Judgment 23/2011

Martin Philip Wright v Law Officers of the Crown – Court of Appeal (File No. 408) – 12th July, 2011

Police Property and Forfeiture (Bailiwick of Guernsey) Law 2006 – appeal against forfeiture of computer – appeal dismissed.

IN THE COURT OF APPEAL OF GUERNSEY

The 12th day of July, 2011 before Jonathan Philip Chadwick Sumption OBE QC presiding, Sir de Vic Carey and Sir Hugh Bennett

MARTIN PHILIP WRIGHT

(Appellant)

-v-

THE LAW OFFICERS OF THE CROWN

On the appeal of the Appellant against the sentence imposed by the Royal Court on the 6th September, 2010 in relation to the forfeiture and destruction of his computers;

THE COURT, having on the 11th July, 2011 heard Advocate A M Merrien, for the Appellant and Crown Advocate G Perry for the Respondents GAVE JUDGMENT in the attached terms and DISMISSED the appeal.

J TORODE
Registrar of the Court of Appeal

IN THE COURT OF APPEAL OF GUERNSEY

CRIMINAL DIVISION – APPEAL NO 408

Before: **Jonathan Philip Chadwick Sumption OBE QC**
Sir de Vic Carey
Sir Hugh Bennett

Judgment delivered: - 12 July 2011

Between: **Martin Phillip Wright** **(Appellant)**

v

Law Officers of the Crown **(Respondent)**

Advocate A M Merrien appeared for the Applicant
Crown Advocate G Perry appeared for the Crown

This is the Judgment of the Court

Sumption, JA

1. Martin Philip WRIGHT was convicted before the Royal Court on 6 September 2010 on two counts of indecently assaulting a child, eleven counts of viewing indecent images of children on the internet and two counts of downloading such images onto a computer. He was sentenced to periods of imprisonment totalling four years, with an extended sentence of five years during which he would be released on licence subject to recall if he failed to comply with conditions of the licence. The court ordered the forfeiture and destruction of the two computers involved.

2. The present appeal, which is brought by leave of the Bailiff as President of the Court of Appeal, relates solely to the forfeiture order. Mr. Wright applied in the Royal Court to allow personal material stored in his computer, including family photographs, genealogical information and music, to be copied and returned to him before the computers were destroyed. The Royal Court rejected that application. Before this court, he contends that in the absence of a proviso for the return of the personal material, the sentence was manifestly excessive or otherwise contrary to principle.

3. There is an initial question relating to our jurisdiction as a Court of Appeal. A forfeiture order is part of the sentence: *R v. Buddo* [1982] 4 Cr. App. R(S) 268. It is therefore reviewable by the Court of Appeal on the same principles as apply to any other part of the sentence. A submission was made to us on behalf of the Law Officers that an application for the return of personal data was different, because it did not relate to the propriety of making a forfeiture order as such, but to a 'separate and ancillary issue'. We reject this submission. The issue on such an application is whether the forfeiture order should be made in unqualified terms or subject to a proviso for personal material. It therefore concerns the forfeiture order itself. A refusal to qualify a forfeiture order with a proviso of this kind is perfectly capable, in a sufficiently clear case, of making the sentence as a whole excessive or beyond the power of the Royal Court.

4. We turn therefore to the substance of the appeal.

5. The Royal Court relied on two statutory powers of forfeiture: under Section 7(3) of the Protection of Children (Bailiwick of Guernsey) Law 1985 (as amended), and under Section 3(3) of the Police Property and Forfeiture (Bailiwick of Guernsey) Law 2006.

6. The Protection of Children (Bailiwick of Guernsey) Law 1985 (as amended) provides by Section 3 that it is an offence for a person to take any indecent photograph of a child, and by Section Article 3A that it is an offence for him to have any such photograph in his possession. Under Section 7(3):

> The court by or before which a person is convicted of an offence under section 2, 3, or 3A of this Law shall order any copies of the work in question and any plate prepared for the purpose of printing copies of that work or video or photographic film prepared for that purpose or indecent photographs of children being copies which have, or a plate or film which has or photographs which have, been found in his possession or under his control, to be forfeited.

