Judgment 29/2013

Paul Robert Jeffreys v
Law Officers of the Crown
Court of Appeal - Criminal Appeal
8th October, 2013

Application for leave to appeal against sentence imposed by the Royal Court on 3 January 2013 for the importation of fentanyl patches.

Approved Text
08.10.2013

IN THE COURT OF APPEAL OF GUERNSEY

CRIMINAL DIVISION APPEAL No 450

11th September 2013

Before:

The Hon. Michael Beloff QC Presiding
John Martin QC
Christopher G Nugee QC

Between:

PAUL ROBERT JEFFREYS

Applicant

-V-

LAW OFFICERS OF THE CROWN

Respondents

The Applicant Jeffreys was not represented
Crown Advocate C G Dunford for the Crown

Authorities, laws & texts referred to:

The Customs and Excise (General Provisions) (Bailiwick of Guernsey) Law, 1972, as amended
Noyon 2007-08 GLR 169
Richards v The Law Officers (17 April 2002)
Law Officers v Bulfinsky and Armega (8 April 2013)
R v Fawcett (1983) 5 Cr App R (S) 158, 161

MARTIN, JA

This is the Judgment of the Court

1. This is an application for leave to appeal against sentence.

2. On 3 January 2013 the applicant, Mr Jeffreys, pleaded guilty to an indictment containing a single charge of being knowingly concerned in the fraudulent evasion of the prohibition on the importation of goods, contrary to section 77(1)(b) and 77(2) of the Customs and Excise (General Provisions) (Bailiwick of Guernsey) Law, 1972, as amended.

3. The charge related to fentanyl, a Class A drug. On 12 October 2012 the applicant was detained on his arrival in the Island from the UK, and found to be in possession of nine fentanyl patches each of 100 µg [micrograms]. They had a street value of £2,700.

4. On 18 March 2013 the applicant was sentenced by the Royal Court to 4½ years' imprisonment, to take effect from 12 October 2012.

5. On 13 June 2013 the Bailiff, as a single judge of this Court, refused leave to appeal against the sentence.

6. Mr Jeffreys has renewed his application for leave to us. He has presented his case himself. In doing so, he has to some extent disowned the grounds of appeal professionally prepared on his behalf; but it will be convenient initially to identify those grounds, which do still provide a basic list of Mr Jeffreys' contentions. In summary, they were (a) that the sentence was manifestly excessive; (b) that this Court's decision in *Noyon* 2007-08 GLR 169 (which treated the drug sentencing guidelines set out in *Law Officers v Richards* as applicable to even small quantities of fentanyl) was wrong; (c) that in any event the quantity of fentanyl to which the charge related was so small as to fall outside the *Richards* guidelines; (d) that the Royal Court was wrong to disregard the intended use of the fentanyl; and (e) that insufficient regard had been paid to the applicant's personal circumstances.

7. As put to us in his oral submissions and written documents, Mr Jeffreys' case was as follows. He had obtained the fentanyl from his girlfriend, who had been prescribed it for pain relief after a leg amputation. He had brought it over to Guernsey to give to a paralysed friend, who had himself been prescribed fentanyl but needed more than he had been prescribed to suppress muscle spasms. There was a deliberate policy in Guernsey of under-prescription of fentanyl, which meant that those who needed it for effective pain relief had either to leave the Island (as the friend ultimately did) or resort to irregular sources of supply. To an experienced user of fentanyl, such as his girlfriend or the friend to whom he intended to give it, fentanyl was no more dangerous than other common medicines such as paracetamol or ibuprofen. The expert evidence about fentanyl had been given by a customs officer, not by a doctor or other medically qualified person, and so related only to use by abusers, not to use by those who needed it for pain relief. The dangers that underpinned the decision in *Noyon* therefore had no relevance. There was no question of his intending to corrupt the inhabitants of Guernsey or make large sums of money, or indeed any money, from supplying the drug; and the *Richards* guidelines, which were designed to deal with importations by people who did intend to corrupt and make money, did not apply. Other recent cases in Guernsey of drug importation were much more serious than his, but had resulted in sentences that were no more severe than the one passed on him. There had been a failure to take proper account of the fact that he had no convictions that related to anything which he had done after 2009, or to have proper regard to his regular dealings with and assistance given to the police when working in Bournemouth town centre in the evenings at weekends, or to consider properly the care he gave to his disabled girlfriend. In all these circumstances, the sentence he had been given was far too high.

8. We deal first with this Court's decision in *Noyon*. That case concerned possession of 18 fentanyl patches each of 100µg; and the defendant, who had a protracted and chronic history of substance abuse and a long criminal record, was sentenced to 4½ years' imprisonment. That sentence was arrived at by discounting from a starting point of seven years, itself derived from the *Richards* guidelines. The Court of Appeal approved the following summary of the qualities of fentanyl, which accords with the evidence given in the present case:

> "The drug Fentanyl is a controlled drug of Class A and more specifically a narcotic analgesic, which is only available on prescription through legitimate healthcare sources. It is an exceptionally strong painkiller used for the management of pain during surgery and for persons with chronic to severe pain who are already physically tolerant of opiates. The drug is also used for the management of opiate withdrawal. Fentanyl is available in both liquid form and in patches made of clear plastic, which are applied to the skin; the patches come in varying strengths, the highest dosage being 100 mg.
>
> Patches are referred to within the drug fraternity as 'sticks' or 'stickies'.
> In the local drug-using community Fentanyl patches are used in addition to and in place of heroin. An overdose of Fentanyl can result in sudden death through respiratory failure, cardiac arrest, cardio-vascular collapse or severe anaphylactic reaction."

The Court also made reference to New South Wales legislation that equated 0.0025g (which is 2,500 µg) of fentanyl to 1g of heroin.

