IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CRI-2009-409-000185

BRANDON PAUL DOUGLAS

v

POLICE

Hearing: 19 November 2009

Appearances: A J McKenzie for Appellant
S J Jamieson for Respondent

Judgment: 19 November 2009

ORAL JUDGMENT OF HON. JUSTICE FRENCH

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[1] This is an appeal against sentence.

[2] Following pleas of guilty, the appellant, Mr Douglas, was convicted in the District Court on ten charges, namely a charge of theft of petrol, three charges of unlawfully taking a motor vehicle, driving with excess breath alcohol, three charges of failing to answer District Court bail, careless use and intentional damage.

[3] The offending spanned a period of several months between late-January and July. Some of the offending occurred while the appellant was on bail.

[4] The appellant is only 20 years of age. However, he has a significant criminal history with some 19 previous convictions between August 2007 and August 2008. These previous convictions include theft, unlawfully taking motor vehicles, failing to

answer bail and breach of release condition. The appellant has previously served terms of imprisonment.

[5] He was sentenced on the offences at issue to an effective total term of nine months' imprisonment.

[6] In the notice of appeal two grounds were raised. First, that the sentence was manifestly excessive, and secondly that the Judge had made a material error of fact. At the hearing counsel, Mr McKenzie, abandoned the first ground and the focus was placed on the second ground.

[7] The material error of fact the Judge is said to have made is a statement that appears at [8] of the sentencing notes:

> You were granted bail on 18 August despite numerous breaches of bail and after a brief remand in custody. You are in employment, the pre-sentence report informs me that you are a high risk offender, you have no apparent insight into your offending and it is highly likely that you would re-offend.

[8] Mr McKenzie submits the Judge was wrong to state the appellant had "no apparent insight" into his offending. In support of that submission, Mr McKenzie has referred me to the pre-sentence report, and in particular a statement that appears at page 4:

> Brandon Douglas was open and forthcoming with information in his interview and demonstrated a good level of insight into some aspects of his offending. He summarised by saying "all this offending is just stupidity".

[9] Mr McKenzie also referred me to the fact that the probation report contains several references to further psychological assessments and/or counselling, the very sort of matters for which intensive supervision is designed. Mr McKenzie submits intensive supervision would have been the appropriate sentence in this case.

[10] Mr McKenzie also raised with me an issue relating to the conduct of the appellant during the period between his pleas of guilty and sentencing. The appellant was granted bail during that period by another District Court Judge and within that time obtained employment and refrained from offending. Mr McKenzie

points to this and says it reinforces the appropriateness of intensive supervision rather than imprisonment.

[11] I have carefully considered all of Mr McKenzie's submissions. He has certainly said everything that could possibly be said on behalf of this appellant. However, I am not persuaded the Judge has in fact made an error of fact, let alone a material one. The reason for my saying that is that the probation report also contains other significant passages. For example, also at page 4:

> **Needs Assessment and Motivation to Change**
>
> Brandon Douglas is assessed as a high risk offender whose offending behaviour demonstrates he has an attitude that he thinks he is exempt from needing to following [sic] society's rules and laws. This attitude does not seem to be systemic but certainly triggers and sustains his offending. Given he has no insight as to why he values the rewards of offending over the costs, he is highly likely to commit repeat offending. Given his current statements differ little from those he has made in previous pre sentence reports, further psychological assessment is warranted.
>
> The Community Probation & Psychological Services do offer programmes to address his offending supportive attitudes but, given his high risk rating, he is not eligible as these programmes are reserved for medium risk offenders only. The remaining treatment option is a referral to Psychological Services, either in the community or in custody. There is a lengthy waiting list for this service and therefore a strong possibility of him not been [sic] seen for many months if at all. If he remains in the community, in order to engage in urgent psychological treatment Brandon Douglas would need to fund this himself. This is something he is willing to do, however, given his employer can not commit to ongoing work, his ability to finance this expensive treatment option is dubious.

[12] Over the page, the report also says of the appellant, "Ultimately it is his ability to justify anti social behaviour that underpins his offending." In addition, the probation report recounted a history of non-compliance with community-based sentences, and in fact recommended imprisonment.

[13] The other point I would make is that when one considers the sentencing notes, the Judge has in fact directly addressed the submission that a sentence of intensive supervision was the most appropriate course of action, and he has given his reasons for rejecting that submission:

> [13] The relevant sentencing purposes are to hold you accountable. The sentence should not only denounce this offending but should also deter from

> continuing to offend in this way. The protection of the community is also an important sentencing purpose. In terms of sentencing principles this is comparatively serious offending. I am required to impose the least restrictive outcome. Mr McKenzie submits that is a sentence of intensive supervision because that would be likely to reduce the chances of re-offending. I do not agree. I do not consider that the relevant sentencing purposes and principles having regard to the number of charges on which you are appearing for sentence, and your history of offending in precisely the same way, could be met by any sentence or combination of sentences other than a short term of imprisonment. Had a home detention address been available I would not have sentenced you to home detention.

[14] It is clear from this passage that the Judge was influenced not only by issues of insight or lack of insight, but other important principles and purposes of sentencing including denunciation and protection of the community. Deterrence, of course, is not only about individual deterrence, but also general deterrence.

[15] The statements made in [13] of the sentencing notes are forceful and in my view compelling, having regard to this young man's record and the nature of the offending that was in issue.

[16] All in all, in my view the sentence that was imposed was undoubtedly a sentence that was open to the Judge. It was within range, and I am unable to detect any error in his reasoning such as would justify appellate intervention if I am to be true to the appellate role. The appeal is accordingly dismissed.

Solicitors:
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