Article 9(4)(b) provides that for these purposes references to a photograph include 'data stored on a computer disc or by other electronic means which is capable of conversion into a photograph.'

7. It will be apparent that Section 7(3) of the Law of 1985 is mandatory, but that it applies only to the forfeiture of the photograph, film or video, or any corresponding plate or film. In the present context, which involves computer images, it applies by virtue of Section 9(4)(b) to any 'data' capable of conversion into a photograph. It follows that the power is to order the forfeiture of data. It does not extend to the forfeiture of any part of the computer hardware, nor to the forfeiture of material which does not correspond to any indecent image of children but is to be found on the same hard disk or memory chip as other material which does. A wider meaning might be given to the statutory provision if it was established that it was technically impossible or impractical to forfeit the indecent material without forfeiting the hardware or inoffensive data as well. But the Law Officers do not go that far and there is no evidence to that effect. What is said is that separating the indecent material is difficult and time-consuming. This is not enough. Statutory powers of forfeiture, even in a criminal context, fall to be strictly construed.

8. Section 3(3) of the Police Property and Forfeiture (Bailiwick of Guernsey) Law 2006 confers a more general power on the Court, which is discretionary, to make a forfeiture order in relation to property where (among other cases) a person is convicted of any offence and the property in question 'has been used for the purpose of committing, or facilitating the commission of, any offence.' Subsection (5) requires the Court to have regard, in making a forfeiture order under this provision, '(a) to the value of the property, and (b) to the likely financial and other effects on the offender of making the order, taken together with any other order that the court contemplates making.'

9. As we have said, a statutory power of forfeiture which is limited to data does not extend to the computer itself. But a statutory power to forfeit the computer does, as it seems to us, extend to anything which can be said to be part of the computer. Data recorded on a computer's hard disk or memory chips is part of the computer. The process of recording it involves a physical reconfiguration of the disk or chips. Advocate Merrien, appearing for Mr. Wright, accepted this. His point was that it was manifestly excessive for the Court to exercise its power of forfeiture without making provision for the return of the personal data.

10. There are, as it seems to us, two difficulties about this contention.

11. The first is the practical difficulty of returning the personal material to Mr. Wright. Someone would have to be employed to go through the data on the computers, deciding which parts were indecent and which parts were not. Mr. Wright has offered to pay for a technical consultancy to carry out this work, but so far, he has failed, in spite of requests by the Crown

Advocate, to pay even the sum (£500) required to obtain an initial estimate of the costs involved. Before us, Advocate Merrien has candidly accepted that he is not in a position to pay. Mr. Wright was invited after the leave application to make the task simpler by identifying the approximate number and locations of the files which he wishes to have returned, but he says that he is unable to do so without access to the computers. Nor is it only a question of cost and time. The copying of the personal material onto a compact disk or other storage medium entails potential liabilities if any of it turns out to be copyright material downloaded without a license: for example the 400-600 albums of music which Mr. Wright says he has stored. It would be unusual for a court in effect to direct the police to carry out an activity that carried with it a contingent absolute liability to a third party.

12. The second difficulty is more general and more fundamental. This court will intervene to modify a sentence only if it is shown to be beyond the powers of the Court, or wrong in principle, or in all the circumstances manifestly excessive in the sense that it exceeded the broad margin of judgment allowed to the sentencing court. Mr. Wright is not disputing the appropriateness of the custodial sentences passed on him, nor does he challenge the forfeiture of the computers. To succeed on his appeal, he would have to show that the mere failure to include a proviso for the return of the personal material had an adverse impact upon him so serious as to make the totality of the sentence manifestly excessive. Yet the only evidence before either the sentencing court or this court of any adverse impact on the Defendant is his assertion that the 400-600 albums of stored music is worth some £15,000, which is unsupported by any evidence and at £25 to £38 per album seems seriously exaggerated.

13. In our judgment there is no basis on which we can say that the Royal Court erred in principle or that its sentence was manifestly excessive. The appeal will therefore be dismissed.