

**ONTARIO COURT OF JUSTICE
OLD CITY HALL, TORONTO REGION**

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

CHRISTOPHER DAYFOOT

Before Justice S.R. Shamai
Reasons for Sentence released on July 18, 2007

M r. Fred Bartley & Ms. Danielle Carbonneau for the Crown
M s. K. Hensel..... for the Accused, Christopher Dayfoot

SHAMAI J:

[1] Christopher Dayfoot entered guilty pleas on January 17, 2007, on counts of robbery, uttering a threat, failing to comply with recognizance, and fail to appear in court. I imposed sentence on June 22, 2007, with reasons to follow. As Mr. Dayfoot underwent extensive testing for Fetal Alcohol Syndrome Disorder, while on bail pending sentence, it seemed important to me to provide not only my decision as to a fit sentence, which was substantially the subject of a joint submission for conditional sentence, but as well to give reasons for sentence.

[2] Mr. Dayfoot raises the issue of Fetal Alcohol Syndrome Disorder (FASD) on his sentencing hearing, as a mitigating factor. The Court, and more particularly, Mr. Dayfoot, has had the benefit of extensive testing for the symptoms of both FASD and Autism prior to sentencing. The issues were raised by Mr. Dayfoot's adoptive mother, Michelle Dayfoot, whose efforts in identifying her son's problems, and caring for him, have been consistent and intensive, throughout his life. Ms. Dayfoot testified extensively about her experience with her son. Her testimony was intended in part to provide background to the court about Mr. Dayfoot for the purpose of sentencing, and to lay the groundwork for an adjournment in the sentencing hearing for the purposes of conducting further testing in relation to the possible existence of FASD and/or Autism.

[3] I adjourned sentencing for a period of approximately five months, as Ms. Dayfoot was prepared to closely supervise her son, and as well, to set up and follow through the extensive attendances for testing, which have been necessary for the examination of the issues here. Mr. Dayfoot expressed his willingness to undergo the testing. Because of his failure to attend at court while pending trial, his mother being surety, he had been in custody for approximately four and a half months prior to entering his plea. In releasing Mr. Dayfoot pending sentence, I named his mother as surety. At one point, she rendered him into custody because of her concerns with his behaviour. The issue is described as relating to a medication issue, which neither Christopher nor Ms. Dayfoot was able to control, as the medication was for the purpose of controlling behaviour and had been prescribed by a doctor within the correctional services. This demonstrates a sad and cumbersome method of dealing with a

behavioural issue; at the same time it shows Ms. Dayfoot's stated strict approach to her son.

[4] As indicted earlier, Mr. Dayfoot was adopted by Ms. and Mr. Dayfoot. He was 19 months old at the time. His birth records are not available; however Ms. Dayfoot understands that Mr. Dayfoot's heritage is native, and Mr. Dayfoot identifies with that community. Ms. Dayfoot testified to her contact recently, about a year ago, with her son's maternal grandmother. She provided detail to Ms. Dayfoot about Christopher's native heritage, although not a band or tribal affiliation. It is undisputed that Section 718(2)(e) applies to Mr. Dayfoot's case. This plea was taken in the Gladue Court, although no Gladue Report was commissioned. The extensive material tendered on sentencing is consistent with the aims of the Court, and indeed with the jurisprudence, in enabling the Court to consider the issues relating to Mr. Dayfoot's background, in the context of considering the "unique background or systemic factors", mandated by the Supreme Court of Canada in the case of *R. v. Gladue*. Donna Henry, the Native Courtworker in our *Gladue* court, created a proposal for the assessment of Mr. Dayfoot's possible issues, and he complied, with his mother's assistance, with the many attendances to complete the assessment. All parties are to be congratulated in this, as the very symptoms of attention deficit and unwillingness to follow direction make it difficult to complete the assessment. However, in the result, Mr. Dayfoot attended at Anishnawbe Health Centre, Alter Psychological Services, and Pryor, Linder and Associates on numerous occasions and underwent batteries of psychological and other testing. Dr. Laura Pripstein at the Anishnawbe Health Centre and St. Joseph's Health

Centre provided a final diagnosis based on the collected and historical information.

