



In The Supreme Court of Bermuda

CRIMINAL JURISDICTION

Case No. 22 of 2019

BETWEEN:

THE QUEEN

-and-

KYLE WHEATLEY

CALSHUNTO JAMES

and

KENTON SMITH

Before: The Hon. Acting Justice Juan P. Wolffe

Appearances: Mr. Alan Richards for the Prosecution
Mr. Richard Horseman for the Defendant Kyle Wheatley

Date of Hearing: 9th December 2019

Date of Sentence: 10th December 2019

SENTENCE

Section 128 of the Criminal Code Act 1907 (“Criminal Code”) – Conspiring to Prevent the Course of Justice – Offence committed by Police Officer

1. On 9th December 2019 Defendant Kyle Wheatley (hereinafter referred to as “Defendant Wheatley”) pleaded “guilty” to the sole count on the Indictment, namely Conspiring to Prevent Justice contrary to section 128 of the Criminal Code.
2. On the 10th December 2019, after hearing submissions from Mr. Richards and Mr. Horseman, I sentenced Defendant Wheatley to a term of imprisonment of two-and-a-half (2½) years. Set out below are my reasons for doing so.

Summary of the Evidence

3. At the time of the offence Defendant Wheatley was employed as a Police Constable with the Bermuda Police Service (the “BPS”) and was attached to the Court Liaison Unit (the “CLU”). The CLU has the responsibility for the receipt, processing, and inputting of all criminal files for Court, parking tickets, and ticket summonses issued by members of the BPS for traffic offences. The administrative process carried out after a member of the public is issued a traffic ticket by a police officer is that the copy portion of the traffic ticket is forwarded to the CLU where they are sorted alphabetically into a Court date order. The information from the traffic ticket is entered into the Judicial Enforcement Management System (JEMS), and the traffic tickets then remains in a secure drawer at CLU until the Court date. On the Court date the traffic ticketholder appears in Court and either pleads “not guilty” and a trial date is set, or pleads “guilty” and is sentenced (which could include a fine, a period of disqualification from driving vehicles, the imposition of demerit points, or even imprisonment). After the Court appearance of the traffic ticketholder the traffic ticket is then returned to CLU for filing.
4. On or about the 5th January 2018 the Professional Conduct Unit of the BPS received a complaint from a male member of the public who had received an offer to have his speeding ticket “pulled” in exchanged for cash. By “pulled” I take this to mean the withdrawing of a traffic ticket, which was properly issued by a police officer, from the said administrative and Court processes. That is, with the intended result that the said traffic ticket is not put before the Court, and ultimately, the person who was issued the said traffic ticket would

not be prosecuted or potentially convicted for the relevant traffic offence set out on the ticket (and by extension not sentenced for the offence if convicted).

5. The said male member of public complained that after being issued a traffic ticket on the 28th November 2017 he was informed by a female colleague that she could get the ticket pulled by a police officer and that this would cost him \$50.00. This male member of the public agreed and gave the traffic ticket to the female colleague. The next day the female colleague informed the male member of the public that pulling the ticket would actually cost him \$250.00 i.e. not the initially quoted \$50.00. As a result, the male member of the public had a change of mind and indicated to his female colleague that he would rather attend Court and answer to the traffic ticket. He asked for his traffic ticket back but was informed by his female colleague that the traffic ticket had already been pulled and that the said \$250 would have to be paid. It was during this conversation that the female colleague informed the male member of the public that the police constable who pulled the traffic ticket was Defendant Wheatley.
6. Being in receipt of this information from the male member of the public a police investigation was commenced against Defendant Wheatley and to this end enquiries were conducted with the CLU. Eventually, Defendant Wheatley was arrested for the offence of bribery and searches were conducted of his workspace at CLU, his residence at #48 Middle Road in Smith's Parish, and of his silver grey Hyundai Accent, registration number 47058. At the time of his arrest Defendant Wheatley's black Samsung 8 cellphone was seized by police. During the search of his workspace, seven (7) moving violation tickets (MVT's) were found in his locked personal desk drawers. Apparently, locking one's personal desk drawer was against CLU policy. During the search of his residence five (5) MVT's were found throughout the kitchen and the bedroom. Other drug related items liable to seizure were also seized at Defendant Wheatley's residence but other than providing a contextual background they do not form part of the offence for which he was sentenced.
7. The evidence gathered by the BPS when investigating Defendant Wheatley revealed that two other individuals acted as "brokers" for Defendant Wheatley by identifying people that

had received traffic tickets and obtaining cash for him in order for the traffic tickets to be pulled.

