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THE CHILDREN'S COURT OF
WESTERN AUSTRALIA

MI 59 of 2019
JO 244-246 of 2019
PE 5329 of 2019
PE 5330 of 2019
PE 2224 of 2020

THE STATE OF WESTERN AUSTRALIA

and

WT

JUDGE H. QUAIL

TRANSCRIPT OF PROCEEDINGS

AT PERTH ON MONDAY, 11 JANUARY 2021, AT 11.20 AM

MR J. GRINCERI represented the State of Western Australia.

MS N. ANDERSON appeared for Youth Justice Services.

MS H. MUHLING appeared for the accused.

HIS HONOUR: WT, I'm going to now sentence you again. All right. I've got to go through a bit because what I'm saying is recorded and it's actually going to be written out so that other people can read it. They won't read about you because your identity is protected, okay, but other people need to know the reasons for my decision. So it's just going to take me a little while to go through some of that and then at the end I'm going to speak to you and tell you what the new sentence is. And I will tell you when that is.

WT has pleaded guilty to the charges which are before me today. I won't go through each of them now because we went through them a little while ago. And he was, after pleading guilty, sentenced by Magistrate Hogan on 13 November 2020 to a 12 month conditional release order, which applies to all of those charges before me today.

Now, there were other charges, which were also before the magistrate. It is a little bit difficult to tell from the transcript, but certainly at least one of them, I think, had gone to trial. The magistrate dealt with the other charges by way of a section 67 dismissal for time spent in custody. Now, whether that is a disposition which is properly open is, in fact, something which is being considered by the Supreme Court at the moment, but in any event those matters are not before me for review. It's only the charges which the magistrate placed WT on a conditional release order for, which are before me.

Now, pursuant to section 40 of the Children's Court of Western Australia Act, this is a hearing afresh. In other words, it's not necessary for the defence to identify any error on the part of the magistrate. I have to decide afresh what the appropriate sentence is having regard to all of the circumstances, and those circumstances are not only those which were before the magistrate at the time, but I also need to take into account what has happened since WT's sentencing on 13 November.

And I have had regard to the reports which were before the magistrate and I identified them before so I won't go through them again, but what I have also heard this morning is not only the plea in mitigation from Ms Muhling who represents WT, I've also heard from Mr Grincer, but in terms of additional information, there has been some important additional information which has been provided verbally by Youth Justice through Ms Anderson in terms of how WT has been going on the conditional release order since the magistrate put him on it.

And I've also heard from Ms Arends about WT's circumstances because he is in the care of the department,

which I will say something about in a moment, but he has been placed with his sister in Kalgoorlie has been living with her for the last two months and so I have had an update about that and I know that WT's sister is in the back of the court in Kalgoorlie and has accompanied him to the court.

Now, in considering sentencing afresh I am mindful of the principles of Juvenile Justice. Ms Muhling has helpfully gone through those which are expressed in the Young Offenders Act in her written submissions, and I've, of course, also had regard to what the Court of Appeal has said about the application of those principles of Juvenile Justice in decisions such as JTP v The State of Western Australia [2010] WASCA 191 and DC v The State of Western Australia [2014] WASCA 121, which I'm not going to go through in any detail now, but the abiding principle of Juvenile Justice is a focus on rehabilitation of young offenders.

Now, the facts of the charges have been read out this morning by the State prosecutor. I'm not going to repeat them. They were admitted on WT's behalf and I will incorporate what the prosecutor said into these reasons. The offences which are properly identified by Mr Grincerri as being the serious ones, and Ms Muhling agrees, are the incident which happened on 14 March 2019 at Hillarys which started off with an attempted robbery and then an actual robbery where WT along with someone who was a co-offender and older. Unfortunately I don't know what happened to him or her, but those two charges of actual completed robbery involved violence and the stealing of two bicycles from the complainants, who were simply minding their own business.

And albeit that WT is a very small child and was very young at the time, nonetheless, the experience of being robbed would have been traumatic for the two victims involved, and the impact on them is - although I don't have victim impact statements, is something which I do take into account and it's why these offences of robbery are serious.

Now, the threats at the home where WT was living are less serious, but, nonetheless, people in the Department of Communities who are doing their jobs looking after young people in care ought not be threatened. WT, though, I know was unhappy with his circumstances at the time. He's a very young boy, immature and incidents like this do regrettably happen. Importantly, though, WT hasn't done anything similar since. Indeed, he has not been charged subsequent to these offences and so there's some indication there of increasing maturity and a recognition by him that he ought not be doing things like this.

Now, when WT came to be sentenced by the magistrate, there are a couple of significant considerations which I need to take into account. The most significant of those is at the time of his sentencing he had, in fact, spent 113 days in custody. Now, the reason for that is, as Ms Muhling concedes, largely WT's fault in the sense that he committed some of these offences whilst on bail and was thus in a, it seems, schedule 2 position, and it also seems that at that time for reasons that I will come to he was - "running riot" might be putting it too highly, but certainly the department didn't know where he was.