[5] Dr. Pripstein concludes that Mr. Dayfoot suffers ARND with confirmed maternal alcohol exposure. ARND is Alcohol-Related Neurodevelopmental Disorder. That phrase, according to Professor Moore and (now) Justice Green, in their article on FASD, (19 C.R.(6th)99) is included in the constellation of problems referred to in FASD. The American Academy of Pediatrics sees it the other way, with ARND representing an umbrella term subsuming Fetal Alcohol Syndrome Disorder, as the former is a more specific term allowing less divergence in interpretation than FAS. The Policy Statement of the American Academy of Pediatrics in August 2000 reflects the adoption by the Institute of Medicine of the term ARND, in 1996, to “describe conditions in which there is a history of maternal alcohol exposure (described as substantial regular intake or heavy episodic drinking) and an outcome validated by clinical or animal research to be associated with that exposure”. (Pediatrics Vol.106 No.2 August 2000 pp358-361). Either way, Dr. Pripstein concludes her report with a series of recommendations in order to address the diagnosis.

[6] Counsel for Mr. Dayfoot points out one anomaly in Dr. Pripstein’s report. The doctor refers to “significant central nervous system damage/dysfunction connected to confirmed alcohol exposure which is consistent with an ARND diagnosis”. (Ex 6a, p. 2) In fact no physiological testing, such as a CATSCAN, or MRI, was performed, and as the doctor points out later in her report, issues of abnormal brain structure and brain impairment ought to be considered. This recommendation is made by Clinical

Psychologist Kim Garvey, who completed the psychological assessment for Pryor, Linder Associates: she says "An evaluation by a neurologist should be undertaken to clarify his physiological structures as a way of determining other possible causes of his behavioural difficulties". I accept for the purposes of understanding the evidentiary basis of this sentencing hearing that such evidence has not yet been collected, and that the Doctor's comment was based on the anecdotal, not the physiological basis.

[7] I will deal later with the further recommendations of Dr. Pripstein.

[8] In addition to the reports of Ms Garvey, Ms Alter (registered psychologist at Alter Psychological Services) and Dr. Pripstein, I have the reports of Probation Services, Exhibit 3 in this sentencing hearing. The letter of Lee Farrel, Probation and Parole Officer, dated January 19 2007 provides to Crown counsel Ms. Carbonneau a summary of Mr. Dayfoot's involvement with the criminal justice system and a presentence (pre-disposition) report prepared for the Barrie Youth Court in the fall of 2004. Mr. Farrell's recommendation reflects his conclusion that Mr. Dayfoot is "not willing or able to comply" with community based sentences. As well the writer expresses a concern that Mr. Dayfoot's "substance abuse seems to be escalating for him and correspondingly the seriousness of his offences is increasing."

[9] I will not attempt to reproduce the copious and minutious detail of Mr. Dayfoot's life and development, which have been provided to the Court through the extensive testimony of his mother and the several reports referred to above. I will

observe a few things however:

[10] Michelle and Charles Dayfoot, Christopher's adoptive parents, have been stymied virtually since they first brought Christopher into their home, by his unusual behaviour patterns. He enjoyed social interaction but developed such anxiety in that regard that his mother would tell him he was going to church, rather than a social gathering, so he would not be too anxious. His processing speed was found to be much more limited than his verbal ability, evidenced by reading comprehension, with resulting difficulties in school. He was slow to speak. He was easily influenced by peers. He would take on risky challenges and accomplish great athletic feats, but shy away from the challenges of school. Ms Dayfoot, a teacher, has focused enormous effort of understanding her son, getting expert assistance with his behaviour, and informing herself as to possible causes of his behaviour. Throughout, it appears that the Dayfoots have provided a structured and supportive and loving home environment for their son. According to the letter to the Court by Mr. Dayfoot dated December 16/06 (dictated to his mother from jail), his mother's love is not lost on him. What does seem to be lost is the detail of Mr. Dayfoot's birthparents. In particular, the evidence about his mother's alcohol consumption seemed to be the subject of conflicting accounts. However, the experts concluded that there was sufficient support for the accounts of her alcohol abuse, in combination with the stated effects on Mr. Dayfoot, for a diagnosis of Alcohol Related Neurological Disorder to be made. Apparently there is consensus that Mr. Dayfoot was abandoned at 6 months of age, to fostercare, and adopted by the Dayfoots at 19 months.

