

**IN THE DISTRICT COURT  
AT WELLINGTON**

**I TE KŌTI-Ā-ROHE  
KI TE WHANGANUI-A-TARA**

**CRI-2019-085-000779  
[2019] NZDC 13977**

**NEW ZEALAND POLICE**  
Prosecutor

v

**THOMAS JAMES MORRISON**  
Defendant

Hearing: 19 July 2019

Appearances: A Handcock for the Prosecutor  
L Sziranyi with R Bayer for the Defendant

Judgment: 19 July 2019

---

**NOTES OF JUDGE W K HASTINGS ON SENTENCING**

---

[1] Thomas Morrison, you appear for sentence on 30 charges. By my count, there are 22 theft charges, each of which carries a maximum penalty of three months' imprisonment; there is one charge of assaulting a constable with intent to obstruct, which carries a maximum penalty of three years' imprisonment; there are three charges of threatening to kill, each of which carries a maximum penalty of seven years' imprisonment; there are two trespass charges, each of which carries a maximum penalty of three months' imprisonment; there is one charge of assaulting a constable acting in the execution of his duty, which carries a maximum penalty of six months' imprisonment; and one charge of failing to supply identifying particulars, which also carries a maximum penalty of six months' imprisonment.

[2] Since your first appearance on 3 May 2018, you have been on bail from 3 July 2018 to 7 August 2018 and from 18 December 2018 to 28 February 2019. As of today's date, by my count you have spent 12 months in custody and three months on bail. The time period of your offending stretches from January 2018 to April 2018 and then, while on bail, in July 2018 and January 2019.

[3] Your criminal history spans 24 pages. It starts in the adult court in 1997 in Tauranga. All of your convictions are for very similar offending.

[4] I have a comprehensive neuropsychological assessment Dr McGinn dated 7 June 2019 which formally diagnoses you with foetal alcohol syndrome disorder.

[5] Defendants who have foetal alcohol syndrome disorder, or FASD, present challenges for every participant in the criminal justice process. They present challenges that cannot be adequately overcome by a judge alone, sitting at the end of the process. Individual and systemic criminal justice outcomes are improved by a more holistic wraparound approach that involves health and social interventions, well in advance of a defendant's criminal justice system involvement, that reduce the risk of a defendant with FASD entering the criminal justice system. Once inside the criminal justice system, individual and systemic outcomes are improved by interventions from the police at an early stage, by prosecutors, by defence counsel, and ultimately by judges at bail hearings, case review hearings, trial, and sentencing.

[6] There are diagnostic criteria for FASD.<sup>1</sup> These include confirmed maternal alcohol exposure, evidence of a characteristic pattern of facial anomalies, evidence of

---

<sup>1</sup> See for example the excellent article by Judith Adams, "Fetal Alcohol Spectrum Disorder", <https://www.sialliance.health.nz/UserFiles/SouthIslandAlliance/File/2016%20SIAP%20Fetal%20alcohol%20spectrum%20disorder.pdf>. The Canadian Diagnostic Standard is typical:

**FAS with confirmed maternal alcohol exposure**

A. Confirmed maternal alcohol exposure

B. Evidence of a characteristic pattern of facial anomalies that includes features such as short palpebral fissures and abnormalities in the premaxillary zone (e.g., flat upper lip, flattened philtrum and flat midface)

growth retardation, and evidence of central nervous system neurodevelopmental abnormalities.<sup>2</sup> FASD will “manifest along a spectrum of cognitive deficits and maladaptive behaviour.”<sup>3</sup>

[7] This raises the issue of overlap that those with FASD have with a number of other neurological and social factors. Mental and impulsive disorders such as ADHD have been found to coexist in a significant majority of defendants with FASD.<sup>4</sup> It may be difficult, as a result, to attribute FASD alone to any particular criminal behaviour, and there are undoubtedly many people with FASD who do not engage with the criminal justice system. But one study has found that young people with FASD in Canada are 19 times more likely to be incarcerated than young people without FASD.<sup>5</sup>

[8] The concern, then, is not to criminalise people with FASD, nor is it to excuse the misconduct of those with FASD. The concern is to figure out what to do about the behaviours that bring people with FASD into the criminal justice system, while they are in the system, to maximise the possibility that they do not return to the system when they leave it.