8. Data from Defendant Wheatley's cell phone consisted of 3000 audio/voice notes, photographs of traffic tickets and numerous WhatsApp conversations which revealed communication between Defendant Wheatley and others making multiple requests for traffic tickets to be pulled. In most of the WhatsApp conversations, Defendant Wheatley gave confirmation that the traffic tickets were pulled by indicating the words "sorted", "shredded", or "done". There were also telephone conversations between Defendant Wheatley and one of the said brokers revealing additional 28 images of traffic tickets, as well as the bartering of prices for traffic tickets to be pulled. The brokers arranged payment from the traffic ticketholders to Defendant Wheatley and he in turn arranged a commission be paid to the brokers. From this it would appear that this scheme had been in operation since as early as 2016.
9. In total, at least 61 traffic tickets did not reach Court proceedings as a result of Defendant Wheatley's conduct. By the Prosecution's estimation Defendant Wheatley received approximately \$10,700 in return for pulling traffic tickets and that the actual loss to the Government was in the region of \$20,675 (i.e. the sum that would have been received had the members of the public appeared in Court, convicted, and fined).

Sentencing Guidelines

10. Section 128 of the Criminal Code stipulates that:

"Conspiring to defeat justice

128 Any person who conspires with another person to obstruct, prevent, pervert or defeat, the course of justice, is guilty of an offence, and is liable on summary conviction to a fine of \$50,000 or to imprisonment for five years, or both; and on conviction on indictment to an unlimited fine or imprisonment for ten years, or both."

11. Conspiring to prevent the course of justice under section 128 of the Criminal Code falls within those categories of corruption-type offences found within Part VII of the Criminal Code (under the heading “Offences Against Public Authority, Public Order, The Administration of Justice, Personal Liberty etc.”) which strike at the heart of the justice system and compromises the integrity upon which the justice system operates, particularly when such offences are committed by public officials such as police officers. The BPS and the Courts must be able to rely upon police officers carrying out their duties in a manner which is consistent with the proper administration of justice, anything less has the potential of shaking the very foundation of the justice system. Clearly, by virtue of the relatively high maximum sentence of ten (10) years imprisonment on indictment, our lawmakers reinforce the stance that such offences should not only be seen as gravely serious but that those who engage in such corrupt practices should be dealt with extremely seriously. Therefore, a clear and unequivocal message must be sent to Defendant Wheatley and to would-be offenders that they will be treated harshly when sentenced.
12. Unfortunately, but not surprisingly, local and overseas jurisprudence is not replete with precedent sentencing authorities in respect of the specific offence of conspiring to prevent the course of justice. However, I am grateful to both Mr. Richards and Mr. Horseman who handed up some authorities which although may not be on all fours in respect sentencing guidelines for a section 128 offence, they do provide some useful guidance as to generally how similar corruption-type offences committed by police officers could be treated when sentencing is being considered.
13. In respect of the authorities relied upon by Mr. Horseman they can be summarized as follows:
 - Attorney General’s Reference (No. 67 of 2010) R v Bohannan: After a trial and on appeal a 47 year old police officer of the Metropolitan Police Service was sentenced to six (6) years imprisonment for passing on police intelligence (including details of police operations) to a drug dealer. He was engaged in 471 inappropriate intelligence checks over a period of five (5) years.