[13] Ms. Dayfoot's unbounded energy to understand and assist her son have taken her into the study, in an informal setting and through some continuing education as a teacher, of autism and Asperger's syndrome. She initiated the exploration of Autism, and she administered the inventory to determine the existence of Asperger's. With great respect to her experience of her son, such testing lacks the critical components of expertise and objectivity. Ms. Dayfoot is not only caring, she appears to me to be a controlling personality. I have real concerns that these explorations may be unduly imbued with her personality and her view of the world.

[14] Nonetheless, her persistence with her son and her application to task have produced for the Court a thorough assessment and conclusion with respect to the presence of ARND. My experience in the detection of this syndrome in persons before the court is, as noted before, that the very symptoms of compromised "executive control", failure to control impulsive behaviour, and failure to link actions with consequences makes the completion of an assessment such as the one the accused here did complete, an unlikely event. Moreover, the stable environment from which appointments can be kept, and documentation elaborated is often missing for those whom are suspected of suffering ARND. Ms. Dayfoot and her son, the accused, are to be congratulated for persisting in completing this assessment.

[15] Having assembled all this information and a diagnosis for Mr. Dayfoot, the question is, what impact does it have on the sentencing process? In their article about Fetal Alcohol Spectrum Disorder and the Criminal Justice System (cited earlier) authors

Moore and Green note the extensive and difficult issues which may be posed by FASD in relation to trial issues for accused and complainants suffering FASD. On sentencing, the authors state simply:

“Convicted FASD persons are, by definition, special needs defendants. The special programs and services essential to meeting these needs are woefully lacking” (op.cit. p.107)

[16] In Mr. Dayfoot’s case, the resourcefulness of his family has made the availability of special programmes and services less problematic.

[17] The sentencing vehicle making the resources available to Mr. Dayfoot presents an interesting legal challenge however. As noted in the brief reasons on the day sentence was imposed, Mr. Dayfoot’s continued non-compliance with court orders is notionally a stumbling block to a conditional sentence. A consideration of the requirements of s. 742.1 of the Criminal Code, which enables the imposition of a conditional sentence, requires that the offender not endanger the safety of the community. Implicit in this is the ability to comply with court orders. Mr. Dayfoot’s record shows an abysmal history of failing to comply with court orders: there are 19 findings of guilt and convictions for this type of offence. In considering a conditional sentence for an individual for whom FASD was a “possibility”, Justice Knazan made this observation:

“The failure to comply with any court orders in the past becomes less aggravating once I consider the possibility that Mr. Paul has never really been absorbing or processing the Court’s direction, or is incapable of the minimum level of social function that court orders require” (*R. v. Paul*, Ontario Court of Justice, Oct. 6, 2006 @13)

[18] The other key to a consideration of this aspect of conditional sentence is whether the offender is likely to commit violence upon other members of the community. In this regard, Mr. Dayfoot is not likely to endanger the community. This is the first violent offence on his record, and although robbery is by definition violent, it was the threat, not an act of violence, which qualifies this incident as robbery. As well, the circumstances strongly suggest that the co-accused exerted a negative influence upon Mr. Dayfoot.

[19] Both these factors are consistent with the manifestations of FASD and ARND. The inability to process a court order, barring significant assistance, is symptomatic, as Justice Knazan notes in the case of *Paul*. Moore and Green observe: "Planning, organizing and learning from past mistakes are not in their repertoire... Typically they do not make connections between cause and effect, anticipate consequences or take the perspective of another person." (op. cit. @101.) This combination is a recipe for non-compliance with a court order.

[20] The susceptibility to influence of others, or suggestibility is documented in the Moore and Green article as well. This tendency is symptomatic of FAS, although not exclusive to it.

[21] In Mr. Dayfoot's case, a plan of care is detailed by Dr. Pripstein, upon consideration of the many sources of data resulting from the FASD assessment. She starts with the manifestations of anxiety, and Mr. Dayfoot's struggles with the anxiety

he faces. She continues to make recommendations regarding his developing a vocational strategy, having regard to his strengths and weaknesses. She recommends that a Medic Alert bracelet be obtained, and engraved "FASD", so that when (or should) Mr. Dayfoot become involved again with the criminal justice system the police and the courts may start with "a better understanding of his behaviour". Lastly, Dr. Pripstein recommends that Mr. Dayfoot increase his interaction with the Aboriginal traditions and culture.

