EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

NOTE: NO PUBLICATION OF A REPORT OF THIS PROCEEDING IS PERMITTED UNDER S 438 OF THE ORANGA TAMARIKI ACT 1989, EXCEPT WITH THE LEAVE OF THE COURT THAT HEARD THE PROCEEDINGS, AND WITH THE EXCEPTION OF PUBLICATIONS OF A BONA FIDE PROFESSIONAL OR TECHNICAL NATURE THAT DO NOT INCLUDE THE NAME(S) OR IDENTIFYING PARTICULARS OF ANY CHILD OR YOUNG PERSON, OR THE PARENTS OR GUARDIANS OR ANY PERSON HAVING THE CARE OF THE CHILD OR YOUNG PERSON, OR THE SCHOOL THAT THE CHILD OR YOUNG PERSON WAS OR IS ATTENDING. SEE http://www.legislation.govt.nz/act/public/1989/0024/latest/DLM155054.html

IN THE YOUTH COURT
AT ROTORUA

I TE KŌTI TAIOHI
KI TE ROTORUA-NUI-A-KAHUMATAMOMOE

CRI-2018-269-000016
[2019] NZYC 175

THE QUEEN

v

[EF]
Young Person

Hearing: 17 April 2019

Appearances: A McConachy for the Crown
M Simpkins for the Young Person

Judgment: 17 April 2019

ORAL JUDGMENT OF JUDGE A C WILLS

---

[1] [EF] is before the Court today following an application for transfer of his sentencing to the District Court. [EF] faces three charges, two of aggravated robbery and one of burglary. He was also subject to a supervision order at the time of the offending and there is an outstanding supervision sentence in relation to a number of charges - receiving, escaping from custody, possession of cannabis, possession of instruments for drugs, resisting police and a further escaping charge.

[2] In making that decision today, I need to consider many factors, the offending itself and all of the principles that are required in the Act.

[3] The Crown applied for an order that the sentencing be transferred to the District Court. Mr Simpkins [EF]'s counsel asks that disposition remain in the Youth Court.

[4] In making the decision, I must apply general Youth Court principles because that transfer application is provided for in the Oranga Tamariki Act 2018. The principles are set out in s 208 and ss 4 and 5 of the Act. In general, the principles in ss 4 and 5 provide a start point that require a young person who commits an offence to be held accountable and encouraged to accept responsibility for their behaviour and further that they are dealt with in a way that it acknowledges their need and that will give them the opportunity to develop a responsible beneficial and socially acceptable ways.

[5] The relevant principles in this particular case for [EF] that are set out in s 208 are these:

> (d) that a young person who commit an offence should be kept in the community so far as that is practical and consonant with the need to ensure the safety of the public.
>
> (e) that a young person's age is a mitigating factor in deciding the nature of sanctions to be imposed.
>
> (f) that sanctions imposed should be the least restrictive form that is appropriate in the circumstances.
>
> (fa) measures to deal with offending by a young person should, so far as practicable, address the causes underlying that offending and

(g) in deciding the measures for dealing with offending by a young person, consideration should be given to the interests and views of victims and the impact of the offending on them.

[6] Section 284 sets out the factors that must be taken into account when making a decision about transfer into the District Court. Those are:

(a) the nature and circumstances of the offence,

(b) the personal history, social circumstances and personal characteristics of the young person, so far as those matters are relevant to the offence,

(c) the attitude of the young person towards the offence,

(d) the response of the young person's family or whanau to the causes that underlie the offending and the measures available to address those causes and the young person themselves,

(e) any measures taken or proposed to be taken by the young person or their whānau, and

(f) the effect of the offence on any victim.

(g) Previous offending is also a factor.

(h) Family Group Conference recommendations and plans are relevant, and I must also consider in s 284 the causes that underlie the offending and the measures available for addressing those.

Nature and circumstances of the offending

[7] I look first at the nature and circumstances of the offence. The first charge in time was an aggravated robbery that took place on [date deleted] 2018 at about 4 o'clock. [EF] and another young person went to a dairy on [street deleted] in Rotorua. They watched the shop and when no one was inside, went in. [EF] was wearing sunglasses and pulled his hood over his head to conceal his face. He punched

the victim in the head and he fell to the ground. He then held the victim down while the other young person took money and cigarettes. The victim had a small cut to his left eyebrow and a scrape on his elbow but did not require medical attention. When [EF] was initially spoken to by the police, he denied the offending.

