

SENTENCING EXPLAINED

PREVIOUS CONVICTIONS

Where offenders have previously been convicted of one or more criminal offences, the court must take this previous offending into account as an aggravating factor when sentencing in respect of a new offence, providing that it considers that it is ‘reasonable’ to do so. Previous convictions can consequently have the effect of increasing the severity of the sentence imposed on an offender. Whilst the majority of offenders being sentenced by the courts will have at least one previous conviction, a previous conviction should be ‘relevant’ in order for it to have an impact on a new sentence being imposed. The relevance of a previous conviction will usually depend on the degree of similarity between the previous offence and the current offence, as well as the amount of time which has passed since the previous offence.

Previous convictions have taken an increasingly prominent role at sentencing in recent decades. When the Criminal Justice Act 1991 was first enacted, courts were instructed that they ‘shall not’ treat previous convictions as an aggravating factor for the purposes of sentencing. However, this was amended in 1993 so that courts ‘may’ take into account any previous convictions or failure to respond to previous sentences. This was further tightened by the Criminal Justice Act 2003 so courts ‘must’ treat previous convictions as aggravating where reasonable to do so.

What are previous convictions and when do they become ‘relevant’ at sentencing?

Previous convictions are convictions for offences obtained prior to the commission of a new offence. An offence which was committed after, but sentenced before a current offence, will not constitute a previous conviction. The previous conviction may have been obtained in any court in the United Kingdom or be a service offence within the meaning of the Armed Forces Act 2006.¹ The prosecution is required to prove an offender’s previous conviction to the criminal standard, which is ‘beyond reasonable doubt’.

Previous convictions *must* be treating as an aggravating factor if the court considers it is reasonable, having regard to (a) the nature of the offence to which the conviction relates and its relevance to the current offence and (b) the time that has elapsed since the conviction.²

The court is therefore obliged to consider previous convictions as aggravating features at sentencing where it considers that it is ‘reasonable’ to do so. Whether or not it is reasonable to factor in previous offending will be a matter of discretion for the court. However, assessment of

¹ Section 65(4) of the Sentencing Code. Under section 76 of the Sentencing Code courts have the power to also take into account convictions secured in other jurisdictions.

² Section 65(2) of the Sentencing Code.

this will be informed by the perceived ‘relevance’ (i.e. degree of similarity) between the previous offence and the current offence, and the amount of time which has passed since the previous offence. With regards to the former, previous offending which is unrelated to the current offence being sentenced should not be treated as an aggravating factor, whereas an offence that is similar in nature should be. With regards to the latter, the shorter the space of time between the previous offence and the current offence, the more likely it is to be considered to constitute an aggravating factor.

Previous convictions and Sentencing Council guidelines

The Sentencing Council’s Definitive Guidelines confine the relevance of previous convictions to the framework’s ‘Step Two’ considerations. This means that the ‘Step One’ considerations of offence ‘seriousness’ and ‘harm’, will be determined without reference to an offender’s criminal history. Having established the appropriate sentencing bracket in Step One, reference to an offender’s criminal history (or lack of) can then help the court to navigate where in that bracket the offence should be placed. Where the court finds that the offender has a relevant previous conviction, this will be treated as an aggravating factor and may contribute to a more severe sentence being imposed. However, where the offender has no previous convictions or no relevant/recent convictions, this can be a mitigating factor and may contribute to the imposition of a less severe sentence.

What proportion of offenders have previous convictions?

The vast majority of offenders sentenced for the more serious offences – indictable offences – have at least one previous conviction or caution.³ In the 12 months to September 2019, only 19.5% of offenders sentenced for an indictable offence had no previous convictions or cautions; almost as many offenders (18.4%) had 26 or more previous convictions or cautions.⁴ There is, however, a great deal of variation in the number of previous convictions or cautions depending on the type of disposal: 51.5% of those cautioned for an indictable offence had no previous convictions or cautions whereas only 9.0% of those sentenced to an immediate custodial sentence for an indictable offence had no previous convictions or cautions.⁵

This does not mean that the vast majority of these offenders are having their sentences increased due to their previous convictions. As noted above, a previous conviction has to be relevant to the current offence to be treated as an aggravating factor for the purposes of sentencing. Research conducted by Roberts and Pina-Sánchez based on the Sentencing Council’s Crown Court Sentencing Survey found that notwithstanding the high proportion of offenders convicted of an

³ Indictable offences include ‘indictable only’ offences (the most serious offences, such as murder and rape, that can only be tried in the Crown Court) and ‘either-way’ offences (offences that can be tried either in the magistrates’ courts or the Crown Court depending on the seriousness of the offence in question).

⁴ Ministry of Justice (2020) *Criminal Justice System statistics quarterly: September 2019*, Overview Table Q6.1.

⁵ Ministry of Justice (2020) *Criminal Justice System statistics quarterly: September 2019*, Overview Table Q6.1.

indictable offence having previous convictions, 64% of those sentenced in 2011 had no previous convictions for the purposes of sentencing (i.e. no 'relevant' previous convictions).⁶

⁶ Roberts, J.V. and Pina-Sánchez, P. (2014) Previous convictions at sentencing: Exploring empirical trends in the Crown Court'. *Criminal Law Review*, 8:575-588, p.584.