His grandmother who he was supposed to be living with had no control of him and he was certainly out of control to a degree and thus he ended up in custody, in circumstances where he was very young, because this offending covers a period when he was 11 and 12 and he's still only 13 years and 10 months old. So at the age of 11 he first went into custody. The period when he was in custody, was broken up. It wasn't 113 days consistently, but the periods were between February 2019 and November 2020 as there were continuing problems with his bail and his accommodation.

Nonetheless, WT was entitled to have that time taken into account and it's significant that he was as young as he was. The impact of custody on young people is greater than on older people, and it's particularly significant in circumstances where his history of appearances in the Children's Court, in fact, shows that he has not been in trouble previously. He has got no prior record at all before he has ended up in detention on remand because of those behavioural problems and bail problems whilst all these charges were progressing through the system.

Now, when he was sentenced by the magistrate he was given credit, as I said, for time in custody, but those time in custody matters were stealings. There was an attempted robbery, a breach of bail, a trespass and criminal damages, which were related to the threats made. Still I have to say in the Children's Court the 113 days would not be fully utilised in the sentencing in relation to those offences which are recorded as section 67 dismissals in circumstances where WT had never been in any trouble before.

Now, in the sentencing, although it's not necessary to demonstrate any error, the magistrate's remarks, with respect to him, are very brief. Magistrate's Court is a bit different to the President's court. It is often the case that magistrates are not able to take as long as the President in going through those matters which are relevant

to their sentencing disposition, but there are some things that they have to do.

As the Court of Appeal made plain in the decision of *LCM v The State of Western Australia* [2016] WASCA 164 at 135, section 9AA of the Sentencing Act applies to sentencings in the Children's Court and it's necessary to state and express what the discount is for a plea of guilty on Children's Court charges and, with respect to the magistrate, he didn't do so in sentencing WT and so that is something which will now need to be done in the resentencing. It has been explained to me that although WT didn't plead guilty at the very earliest opportunity to these charges, he never intended to plead not guilty. He didn't plead not guilty. It was simply the case of them tracking along so that everything could be dealt with together.

It's also a consideration in relation to children, particularly those with a level of cognitive disability as WT has, which I will say more about in a moment, it can be difficult to get instructions and often lawyers are in a difficult spot in terms of securing pleas at the very earliest opportunity. It does seem to me, having regard to all those circumstances, that the appropriate discount that WT should have received for his pleas of guilty was one of 20 per cent, the maximum being 25 per cent.

In his sentencing his Honour also said the following in relation to WT. This is at page 13 of the transcript:

He has got a diagnosis of FASD so he can't ever be rehabilitated from that actual disability, if that's what's it's called, which means he's likely to reoffend because he can't not offend because of his FASD diagnosis, which means he will be on a CRO and he will breach it and he will, therefore, be alleged to be in breach. He will go on bail and will be schedule 2 forever.

Now, again with the greatest respect to his Honour, that was an error. WT does have a diagnosis of FASD and I'm going to come to that in a moment, but because he has a diagnosis of FASD does not mean he can never be rehabilitated and it doesn't mean that he is likely to reoffend and it certainly doesn't mean that he can't not offend because of his FASD diagnosis. As the Court of Appeal said in *LCM* - this is at paragraph 123:

By its nature and as its name indicates, FASD involves a spectrum of disorders. A particular disorder of an individual with FASD may be severe. It may be minor. FASD may lead to a varying number of deficits of

varying intensity. Thus blanket propositions about how a diagnosis of FASD bears on the sentencing process should be avoided. Rather, attention must be directed to the details of a particular diagnosis of FASD including the nature and extent of the specific disabilities and deficits and how they bear upon the considerations relevant to sentence.

Now, I want to deal briefly, not in any great detail with some of WT's personal circumstances, which are relevant to sentencing in relation to these matters afresh. WT is the third of four children. His parents separated in infancy and he lived with his mother in Kalgoorlie until the age of four, after that he went into the care of his grandmother because the department intervened because of the significant neglect that WT was experiencing and he is now subject to a protection and care order until the age of 18.

His grandmother tried very hard with WT after he came into her care, but it seems that things deteriorated from about 2015 when WT moved down to Perth. In his original home environment, although he was very young and perhaps has very little memory of it, he was exposed to not only considerable neglect but substance abuse, violence and antisocial criminal behaviour.

With his grandmother there has been some exposure in terms of his wider family to antisocial behaviour, but it seems in reading the reports that the bigger problem in terms of care by his grandmother, although WT very much liked her and wanted to stay with her, it was clear that she didn't have the ability to control him and keep him at home and it was really during 2019 it seems when that had deteriorated to the extent where WT, albeit very young, had, in the words of the department, self-selected and wasn't staying very much with his grandmother and, indeed, the department didn't know where he was, which is no reflection on them.

