cases involving fraudulent use of cards, and similar offences.

[20] In *Ip* the offender made fraudulent claims on her employer's rewards programme for customers and then sold the goods. The total sum involved was around $62,000. At [23] Potter J said:

> There is no dispute about the starting point of two and a half years which was in line with counsel's submissions to the sentencing Judge, and with relevant authorities. In that respect I refer to *R v Harvey* CA349/00 7 December 2000: $135,000 dishonestly withdrawn from a bank account over eleven months – starting point three years imprisonment; *R v Townhill* CA392/00 7 December 2000: $21,000 approximately dishonestly obtained in four separate transactions – starting point indicated of at least two years; *Le'Au'Anae v Police* AP92/02 HC AK 16 August 2002 Rodney Hansen J:

> twenty charges of using a document to obtain a pecuniary advantage; total sum defrauded approximately $63,000 – starting point indicated of at least two years. In *Pratheepan v New Zealand Police* HC AK CRI 2004-404-436 10 December 2004, Courtney J, the appellant gained access to in excess of $80,000 by fraudulent activities although the net gain to the appellant was approximately $37,000. A starting point of eighteen months imprisonment and a sentence of twelve months imprisonment after a discount for mitigating factors was upheld on appeal to this Court, but the appeal was allowed to the extent of granting leave for the appellant to apply for home detention.

[21] The starting points in those cases were between 18 months and 3 years. The offending in all of those cases was markedly worse than Mr Palmer's offending. The most obvious difference from Potter J's summary is the amounts involved. The smallest amount involved, $21,000, was double the amount involved in Mr Palmer's case, with Mr Palmer's offending also having occurred with another person.

[22] In addition, there was a good deal more criminal calculation in *Ip* and in the cases referred to by Potter J. In *Le'au'anae*, for example, with a starting point "of at least 2 years" the facts as recorded in the judgment of Rodney Hansen J were as follows:

> [2] The offending took place over a period of nine to ten months in 2000. Using assumed names and false identity documents, the appellant opened bank accounts and credit card facilities. He drew against valueless cheques deposited into the bank account and used the credit cards to defraud the banks involved of the total sum of $63,479.30.

I note, also by way of comparison, that the end sentence for *Le'au'anae*, was 18 months imprisonment. In that regard Rodney Hansen J noted, amongst other things:

> [3] The offending took place immediately before and following his conviction and sentence in May 2000 on six charges of theft involving property to a total value of some $20,000. For that offending he was sentenced, on 10 May 2000, to eight months imprisonment, suspended for one year, and eight months periodic detention. He was ordered to make reparation of $20,824.62.

[23] One prominent feature of Mr Palmer's offending with the EFTPOS card is that it was opportunistic, not calculated as in the *Ip* cases. Mr Palmer simply found a card with the PIN number recorded on it. When spoken to by the Police, Mr Palmer said "he thought it was Christmas" when he found the card. He said that he and Ms Hallett had spent the money on cigarettes and presents for others. No doubt they

spent some of the money on other things for themselves. But the calculation and other indicators of criminality involved in this offending bordered on negligible compared with the calculation and planning and deception involved in *Ip* and the other cases referred to in *Ip*. The opportunistic nature of the offending by Mr Palmer is also indicated by both of his other offences. Culpability was also less because of the drug addiction, as the Judge indicated.

[24] The starting point of 2 years imprisonment assessed by Judge Treston was not solely for the lead offence. He selected that starting point for what he described as "this bracket of offending". Plainly there was an uplift for the other offences. The Judge did not indicate the extent of the uplift. Having regard to the nature of the other offences the uplift could not have been more than a few months.

[25] A separate point on appeal was disparity between Mr Palmer's sentence and that of Ms Hallett. Mr Foote's submissions on parity were directed principally to the end sentence. However, it is appropriate firstly to consider the starting point indicated on Ms Hallett's sentence.

[26] Ms Hallett was sentenced about seven weeks before Mr Palmer. On Ms Hallett's sentencing Judge Maze said at [6] that, if imprisonment had been an option "he might have taken a starting point of 9 months".[1] The disparity between the two starting points cannot, in my judgment, be regarded as within an acceptable range. Had Ms Hallett committed a distinct offence, but with broadly similar facts, the disparity would be marked. The starting point for one offence would be getting towards three times the starting point for a broadly similar offence. In this case they were joint offenders with no material distinction between their individual acts. The summary of facts records that they both used the card on different occasions. Indeed, the first use of the card appears to have been by Ms Hallett. Judge Maze also proceeded on the basis that the card had been found by Ms Hallett, or at least by the two of them. He said: "It appears as though you found her [the owner's] EFTPOS card on the street". In any event, there was no basis for drawing any distinction between Mr Palmer and Ms Hallett in terms of culpability for the offence.