---

C. Evidence of growth retardation, as in at least one of the following:

- low birth weight for gestational age
- decelerating weight over time not due to nutrition
- disproportional low weight-to-height ratio

D. Evidence of central nervous system neurodevelopmental abnormalities, as in at least one of the following:

- decreased cranial size at birth
- structural brain abnormalities (e.g., microcephaly, partial or complete agenesis of the corpus callosum, cerebellar hypoplasia)
- neurologic hard or soft signs (as age appropriate), such as impaired fine motor skills, neurosensory hearing loss, poor tandem gait, poor eye-hand coordination.

<sup>2</sup> Albert E. Chudley, Julianne Conry, Jocelynn L. Cook, Christine Loock, Ted Rosales, Nicole LeBlanc, “Fetal alcohol spectrum disorder: Canadian guidelines for diagnosis” (2005) 172 *Canadian Medical Association Journal* S1–S21, which cites Stratton K, Howe C, Battaglia FC., *Fetal alcohol syndrome: diagnosis, epidemiology, prevention, and treatment* (Washington, Institute of Medicine and National Academy Press, 1996). Updated, and more granular, clinical guidelines were published in August 2016 in a special article in 138(2) *Pediatrics*.

<sup>3</sup> Chudley et al., above n.2.

<sup>4</sup> M Mela and G Luther, “Fetal alcohol spectrum disorder: Can diminished responsibility diminish criminal behaviour?” (2013) 36 *International Journal of Law and Psychiatry* 46-54.

<sup>5</sup> Popova S, Lange S, Bekmuradov D, et al. “Fetal alcohol spectrum disorder prevalence estimates in correctional systems: A systematic literature review” (2011) 102 *Canadian Journal of Public Health* 336.

[9] Persons with FASD are likely to be suggestible, have difficulties organising memory, and have diminished capacity to foresee consequences, make reasoned decisions on the spot, and to recognise and learn from mistakes. This is a recipe for frequent collisions with every stage of the criminal justice system. Ways of dealing with persons with FASD, however, can be generalised to a level of best practice guidelines for anyone coming into contact with the criminal justice system.

[10] On arrest, a person with FASD may not fully appreciate the consequences of what they are alleged to have done and are likely to want to please an interviewer by agreeing with leading and tagged questions. It is likely that a person's particular neuropsychological make-up will not be known to the first responders. Making accurate notebook entries or, indeed, visual recordings of first encounters will assist in a subsequent assessment of the admissibility of evidence obtained at first encounter.

[11] After arrest, the police may impose bail conditions or may bring the defendant to Court for a judge to impose bail conditions. A person with FASD is likely to have memory and organisational difficulties and be less able to remember Court dates. A person with FASD is likely to have a history of non-appearance and re-offending and would not necessarily present, on the basis of past behaviour, as a good candidate for bail. Fewer, but possibly more restrictive, bail conditions increase the odds of compliance. A judge is also able to order a screening report at this stage.

[12] The next appearance is when ordinarily a plea would be taken. The defendant would have received initial disclosure and have been assigned a lawyer. The responses of a person with FASD may, however, raise issues concerning fitness to plead. Persons with FASD may appear able to instruct counsel and have a basic understanding of Court proceedings.

[13] If the defendant has pleaded not guilty, it may be that a deeper inquiry is warranted to ensure the voluntariness of the plea and the defendant's understanding of the facts that are alleged upon which the plea is based. Such an inquiry would be appropriate for any defendant, but it becomes acutely important for those with FASD. It may be appropriate to have a case review hearing when there is sufficient information to inform the judge, prosecutor, and defence counsel of the presence of

FASD, with a view to reviewing the level of charge, the efficacy of a trial, and the likely disposition of the matter. At this stage, a comprehensive neuropsychological report, if recommended by the screening report, would be useful.

[14] At trial, a person with FASD may be less able to organise an account of what happened as a result of memory retrieval difficulties and may be less able to communicate clearly what he or she remembers. This could create the impression that the person with FASD lacks credibility. To avoid adverse credibility findings by a fact finder, consideration should be given to appointing an expert communication assistant to ensure the fact finder has the best evidence upon which to reach a verdict. For crimes requiring proof beyond reasonable doubt of subjective intent, issues may arise as to whether the defendant with FASD had the necessary intent at the time of the *actus reus*. Issues may also arise with respect to defences of diminished responsibility. In both cases, these issues may arise because persons with FASD may be less capable of appreciating the ordinary consequences of their behaviour that brought them to Court in the first place.