It can be very difficult in such circumstances to find children who don't necessarily want to be found and aren't cooperating with the department, and it's in that context where he was almost homeless, certainly hanging around with older people, being exposed to criminal and antisocial behaviour, it was in those circumstances that WT was getting into the trouble with the law that he was. He had lived for a while in a group home in 2018. That didn't work out very well, resulting in the offending, some of which is before me on review.

Now, before I deal with the changes in WT's circumstances since his sentencing and really which come

about even prior to his sentencing in November of last year, it's also necessary to say a bit more about his background and in that regard I've been assisted by the FASD report, which I've been through, of 3 December 2020, but even more so, I have to say, by the psychological report of 16 December. In relation to the FASD report, WT has been diagnosed with FASD and the presence of the sentinel features which are identified suggest, although it's not proven, that he was exposed to prenatal alcohol.

His grandmother says that prior to his birth his mother wasn't very heavily involved in substance abuse, but did later become so involved. The FASD report confirms that at the time of the assessment in February 2020 WT did have severe impairment in three areas, language, memory and in academic performance, and in terms of his academic performance, that is at least it seems to me partially related to the fact that his history of schooling has been seriously truncated because of the difficulties in his care and he has been truanting from as early as year 4.

At the time of the FASD report he was essentially illiterate. Now, that is not to say that on the basis of the FASD report it's possible to generalise in the way that the learned magistrate did and, with respect, he was in error, as I have already said, to do so. It's clear from the FASD report that WT does have significant cognitive strengths in non-verbal areas, in relation to his fine motor skills, simple attention, regulation of affect and his adaptive and executive functioning.

So although he has problems with memory and language in particular, it's not the case at all that it's inevitable he will reoffend and inevitable that he is incapable of being rehabilitated. In my view, it's very much the case that WT is someone who requires ongoing assistance in order to secure the long-term protection of the community, but also so that he can live the best life that he can and it does seem to me that he is completely capable of learning. He has just not much had the opportunity.

The psychological report, as I say, is helpful and to a degree confirms, I think, those conclusions. He was very cooperative and polite in the assessment process, indeed, displayed very good interpersonal skills and engagement with the psychologist. I won't read them, but the psychologist's conclusion and her opinion at page 17 and page 18 I agree with and, as the psychologist, Ms Sampson, who is very experienced, said, it's important that WT re-engage in education and other prosocial activities. It's important in his educational placement to limit his

exposure to negative peers, and his living circumstances should be stabilised.

Now, it seems to me that the department have had regard to that. It's clear because of the FASD that WT does need structure in his environment and clear rules which are repeated, which brings me then to what has happened over the last couple of months and that is that WT has relocated to Kalgoorlie, bearing in mind that this offending, particularly the serious offending at Hillarys, occurred in the context of his being in Perth. He wanted to be with his grandmother and, if not his grandmother, with his family.

And the department have arranged a placement with his sister who, albeit that she herself is young at 23 years, is, nonetheless, an adult in Kalgoorlie with stable accommodation, and judging by what I've seen so far, things have been going very well with her in Kalgoorlie. WT has stayed out of trouble in Kalgoorlie. He has complied very well with the terms of his conditional release order. In fact, it seems that he has gone beyond what was required in terms of compliance.

The magistrate, when I read the transcript, said that WT should only have to go once a month because he wouldn't be able to go more than that. Well, again with respect, the magistrate was wrong about that because WT has been able to go once a month and has voluntarily attended more than once a month because he obviously has been gaining some benefit out of attending on Youth Justice in Kalgoorlie. He has stayed out of trouble. He has had stable accommodation with his sister in Kalgoorlie and a plan is in place for him to return to school so that he can start to learn again.

And although that has been only over the last two months, it's important to note, as Ms Muhling has, that, in fact, there has not been any reoffending apart from the breaches of bail now for some considerable period of time. So again WT has proved that he is able to stay out of trouble when his personal circumstances are better than they were at the time that he was getting into this serious trouble.

So having regard to all of those matters, the very positive changes since the sentencing, the fact that he has spent 113 days in custody, which is something which ought be taken into account in the sentencing in relation to these matters in addition to the way it was taken into account by the magistrate for the section 67 matters, having regard to the fact that WT was a very young person at the time of offending and is still a very young person

at the age of 13 and the important principles of Juvenile Justice it's my view that it was not open to the magistrate to impose a sentence of detention.

In my view, it's not appropriate now to impose a sentence of detention. This is a matter having regard to the fact that he had spent 113 days in custody, which could have been dealt with and, in my view, certainly now should be dealt with by way of the imposition of a youth community-based order. Taking into account the period of time that WT has already been under supervision and those other matters that I've already referred to, it's my view that there should be a youth community-based order for a further period of five months.