- *R v Keyte [1998] 2 Cr App Rep (S) 165*: After a trial a police officer, who had on 192 occasions made unauthorized entries of a police national computer in order to supply information to a private investigation agency, was sentenced to two (2) year's imprisonment. The police officer received money for the offence but the sums were not particularly large, and, there was no suggestion that police operations were compromised or affected.
- *R v O'Leary [2007] EWCA Crim 186*: After a guilty plea a police officer was sentenced to three and a half (3½) years imprisonment for passing on information to a former police officer who had ties with criminals.
- *Attorney General's Reference (No. 68 of 2009)(R v Turner)*: After an early guilty plea, a police officer who, on a large number of occasions over a period of 18 months accessed police computers and passed information on to criminals, received 18 months imprisonment. There was no evidence of direct financial payment or benefit.
- *R v Kassim [2005] EWCA Crim 1020*: After a guilty plea, a police officer who over a period of three (3) years supplied information about private individuals, received a sentence of two-and-a-half years imprisonment. For his misdeeds the police officer received payments totaling £14,000, and there was no impact on police operations.
- *R v Mungur [2018] 2 Cr App R (S) 33 (300)*: Following a guilty plea for selling the personal data of road traffic victims to solicitors (who would then approach the victims and encourage them to pursue compensation) a police officer was sentenced to four (4) year's imprisonment. He provided information on approximately 22,000 occasions and received the total payment of £363,000.

- *R v Nazir [2003] EWCA Crim 901*: A police officer pleaded guilty to a single count of misconduct in public office and was sentenced to one (1) month imprisonment. The particulars of the offence were that the defendant intended to destroy a fixed penalty notice which was issued by another police officer to a person who was known to the defendant.
14. Mr. Richards handed up an extract from the Sentencing Council for England and Wales. Whilst the extract primarily covers bribery offences under the United Kingdom’s Bribery Act 2010 it can in my view be applied generally to equally serious corruption type offences committed by public officers (such as section 128 offences), particularly when assessing the culpability of the offender and the harm done to society.
15. According to the Sentencing Council’s extract the level of culpability “*is determined by weighing up all the factors of the case to determine the offender’s role and the extent to which the offending was planned and the sophistication with which it was carried out*”. Further, that the degree of culpability can be demonstrated by one or more of the following:

A – High culpability

- *A leading role where offending is part of a group activity*
- *Involvement of others through pressure, influence*
- *Abuse of position of significant power or trust or responsibility*
- *Intended corruption (directly or indirectly) of a senior official performing a public function*
- *Intended corruption (directly or indirectly) of a law enforcement officer*
- *Sophisticated nature of offence/significant planning*
- *Offending conducted over sustained period of time*
- *Motivated by expectation of substantial financial, commercial or political gain*

B – Medium culpability

- *A significant role where offending is part of a group activity*
- *Other cases that fall between categories A or C because:*
 - *Factors are present in A and C which balance each other out **and/or***
 - *The offender’s culpability falls between the factors as described in A and C*

C – Lesser culpability

- *Involved through coercion, intimidation or exploitation*
- *Not motivated by personal gain*
- *Peripheral role in organised activity*
- *Opportunistic ‘one-off’ offence; very little or no planning*
- *Limited awareness or understanding of extent of corrupt activity”*

16. In respect of the assessment of harm, the Sentencing Council’s extract states that it is “*in relation to any impact caused by the offending (whether to identifiable victims or in a wider context) and the actual or intended gain to the offender.*” Further, that the degree of harm can be demonstrated by one or more of the following factors:

“Category 1

- *Serious detrimental effect on individuals (for example by provision of substandard goods or services resulting from the corrupt behaviour)*
- *Serious environmental impact*
- *Serious undermining of the proper function of local or national government, business or public services*
- *Substantial actual or intended financial gain to offender or another or loss caused to others*

Category 2

- *Significant detrimental effect on individuals*
- *Significant environmental impact*
- *Significant undermining of the proper function of local or national government, business or public services*
- *Significant actual or intended financial gain to offender or another or loss caused to others*
- *Risk of category 1 harm*

Category 3

- *Limited detrimental impact on individuals, the environment, government, business or public services*
- *Risk of category 2 harm*

Category 4

- *Risk of category 3 harm*”

17. The above case authorities and the Sentencing Council extract mirror the sentencing principles set out in section 55 of our Criminal Code, particularly those under section 55(2) of the Criminal Code which reads:

