

ENGLAND AND WALES / JUDGMENT

Walton (aka Wright), R v

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Neutral Citation Number: [2010] EWCA Crim 2255 IN THE COURT OF APPEAL CRIMINAL DIVISION No: 201000266 C2 Royal Courts of Justice Strand London, WC2A 2LL Thursday, 5th August 2010 B e f o r e: LORD JUSTICE LAWS MR JUSTICE MCCOMBE MR JUSTICE KING

- ----- R E G I N A v ANDREW RICHARD WALTON (AKA WRIGHT)
- ----- Computer Aided Transcript of the Stenograph Notes of WordWave International Limited A Merrill Communications Company 165 Fleet Street London EC4A 2DY Tel No: 020 7404 1400 Fax No: 020 7404 1424 (Official Shorthand Writers to the Court)
- ----- Miss H Johnson (Solicitor Advocate) appeared on behalf of the Appellant Mr N Methold (Higher Court Advocate) appeared on behalf of the Crown
- ----- J U D G M E N T LORD JUSTICE LAWS: This appeal against conviction arises in somewhat unusual circumstances. It is not opposed by the Crown. On 28th March 2008, before His Honour Judge Downes at the Norwich Crown Court, the appellant pleaded guilty to two counts of having with him a bladed article. These offences put him in breach of a community rehabilitation order imposed at the Leicester Youth Court on 17th April 2007 for an offence of burglary and in breach also of two conditional discharges imposed on 8th June 2007 at the Leicester Magistrates' Court for a bladed article offence and on 12th September 2007 at the Loughborough Magistrates' Court for an offence of criminal damage. Those orders fell to be revoked and the appellant re-sentenced when he appeared at Norwich on 28th March. On 17th April 2008 he pleaded guilty to two offences of failing to surrender to bail and on the same day he was sentenced and, where applicable, re-sentenced to various concurrent and consecutive terms of detention in a young offenders institution amounting to 12 months in all. He appeals against his convictions with leave of the single judge. The grounds relate to his fitness to plead and arise in circumstances which we shall explain in a moment. It is well to bear in mind his date of birth, 9th May 1989. First, the facts of the bladed article offences to which the appellant pleaded guilty on 28th March 2008. Very early in the morning of 3rd January 2008 police officers came across the appellant in the street. He was drunk and aggressive. There was an altercation about a man who had phoned the police and at length the officers arrested the appellant for being drunk and disorderly. He told the police he had knives on him. Inside the waistband of his trousers they found two black-handled bread knives, one with an 8 inch blade, the other a 7.5 inch blade. At the police station he said he was taking the knives back to a friend of his who owned them, but he would not name the friend. After his sentence on 17th April 2008 matters rested there until

12th September 2008, while he was still in custody, when he was produced at the Leicester Magistrates' Court to face a single charge of sexual activity in the presence of a child contrary to section 13(1) of the Sexual Offences Act 2003. On 28th September 2008 that matter was committed to the Leicester Crown Court. The appellant was at liberty on licence by this time and was bailed in respect of the sex offence to appear at the Crown Court on 16th January 2009, when he duly pleaded guilty to that offence. The case was adjourned until 27th March 2009 for a pre-sentence report and a psychological report to be obtained. In fact he appeared in court on 7th April 2009 from custody after a warrant was issued following notice by the Probation Service that he was not co-operating with the preparation of the pre-sentence report. After this a raft of information became available about the appellant's mental state. We can do no better than set out these short paragraphs from an affidavit of Helen Johnson, the appellant's solicitor, who has also appeared before us this morning. The affidavit was sworn on 26th April 2010: "9. The Appellant was seen by Dr Richard Alexander a psychologist who prepared a report about him and concluded at paragraph 4.6 of his report 'Andrew's full scale IQ of 54 (51-59) is very low and gives him a mental age of between 5 and 6 years'.

10. Due to the contents of the psychological assessment a psychiatric report was commissioned from Dr Ekkehart Staufenberg. He carried out a full assessment of the Appellant's functional ability to participate effectively in the trial proceedings and concluded that the Appellant was not fit to plead. He recommended a second psychiatric report to be obtained.
11. Dr Duggan was instructed and prepared a further psychiatric report in relation to the Appellant which again concluded that he was unfit to plead due to his very limited intellectual functioning.
12. It is the evidence of Dr Richard Alexander, Dr Ekkehart Staufenberg and Dr Lorna Duggan which the defence seek to be admitted as evidence in the Appellant's case. It being fresh evidence that was not available to the Norwich Crown Court in 2008.
13. When the three reports were put before Leicester Crown Court on 9th July 2009 an application to vacate the Appellant's plea was made and granted and the Court went on to find that the appellant was not fit to plead.
14. On 4th August 2009 a finding of fact hearing, [we interpolate, that was of course in relation to the sexual offence] took place and the Jury concluded that the Appellant did the act alleged. On 5th August 2009 having heard oral evidence from Dr Staufenberg the Appellant was made the subject of a Hospital Order for an indefinite period with restrictions." Those orders were of course made under sections 37 and 41 of the Mental Health Act 1983. The grounds of appeal are that on the expert psychological evidence now available it is clear that the appellant cannot have been fit to plead on 28th March 2008 or 17th April 2008 because his mental state was such that he lacked the understanding necessary to enable him to follow and participate in the proceedings and to give instructions. Dr Alexander, the psychologist, in his report of 17th May 2009 concentrated on the appellant's very low intelligence rating.