[15] If the defendant with FASD is found guilty or pleads guilty, significant sentencing issues arise. The Sentencing Act 2002 requires a sentence that is proportionate to the gravity of the offence and the degree of responsibility of the offender. Sentencing judges must be able to tailor a sentence that both reflects society's denunciation of the offending and the possibility of the offender's rehabilitation and reintegration into society. Most sentencing statutes also require a sentence that specifically deters the defendant from re-offending and generally deters others from committing the same or similar offence.

[16] The FASD of a defendant for sentence cannot be ignored in an assessment of the degree to which the defendant is responsible for the offending. A defendant's FASD must be considered when considering rehabilitation and reintegration. Rehabilitation in the traditional sense presupposes that a defendant is able to understand and learn how not to do what brought him into the criminal justice system. Defendants with FASD are less able to process this information and learn from their mistakes if rehabilitative efforts are conveyed in a one-size-fits-all format. Persons

with FASD cannot be restored to a position they would have been in had they not been born with FASD.

[17] The deterrent value of a sentence also becomes a much less relevant consideration when sentencing a person with FASD, given that a person with FASD is less able to foresee the consequences of his or her actions. Like effective rehabilitation, deterrence assumes that a person can learn from her or his mistake so that the mistake is not made again. Reducing the risk of recidivism and reintegrating a defendant with FASD into the community becomes much more of a management issue than a punishment issue.

[18] Defendants with FASD who receive sentences short of imprisonment, or sentences of imprisonment followed by release conditions, need to have those conditions carefully considered. The concerns are the same as the concerns with bail conditions, except that sentence or post-sentence conditions will likely be in place for a longer time. Free-floating monitoring conditions will almost inevitably be breached by persons with FASD who are inherently less able to keep appointments or to remember what they were supposed to do between appointments. Punishment for breaches of such conditions will keep persons with FASD in the criminal justice system longer than is necessary and effectively punishes them for having FASD rather than for criminal behaviour.

[19] Essentially, the imposition of such unsupported conditions sets a person with FASD up to fail. If, however, conditions are clearly explained, are necessary and have a purpose, and provided they are accompanied with support which could be as small as timely reminders or as large as a facilitated living residence with support persons, then it is reasonable to assume a person with FASD would be better able to comply with such conditions, which in turn makes recidivism less likely.

[20] Conditions administered by probation services can pose special difficulties for persons with FASD. Ordinarily, successful compliance with conditions will mean the conditions are relaxed or removed, on reasoning that compliance is a sign of rehabilitative success. Often, however, the success of people with FASD depends on the continued existence of those conditions. Removing them could have the effect of

making reintegration into the community less successful and increase the chance of re-offending.<sup>6</sup>

[21] The judge cannot have direct influence beyond the expiry of a sentence, but what she or he does up to, and sometimes during, sentence can make a difference. Failure to take FASD into account at all stages of the criminal justice system does not achieve justice for the person with FASD or for the general community. There is little to be gained by holding persons with FASD to standards they cannot achieve, and there is much to be lost by not doing things currently within our reach to address recidivism.

[22] I turn now to Dr McGinn's report. She is a clinical neuropsychologist who was trained in FASD in Canada. She is New Zealand's leading expert on FASD. She reports that you have spent most of your life in and out of jail since you were 17 years old. She writes that you told her that, in total, you think you have spent about 20 years of your life in prison.

[23] She sets out your history in great detail. She writes that you told her that your mother was a chronic alcoholic and is now a methamphetamine addict. You told her that you were always into mischief and always in trouble at school, and that you were expelled from all the schools that you attended. You told her that you were always stealing when you were little. Once you were in state care, you remember living at Weymouth Home and Waimokoia in Auckland and spending a lot of time in the "naughty corner." You could not name most of the schools you attended, but you said that you went to Melville High in Hamilton. It was not long before you were expelled. You told Dr McGinn that as an adult you have either been in prison or homeless, and that you have never kept your own home. You have also never maintained paid employment and have been on an invalid's benefit because of your FASD.

[24] She writes that it was difficult to get an account of how you lived when not in prison. You described a cycle of getting out of prison, having no identification

---

<sup>6</sup> Caroline L Tait, Mansfield Mela, Garth Boothman and Melissa A Stoops, "The lived experience of paroled offenders with fetal alcohol spectrum disorder and comorbid psychiatric disorder" (2017) 54 *Transcultural Psychiatry* 107.

documents, being homeless, and stealing to get food and clothes. Sometimes you would couch-surf, but you said people got sick of you. You did not recall that anyone from a disability agency or other service had helped you or that you had ever been in a post-release hostel.