And the purpose of that is really so that WT can continue to have the benefit of the rehabilitative assistance of the Youth Justice officers who he is working so well with in Kalgoorlie. Now, Ms Anderson, in terms of an agenda, I don't have any new agendas, but what ought that be in terms of the agenda for the - - -

ANDERSON, MS: The original order was for supervision only.

HIS HONOUR: Supervision only.

ANDERSON, MS: I would suggest supervision and attendance as directed, your Honour.

HIS HONOUR: All right.

ANDERSON, MS: That way we can leave it up to Youth Justice to make those directions.

HIS HONOUR: Thank you. So the condition of the youth community-based order will be supervision and attendance as directed. If Youth Justice feel that there's a need for WT to do some counselling, then that can be incorporated under the attendance component, and the supervision, again if they feel it needs to be more than once a month, it can be more than once a month. Now before I speak to WT are there any other orders which are required to go along with that order?

ANDERSON, MS: Not from the Youth Justice perspective, your Honour.

ARENDS, MS: No, thank you, your Honour.

HIS HONOUR: All right. Now, WT, I don't know if you followed - - -

WT: Yes.

HIS HONOUR: - - - anything that I said there, right, but what you need to know is this. All right. I am resentencing you, WT. I don't think you should have received a sentence of detention. That is because you spent so much time in custody, but also, WT, it's because you've been going really well. I'm really impressed by what I've heard about how you've changed since you've gone back to Kalgoorlie. All right.

WT: It's just not me.

HIS HONOUR: Yes.

WT: My sister is helping me to, yes - - -

HIS HONOUR: Well, look - - -

WT: - - - keep out of trouble.

HIS HONOUR: - - - it's very good, WT, that you're giving credit to your sister, but don't sell yourself short. You're the one that's actually staying out of trouble as well. All right. But I hope you can see from this experience, WT, that what happens when you've got somewhere safe to live with people you like like your sister, things go well for you, don't they?

WT: Yes.

HIS HONOUR: When you run away, when you haven't got somewhere stable to live, when you're hanging out with older boys, that's when you get into trouble, isn't it?

WT: Yes, true, true.

HIS HONOUR: So what's the lesson in that, WT?

WT: Don't be an idiot ever again.

HIS HONOUR: Yes, don't be an idiot - - -

WT: Yes.

HIS HONOUR: - - - and stay living with your sister. She's good for you.

WT: Yes.

HIS HONOUR: And then that way you stay out of trouble and if other boys come along and say, "Come on, WT. You come with us. We're going to go and have a bit of fun," what are you going to say to them, WT?

WT: No. Yes.

HIS HONOUR: Say, "No." Just say, "No." Say, "No, I've got to go home and be with my sister." All right. Now, it's also really important, WT, I don't want you believing - don't believe what anybody says to you about you can't learn. You can learn. All right.

WT: Yes.

HIS HONOUR: So it's very important that you go back to school so you can learn to read and write. It's difficult to get through life unless you can read and write. So that's what you've got to - that has got to be your focus this year when you go back to school is learning how to read and learning how to write. Okay. So that's the next very important thing that I want you to remember. You got that?

WT: Yes.

HIS HONOUR: All right.

WT: Yes, got it.

HIS HONOUR: So, WT, what it's going to be, it's going to be a - instead of a sentence of detention hanging over your head, it's going to be a five month - it's called a youth community-based order. So you're still going to be on an order and if you breach the order you've still got to come back to court and be resentenced. Okay. So if you commit any other offences, you've still got to come back to court, and if you don't do the order, you've got to come back to court.

WT: Yes.

HIS HONOUR: But you've been going so well I'm pretty confident that you will complete this order, okay, because it's really - just as you know, it's just so that you've got somebody to talk to so they can check you're going all right and if you need any help - - -

WT: Yes.

HIS HONOUR: - - - they can give it to you. Okay. So it's going to go for another five months. Do you understand that?

WT: Yes, I understand.

HIS HONOUR: All right. That's going to be sent through to you and when you sign it up you can leave with your sister. Have you got any questions, WT?

WT: Have you - how much - or, like, how much will I be, like, reporting in a week or a month?

HIS HONOUR: Right. Now, before you had to report once a month. Okay. Well, I've actually said - I've actually changed that. I've said it's up to your Youth Justice officer. If they want to see you every week, then you've got to go and see them every week. Okay. If they want to - if they say, "No, WT, you can just come and see us next fortnight or three weeks time," you've just got to do what they say about that. Understood?

WT: Yes.

HIS HONOUR: All right.

WT: I understand.

HIS HONOUR: Any other questions, WT?

WT: No, not really, no.

AT 12.21 PM THE MATTER WAS ADJOURNED ACCORDINGLY