- “(2) *In sentencing an offender the court shall have regard to—*
- (a) the nature and seriousness of the offence, including any physical or emotional harm done to a victim;*
 - (b) the extent to which the offender is to blame for the offence;*
 - (c) any damage, injury or loss caused by the offender;*
 - (d) the need for the community to be protected from the offender;*
 - (e) the prevalence of the offence and the importance of imposing a sentence that will deter others from committing the same or a similar offence;*
 - (f) the presence of any aggravating circumstances relating to the offence or the offender, including—*
 - (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factors;*
 - (ii) evidence that the offender, in committing an offence, abused a position of trust or authority in relation to the victim;*
 - (fa) the presence of any aggravating circumstances relating to a serious personal injury offence as defined in section 329D, or an offender where the victim is a child, including—*
 - (i) evidence that the offender seriously wounded, maimed or disfigured another person or endangered the complainant’s life;*
 - (ii) evidence that the offender preceded or accompanied the offence with acts of torture or serious violence;*
 - (iii) evidence that the offence was committed against a particularly vulnerable victim;*
 - (iv) evidence that the offence was committed against a member of the family, against a child cohabiting with the offender or while abusing his position of trust;*

- (v) *evidence that there were one of two or more persons jointly committing the offence;*
- (vi) *evidence that the offender was acting within the framework of unlawful gang activity as defined under section 70JA;*
- (vii) *evidence that the offender has previously been convicted of offences of the same nature;*
- (g) *the presence of any mitigating circumstances relating to the offence or the offender including—*
 - (i) *an offender’s good character, including the absence of a criminal record;*
 - (ii) *the youth of the offender;*
 - (iii) *a diminished responsibility of the offender that may be associated with age or mental or intellectual capacity;*
 - (iv) *a plea of guilty and, in particular, the time at which the offender pleaded guilty or informed the police, the prosecutor or the court of his intention so to plead;*
 - (v) *any assistance the offender gave to the police in the investigation of the offence or other offences;*
 - (vi) *an undertaking given by the offender to co-operate with any public authority in a proceeding about an offence, including a confiscation proceeding;*
 - (vii) *a voluntary apology or reparation provided to a victim by the offender.*

18. Considering section 55(2) of the Criminal Code, the cited authorities, and the Sentencing Council guidelines the sentences that can likely be meted out for corruption-type offences can possibly range from community based sentences up to lengthy terms of imprisonment. It is patently obvious though that those offences that reveal mid-to-high levels of culpability and significant-to-serious harm to others will invariably, as a starting point, result in an immediate custodial sentence for the offender. Anything less than an immediate custodial sentence will not adequately register the deep condemnation which offences such as a section 128 offence invariably invokes.

Sentencing Decision

19. By way of the mitigating circumstances, I take into consideration Defendant Wheatley's erstwhile good character (including the absence of any criminal record) and his genuine expressions of regret and remorse (he apologized to his colleagues in the CLU). Although Defendant Wheatley's plea of guilt came approximately five (5) months after he was initially arraigned on the 1st July 2019 I accept Mr. Horseman's indication that it was always Defendant Wheatley's intention to enter a guilty plea and that he has been in discussions with the Prosecution for some time about this eventuality. Defendant Wheatley is therefore entitled to the normal discount for his guilty plea.
20. Mr. Horseman rightly submitted that as a result of his conduct Defendant Wheatley has suffered a "fall from grace" having had to tender his resignation as a police officer (a position which he held for 14 years), and, that as a former police officer his time at the Westgate Correctional Facility ("Westgate") may be more difficult than if he had not been a police officer. Further, that by all indications it would appear that Defendant Wheatley was well liked by his peers and that prior to the commission of the offence he had an unblemished career in the BPS.
21. I do not find that Defendant Wheatley's fall from grace or the likelihood of him having a difficult time at Westgate to be proper mitigating features of this case (to be fair I do not think that Mr. Horseman was suggesting that they were). Police officers who engage in criminal activities, especially in circumstances where it involves a breach of trust, should expect to have their reputations tarnished and to be imprisoned with those who they once may have imprisoned.
22. However, I do accept as a mitigating feature, albeit a small one, that for 14 years Defendant Wheatley carried out his police duties without incident and presumably he gained the respect of other police officers and members of the public. It is unfortunate that he forsook his integrity and good reputation for the "almighty dollar".
23. Unfortunately, the aggravating circumstances of this case more than sufficiently counter balance its mitigating circumstances. I put the degree of Defendant Wheatley's culpability

as high and his degree of harm done to others as serious, and I do so having regard to the following features of his offence:

He played a leading role in the offence which was part of a group activity: Without prejudice to his co-defendants, the facts of this case show that Defendant Wheatley used the services of “brokers” who received monies from individuals wishing to have their traffic tickets pulled and then passed the monies onto Defendant Wheatley who pulled the relevant traffic tickets and then gave a “commission” to the brokers.