[25] When you were asked what the probation service had done to help you, you said that your probation officer just makes it difficult. You said that you would forget to report and then they would make you report twice a week, but you had no money for food or transport to get to the increased number of appointments. You told her that you needed a routine so that you could get used to following it. You said that Probation would change the days and times and that you would get confused and forget. You explained that Probation did not understand and thought that you were mucking them around deliberately, but you were not.

[26] Dr McGinn told you that people in Canada with FASD receive supported housing, supported employment, and an FASD key worker who could help with problems when they arose. You told her that you would like to receive all of those things but that you never had. You told her that you were also keen for Probation and the Police to learn about FASD so that they would know what was wrong with you and how to help you.

[27] Dr McGinn summarises her assessment of you as follows, and I will quote directly from her report:

Thomas was exposed to alcohol prenatally, and on testing it shows deficits in the five brain domains of adaptive function (unable to reach minimum adult levels of independence and responsibility in daily living), motor skills, motor planning and nonverbal reasoning, attention, distractible limited attention span, memory, slow to learn, quick to forget visual and verbal information, and executive function, disorganised, impaired reasoning and decision making, structure-dependent, confabulates, can't inhibit himself. Deficits in three or more domains of brain function are required for an FASD diagnosis, and Thomas's areas of brain impairment are well in excess of this. Thomas also suffered disadvantage in his childhood and has been a long-term substance abuser of morphine. However, the wide-ranging areas of severe brain deficit found on testing could not be attributed to postnatal factors. He clearly has suffered the problems described by these results since childhood, and FASD is a lifelong condition.



[28] Dr McGinn goes on to make a statement that I agree with. She estimates that well in excess of \$2,000,000 has been spent on prosecuting and imprisoning you for a multitude of petty crimes and for your inability to follow Court-imposed conditions. She writes that had even a quarter of this sum been spent on meeting your disability needs, you would have been able to live a happier and more successful, supported life, and the community would have been safer. She states that “Perhaps now is a time to reconsider and not repeat the approaches that have been ineffective so far.”

[29] That leads me to the pre-sentence report dated 27 June 2019. The probation officer writes that the key issue from a Community Corrections perspective is that you are “released from prison with the recommended support in place, that being in terms of accommodation, meaningful occupation, and a key worker to support his day-to-day living.”

[30] The pre-sentence report states that for a sentence to be successful, you will require multidisciplinary management. The report states that that is beyond the ability of Community Corrections to manage alone.

[31] Ms Sziranyi has supplied a memorandum to the Court dated 18 July 2019. That memorandum records that Probation was unable to make a referral for an assessment by a needs assessment and service co-ordination service provider (NASC) at the Bay of Plenty District Health Board because they require you to be living at an address in order to get the appropriate disability support. Dr McGinn has made a referral for an assessment on the basis of your instructions that you want to go back to your grandfather’s address in [location deleted]. Ms Sziranyi has received an email from the needs assessor for Support Net Kupenga Hao Ite Ora, which is the local NASC in the Bay of Plenty. The needs assessor, Jane Lyall, acknowledges the referral received from Dr McGinn but advises that nothing can be progressed until you are living at your grandfather’s address.

[32] The pre-sentence report recommends a sentence of intensive supervision. Dr McGinn has also made a number of recommendations.

[33] Having discussed this with you, Ms Sziranyi and Ms Handcock this morning, and in light of everything I have just said, to my mind a sentence of nine months' intensive supervision is the appropriate sentence for this offending and for you. This sentence is given on the understanding that you will live at [your grandfather's] address so that the needs assessment can be done on the basis of your actual presence at that address.

[34] There will be three special conditions. These are conditions that will align the purposes of your sentence with Dr McGinn's recommendations:

1. You are to engage with disability support services as directed by your probation officer;
2. You are to attend an assessment for substance abuse as directed by a probation officer. You are then to attend and complete any counselling, treatment or programme as recommended by the assessment;
3. You are to attend an interview with a psychiatrist which Forensic Mental Health will arrange for you, to develop a treatment plan for your ADHD, and you are to comply with that treatment plan.

Those are the only conditions.

[35] I will also impose a judicial monitoring condition, because I am very interested in how your life turns out following this sentence.

[36] There will be no reparation orders.

W K Hastings  
District Court Judge