9. The Court of Appeal's conclusion was as follows:

> "However, this material reinforces the correctness of the approach adopted by the Jurats under the guidance of the Deputy Bailiff, namely that this offence should in principle be treated no less severely than any other offence of possession of a small quantity of a Class A drug with intent to supply. Although in *Richards* this court shied away from value as a significant factor in sentencing, it is clear from the statement of Sgt. Sylvester that there is a market value for these patches and that the value of what was seized from the appellant is not insignificant. In view of the high risk of overdose if this drug is misused, the court is not impressed with arguments that this consignment is of a trifling amount, which should fall outside *Richards*.
>
> In this court's view, trafficking in this particular drug—which, it would appear, only enters the illicit market when those who are prescribed the drug for genuine medical reasons choose to make money out of selling it—is as serious as, if not more serious than trafficking in other Class A drugs of similar quantity. We are concerned solely with the facts of this case and the issue as to whether the sentence imposed on this appellant is too high in the circumstances. It is to be hoped that with a tightening in the practices of those who prescribe these medications the opportunities for those of a like mind to this appellant to establish an illicit trade in what appear to be originally prescription drugs may lessen."

10. These comments, with which we respectfully agree, answer a number of Mr Jeffreys' points. First, the illicit market in fentanyl depends upon the availability of drugs that have originally been lawfully prescribed. The danger the drug represents is accordingly to the illicit user, not to the lawful user. It is that danger which justifies both the classification of the drug and the law's sentencing policy. It is accordingly irrelevant that Mr Jeffreys' friend might have been able to use the drug without harm – although it is obviously the case that the friend's doctor was better placed than Mr Jeffreys to decide how much the friend needed. What is relevant is that Mr Jeffreys could not guarantee that the fentanyl he provided would not enter the illicit market: as he accepted, all he could do was trust his friend. Secondly, fentanyl is an extremely strong drug; and that, combined with its narcotic qualities, makes it directly comparable to other Class A drugs. The fact that there are other drugs that may be stronger does not justify treating fentanyl importation any less seriously. Thirdly, the dangers associated with fentanyl misuse justify treating it very seriously even when only small amounts are involved.

11. Before we leave *Noyon*, we note that it recommended a tightening in the practices of those who prescribe fentanyl. As we have said, Mr Jeffreys claimed that there was a deliberate policy in Guernsey of underprescribing fentanyl. We have seen no evidence to suggest that this is so; and nothing in *Noyon* can have been intended to suggest that those prescribing fentanyl should do so otherwise than in accordance with their best clinical judgment.

12. *Noyon* was binding on the Royal Court, as it recognised. It required the Royal Court to treat fentanyl as falling within the *Richards* sentencing guidelines. Those guidelines were formulated by a Court of Appeal consisting of five judges, including the then Bailiffs of both Guernsey and Jersey. The expressed intent was to provide some community of sentencing policy throughout the Channel Islands. This was because "misuse of drugs is one of the scourges of European society at the present time and the Bailiwicks of Guernsey and Jersey have not escaped the attention of those who wish to make money out of corrupting the inhabitants of these islands into becoming addicted to drugs for which they will pay large sums of money". The quoted passage is the basis for Mr Jeffreys' argument that the guidelines apply only to cases where there was an intention to corrupt and make money. That argument misunderstands the Court of Appeal's remarks. Their purpose was to explain why it had become desirable to formulate sentencing guidelines for drugs cases; nothing in them, nor anything else in the court's decision, indicates that the guidelines apply only to cases involving an intention to corrupt and make money. The guidelines are general, and are intended to apply to drug offences committed for whatever reason. The Royal Court was accordingly entitled to apply them in this case; doing so, it took a starting point of seven years, which is the lowest point of the lowest band for Class A drugs.

13. Mr Jeffreys complains that the sentence of 4 ½ years ultimately passed on him is out of line with sentences passed on other offenders. In particular, he points to the case of *Law Officers v Bulfinsky and Armega*, in which he says the defendants were likewise sentenced to 4 ½ years imprisonment for the importation of a much larger amount of fentanyl, 40 x 100µg patches. We note that even that amount would, at the conversion rate identified in *Noyon*, fall towards the bottom end of the lowest sentencing band, leading again to a starting point of seven years. But in any event the sentence in any given case is the product of a number of factors, which will include the circumstances of the offence and personal mitigation, and a direct comparison between different cases is almost always impossible. Even in cases of co-defendants, where the majority of the facts will be known, the test is whether right-thinking members of the public, with full knowledge of all the relevant facts and circumstances, learning of the sentence would consider that something had gone wrong with the administration of justice: see *R v Fawcett* (1983) 5 Cr App R (S) 158, 161. We think it impossible to contend that such test is satisfied in this case.

14. The sentence of 4½ years represents a discount of 2½ years from the starting point, which is somewhat over one third. The discount reflected a reduced credit for the guilty plea, but gave credit for Mr Jeffreys' cooperative approach. The Royal Court took the view that there was little available personal mitigation in view of Mr Jeffreys' numerous drug convictions. It is clear that sentencing proceeded on the basis of Mr Jeffreys' own account, even though the Court did not think it was of much help to him.

15. We find it impossible to see that the Royal Court failed to take properly into account anything relevant in Mr Jeffreys' circumstances. The fact that he had committed no offence since 2009 was insufficient to counteract the effect of his criminal record before then; and nothing else in his circumstances meant that the offence with which he was charged was less than a serious one.

16. In our view, the sentence passed on Mr Jeffreys was an entirely appropriate one. The starting point was the lowest possible, and he was given a substantial discount from that starting point. We see nothing wrong in the sentence, and refuse leave to appeal against it.