He carried out a series of cognitive tests. As Miss Johnson reported, they showed a full IQ scale of 54, equivalent to the mental age of a five or six year old. Dr Staufenberg's report of 7th July 2009 described (paragraph 14.1) a "profound learning difficulty". The appellant had been sexually abused in his own childhood. He has a significant underlying generalised anxiety. Under "Conclusions", Dr Staufenberg stated: "4. In regard to the ascertainment of Mr Andrew Walton's capacity in relation to effective participation in trial proceedings, I shall respectfully have to recommend that I have rarely come across a case of such manifest incapacity as our assessment unambiguously confirmed.

5. I shall therefore have to respectfully recommend that Mr Andrew Walton be considered incapable in relation to his effective participation in trial proceedings". Dr Staufenberg prepared a further report dated 19th January 2010. "Conclusions", he said: Under "5.1. On the basis of the evidence from Mr Andrew Walton's neurocognitive and personality functioning up until the time of writing the original Court report, I have been able to corroborate highly supportive evidence through my clinical team that the then defendant was indeed suffering from a wide-range of neurodevelopmental cognitive, emotional, psychological and social impairments. Comprising these within the context of memory difficulties, a dependent, low self-esteem and low self-worth informed personality, and the need to be liked and wish to please as well as fit in with others, resulted directly and causally in Mr Andrew Walton's all pervasive wish to avoid any adverse circumstances, including appearance for any extended period of time in Court. Likewise, he would have felt similarly in relation to any police interviews." It is true, however, that Dr Staufenberg noted substantial progress: see paragraph 6.4. Dr Lorna Duggan in her report of 4th July 2009 stated as follows, under the heading "Fitness to plead": "He did not understand the meaning of 'guilty' or 'not guilty' pleas merely stating, 'guilty means you get it done quickly and not guilty means you've not done it' and he told me that his 'pad-mate' had taught him about not guilty earlier in the day. With regard to the guilty plea he entered, he explained that he wanted to leave the court quickly because he had to go on a train journey to Norwich and he was worried about missing his train. This was his first solo trip on a train. In my opinion, he could not challenge a juror, instruct a lawyer or understand and give evidence. In view of the above, I am presently of the opinion that he is unfit to plead and therefore is under disability regarding his trial. Given that his unfitness to plead is related to his very limited intellectual functioning, it is my view that this is unlikely to change in the near future, however, one would anticipate some maturation over the next decade ... It is my view that he can be classified as suffering from a mental disorder within the meaning of the Mental Health Act 1983, namely learning disability associated with seriously irresponsible behaviour. It is my view that a Hospital Order under Section 37 of the Mental Health Act 1983 may be appropriate in this case rather than a custodial disposal. To allow for a full assessment to be completed I respectfully recommend that he is made subject to an Interim Hospital Order under Section 38 of the Mental Health Act 1983." On this material, which it is sought to be admitted in this court pursuant to section 23 of this Criminal Appeal Act, it is submitted that the appellant was not fit to plead on 28th March or 17th April 2008 and his conviction should be quashed. We

agree. We stated at the outset that the Crown do not oppose this appeal. Their position is that given that the appellant is now subject to an order under section 37 of the Mental Health Act, together with a section 41 restriction order, the public interest does not require that any further reports be commissioned. The existing reports may be received under section 23 and we so admit them. We should use our powers under section 6(1) of the Criminal Appeal Act to substitute findings that the appellant suffered from a disability and that he did the act charged. We quash the convictions and make those findings. Miss Johnson has submitted this morning that given the extant section 37 and section 41 orders, which of course continue to be effective, it is necessary today to do no more than order an absolute discharge in relation to the 2008 offences. We think that is a sensible course of action. We make it clear that it is appropriate for the very reason that the Mental Health Act orders made in the other proceedings are extant and effective. That is the order we make. In the result then the appeal is successful in the respects we have described.

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