He abused his position of trust, power, authority, and responsibility: At the time of the offence Defendant Wheatley was employed in the CLU which had the responsibility for the receipt, processing, and inputting of all criminal files for Court, parking tickets, and ticket summonses issued by members of the BPS for traffic offences. Not only was it Defendant Wheatley’s job to carry out the responsibilities of the CLU but it was his duty to ensure that they were done in a fair and just manner. Clearly, in committing the offence Defendant Wheatley used his knowledge of the inner workings of the CLU and exploited any weaknesses in the CLU’s system.

Sophisticated nature of offence: While Defendant Wheatley took advantage of the security and administrative gaps in the CLU’s system the offence was not particularly sophisticated or complex. Probably because of his role within the CLU his efforts to pull and then hide traffic tickets did not need to be overly sophisticated. However, the use and payment of the said brokers did require a considerable degree of communication and coordination between them and multiple “customers” in order to commit the offence.

Offending conduct was over a sustained period of time: Messages found on Defendant Wheatley’s phone appear to suggest that he had been pulling tickets since as early as 2016 and up to January 2018 when the complaint was made by the male member of the public. It is noted that initially Defendant Wheatley was pulling tickets as “favours” but eventually commenced receiving payment for pulling tickets. In any event, while one (1) to (2) years is a significant period of time and 61 tickets is a considerable sum, the time period is not

as long as some of the misconduct exhibited in the cited authorities, and nor is the number of occasions that the offence was carried out (such as in *Bohannan*, *Keyte*, *Kassim* and *Mungar*).

Mr. Horseman submitted that Defendant Wheatley's misconduct was a "poor error of judgment". The argument that a defendant exercised poor judgment increasingly erodes the more occasions that the offence is carried out. Such a submission would have more weight had Defendant Wheatley pulled one or two tickets over a short period of time. By pulling 61 tickets over a period of about two years Defendant Wheatley had considerable time and opportunity to assess and correct any single error of judgment, but presumably because of greed he continued his offending conduct.

He was motivated by financial gain: There was a dispute as to whether Defendant Wheatley received approximately \$5,000 for pulling tickets as submitted by Mr. Horseman or approximately \$10,700 as submitted by Mr. Richards. Counsel accepted that this dispute was minimal and that it did not arise to the need of having a Newton hearing, and eventually Mr. Horseman accepted that the amount received may have been in the region of \$7,500. Comparative to the cited authorities such as *Kassim* and *Mungur* the sum received by Defendant Wheatley was not substantial, but the receipt of and loss of monies that would have otherwise been paid by individuals by way of fines into the Government coffers is particularly egregious (approximately the sum of \$20,675).

It is unclear on the facts as to the amount of "commission" received by Defendant Wheatley's brokers.

Serious undermining of the proper functioning of the BPS and the justice system: As stated earlier, such offences as that which was committed by Defendant Wheatley has a significant impact on the integrity of the BPS and the Court, both of which are tasked with the responsibility of ensuring the proper administration of justice. By his conduct, Defendant Wheatley has brought the BPS into disrepute and has created, or reinforced, the public's actual or perceived mistrust of the BPS. As a dire consequence, the important and

otherwise stellar work of the BPS and the justice system has been brought into question and this may result in difficulties for the BPS and the Courts in enforcing the law. The only saving grace is that it does not appear that any police intelligence, investigations or operations were compromised or affected by Defendant Wheatley's conduct.

24. In consideration of the above, particularly the high degree of culpability and serious harm caused by Defendant Wheatley's misconduct, the appropriate sentence is one of an immediate custodial sentence. Accordingly, I confirm my sentence of imprisonment for two-and-a-half (2½) years.

25. During his submissions Mr. Richards indicated that the Prosecution may seek to make an application for a Confiscation Order pursuant to section 9 of the Proceeds of Crime Act 1997. The Court will hear such application when or if the Prosecution decides to proceed with it.

Dated the 19th day of December, 2019

The Hon. Acting Justice Juan P. Wolffe