[22] While the probation officer Mr. Farrell expressed the view that community supervision was not suitable for Mr. Dayfoot, the recommendation was made without the benefit of the reports tendered through the assessment process. It is significant that despite an initial Crown position that a sentence of two years less a day (less pre-trial custody) was appropriate, the Crown modified its positioning in light of the evidence gathered through the sentencing process. As I noted earlier, Crown now joins the Defence in recommending a conditional sentence.

[23] In my view it is important, in light of the unusually detailed evidentiary base in this case, to review the propriety of conditional sentence for a crime of violence in the presence of confirmed Alcohol Related Neurodevelopmental Disorder. The pattern of non-compliance with court orders is symptomatic of ARND, it appears. The violence in this case is at a low level, being expressed in words and threats rather than causing bodily harm. It is in a setting where the accused Mr. Dayfoot was negatively influenced by his co-accused. Again this is symptomatic of a person suffering ARND. To punish

behaviour which results from a clinically recognized disability runs contrary to the principles of criminal law, certainly where treatment is available. Unaided, the continued disability leaves Mr. Dayfoot more dangerous than he might be with treatment. Thus fundamental principle of sentencing expressed in Section 718.1, relating to the degree of responsibility of the offender, is properly interpreted by fashioning a sentence taking into account the role played by ARND, and the prospect of eradicating this source of criminal misconduct.

[24] The application of section 718.2(e) supports the result of a conditional sentence as well, inasmuch as “the consideration of all available sanctions other than imprisonment... with particular attention to the circumstances of aboriginal offenders” directs the Court to the shocking prevalence of suspected FASD/ARND among the aboriginal population. Restorative justice in sentencing a member of the First Nations communities must be seen in the context of not just the individual and the victim. Daniel Kwochka, (quoted in *R. v. Gladue* paragraph 72), says: “Restorative justice necessarily involves some form of restitution and re-integration into the community.” Where the community is the First Nations communities, many of which have been ravaged and damaged by the dismemberment effected by residential school policies, and the disintegration of family and community identity through adoption, restorative justice must apply to the community as well as the offender and victim. There is particular significance to this in First Nations traditions of justice, as the Court points out in *Gladue* also:

“What is important to note is that the different conceptions of sentencing held by many aboriginal people share a common underlying principle, that is, the importance of community based sanctions.”(para. 74)

To give effect to the use of community based sanctions in this urban setting, the Court must enable the administration of sentencing conditions through the First Nations community as far as is practicable.

The abuse of alcohol and other intoxicants has resulted in a high proportion of FASD in members of the community. This court can only speculate on the systemic impact of FASD with respect to the high proportion of aboriginals in conflict with the law, and in the prison system in some parts of the country.

[25] Thus inasmuch as the relevant circumstances of aboriginal offenders, in Mr. Dayfoot’s situation, includes both his diagnosis of ARND and his separation from his heritage, the fit sentence of this court will take restorative justice into account on a community level. To restore Mr. Dayfoot as a member of his community, and to restore to the community its ability to deal with its own members, the sentence of this court must to the degree possible ensure that the sentence is administered within the appropriate First Nations community.

[26] In the result, for the reasons stated, and in light of the joint submission, the sentence of the Court is, as stated on June 22, as follows:

Eighteen Months sentence, to be served in the community, taking into account four and one half months time served, concurrent on all charges; upon the following conditions: that you report forthwith to the conditional sentence supervisor, and thereafter as required; that you be bound by the following conditions:

- 1) During the first 6 months of this order, remain confined at your home residence, 7 days a week, 24 hours per day except when in the company of Michelle or Charles Dayfoot or for the purposes of attending work, school, making job applications, scheduled medical or counseling sessions, medical emergencies, attend upon your condition sentence supervisor.
- 2) Seek and maintain gainful employment or education.
- 3) Attend upon your medical practitioner Dr. K. Cherla or designate and take whatever treatment as prescribed.
- 4) Reside at 23 Arletta Street, Georgetown.
- 5) Attend upon Alex Jacob of Native Family and Child Services or designate for the purpose of counseling.
- 6) During the remaining 12 months of this order, obey a curfew, be in your place of residence between the hours of 8 PM to 6 AM, except for the purposes of employment, education, or counseling with your mother's permission.

Released: July 18, 2007



Signed: "Justice S.R. Shamai"