[1] *New Zealand Police v Hallett* (DC TAP, CRI 2009-069-000693, Judge J E Maze)

[27] There is then a question as to whether one starting point is too high or the other too low. Having regard to the *Ip* cases, I am of the view that the starting point adopted by Judge Treston was too high and the starting point indicated by Judge Maze was appropriate on a proportionate assessment. In very broad terms, in the light of the decisions referred to in *Ip*, the starting point for fraudulent use of an EFTPOS card, and similar offending, involving a sum of around $10,000, might be between 6 to 18 months imprisonment.

[28] In coming to this conclusion I have had regard to the need for care in assessing apparent disparity between sentences: see, for example *R v Lawson* [1982] 2 NZLR 219 at 223 (CA). The Court of Appeal was there discussing disparity of end sentences, not starting points. However, the relevant points of principle are applicable to starting points.

[29] Having regard to the opportunistic nature of this offending, and giving due weight to the need to avoid disparity, I consider that the starting point in this case should have been the same as the starting point that Judge Maze would have applied to Ms Hallett; that is to say, 9 months.

[30] The remaining appeal point for Mr Palmer relating to the assessment of a sentence, was the submission that the Judge had failed to give adequate credit for Mr Palmer's guilty pleas and other mitigating matters. Ms Owen acknowledged that it did appear that the Judge failed to give adequate credit. That acknowledgement related principally to the guilty pleas, which it was accepted were entered at the earliest possible opportunity. In view of the conclusion I have reached in relation to an appropriate starting point it is unnecessary separately to consider this point in relation to the credit of 6 months that the Judge did give against the starting point he adopted of 2 years. Rather, it is appropriate, in the circumstances, to reassess an appropriate sentence on the basis that the starting point for the lead offence should have been around 9 months imprisonment.

[31] From a starting point of 9 months, and if the other offences were not to be dealt with by cumulative sentences of some sort, an uplift was required. An uplift of 3 months would, in my judgment, be the maximum and quite possibly severe. In

respect of personal aggravating and mitigating factors, other than the guilty pleas, the only circumstances which should be taken into account, as was done by the Judge, are the previous convictions. Against that are the efforts by Mr Palmer to rid himself of the addictions, being addictions which the Judge accepted were the principal cause of the offending. In my judgment some credit is warranted for these efforts to an extent sufficient to outweigh any increase of the sentence that might be imposed for previous offending. There would then be an entitlement to a reduction of one-third of the sentence because of the guilty pleas. This suggests an end sentence of imprisonment, if no other sentence is appropriate, of around 7 months imprisonment.

[32] Having come to this conclusion in relation to a sentence of imprisonment, it is inappropriate to consider whether home detention should be imposed rather than imprisonment. That is because Mr Palmer has been in custody since 17 June 2009. On a sentence of 7 months imprisonment Mr Palmer should have been released by now. I therefore intend to allow the appeal by imposing a reduced sentence which will result in immediate release.

[33] I should record that the possibility of a reduced sentence on appeal which would entitle Mr Palmer to immediate release was not advanced at the hearing of the appeal. A primary consideration had been the possibility of a sentence of home detention. The conclusion I have now reached has followed from the further consideration that I considered this appeal required.

[34] A substituted sentence of 7 months imprisonment will require modification of the sentences imposed on the other charges. I do not consider it necessary to discuss those sentences beyond what is implicit in what I have already said.

Result

[35] The appeal is allowed.

[36] The three sentences of imprisonment are quashed and the following sentences imposed.

[37] For the offence of obtaining by deception there is a sentence of 7 months imprisonment.

[38] The sentence of 7 months imprisonment is subject to the standard conditions specified in s 93 of the Sentencing Act 2002 and s 14(1) of the Parole Act 2002, and further subject to the following special conditions recommended by the probation officer:

a) To attend and complete an alcohol and drug programme to the satisfaction of the probation officer and programme provider.

b) To maintain contact with the methadone treatment service clinic at Te Ngoko Community Mental Health Centre and comply with the recommended care plan to the satisfaction of the probation officer and the programme provider.

c) To attend and complete a violence prevention programme to the satisfaction of the probation officer and the programme provider.

d) To attend for personal and/or relationship counselling if referred by the probation officer.

[39] The conditions are to apply for 6 months after the sentence expiry date.

[40] For the offence of burglary there is a sentence of 3 months imprisonment with the same release conditions.

[41] For the offence of unlawfully taking the bicycle there is a sentence of 3 months imprisonment subject to the same release conditions.

[42] The sentences of reparation are unaltered.

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Peter Woodhouse J