[8] The first offence in time was the burglary of [date deleted] 2018. At 5.30 pm, the home owner locked up and went out and that evening [EF] went to his house on [street deleted] in Rotorua, broke a window and climbed in, taking a PlayStation 4, computer, X-box 1, and $300 in cash. He was identified by a fingerprint and when spoken to by police, he declined to comment.

[9] The next offence was an aggravated robbery which took place [12 days later] in Taupō with another and different young person to the earlier aggravated robbery. The two were with others. They watched the [shop] in [street deleted], then [EF] and one other entered, wearing their hoods up. The shop owner was concerned and called the police. About 20 minutes later, [EF] and the other young person went back into the shop. [EF] rushed behind the counter with his fists raised and demanded the victim get down and placed him in a headlock and threw him to the ground while threatening him. [EF] demanded the victim open the cash register and removed all of the notes from the till drawer. He then took cigarettes and the two left. When the police spoke to [EF] about this shortly afterwards, he declined to make any statement.

[10] In both of the aggravated robberies, there was a degree of violence. There was emotional harm to both victims and minor physical injury to one. There were two people involved, a basic disguise was used and there was some financial loss. Significantly, the offending was committed while [EF] was subject to his supervision sentence.

History, social circumstances and personal characteristics

[11] I now turn to the history, social circumstances and personal characteristics. Since the age of three, [EF] has been engaged with what was Child, Youth and Family Services and is now Oranga Tamariki. He has used drugs from the age of eight and since the age of 12, has been a daily cannabis user whenever cannabis was available.

He has been now in as many as 30 placements and has attended 12 different schools. He has been in the custody of Oranga Tamariki, Child, Youth and Family Services or with the State, and the Court since he was seven years old. He has had at least five psychological assessments over that period since he was seven.

[12] There is no doubt that [EF] has suffered trauma. There is no doubt that he self-medicates to avoid that trauma by the use of drugs and there is no doubt that his attachments are disruptive and dysfunctional. The assessments have not resulted in therapeutic intervention. In part, that has been because there has been no security of placement over a number of years. There was a period in [EF]'s life where he had five placements in five months. That was discussed by a psychologist in one of the reports. That psychologist had asked [EF] about the placements and [EF] was not able to explain why he misbehaved and undermined the placements. He could not come to terms with that when he identified to the psychologist that what he wanted was a long-term home. So, the undermining of placements, the behaviour and the trauma has sat with [EF] really since he was a small child. It has been difficult for him to address those things. The psychological reports note anxiety and physiological distress whenever those issues are addressed in any psychological assessment or intervention. It is clear that [EF]'s initial primary motivation in offending was to obtain money to access drugs.

[13] I will deal with those issues more later, but I turn now to look at the attitude of [EF] and his family towards the offences. Although [EF] has expressed remorse, he does not show empathy towards his victims and the psychological report says that [EF] has developed what he describes as victim entitlement which has led to [EF]'s circle of concern to be narrowed to a few people close to him. It is not surprising therefore that he struggles to show empathy towards victims. [EF]'s mother has been spoken to in relation to this offending and her concern is not for the victims but rather for [EF].

The measures proposed to be taken by the young person to the victims

[14] [EF] has no ability to offer reparation or make amends and although he suggested he would write an apology letter, that has not to my knowledge been done

and I do not consider that it would be appropriate at this time for him to write such a letter. That may need to wait for later.

Effect on victims

[15] The next factor is the effect on the victims. I have a victim impact statement from the manager of the [dairy]. That person was hit hard and had a swollen eye and scratches and a bruised shoulder. He says that he was terrified at the time and that he also suffered over $2000 of financial loss. It is his belief that [EF] should spend at least a year in jail. The social work report refers to the views of the owners of the [shop]. The person who was working in the shop at the time was the owner's son. He was shaken by the attack but said to the social worker about [EF] that he was too busy to worry about people who lacked ambition or goals with a future and he too felt that [EF] should spend at least a year in prison.

Previous offending

[16] I turn now to the previous offences that have been proved. [EF] has 11 convictions for burglary, two for demanding with menaces and six for other dishonesty offences. The police however say that they have engaged in some way with [EF] (and that will be in a vast range of matters including absconding and relevant care and protection issues) 131 times over his life. [EF] has been sentenced to supervision before, - that was in June 2017, to supervision, with residence on 7 November 2017 followed by six months' supervision, and on 17 July 2018 again to supervision with residence followed by six months' supervision. Each of the supervision sentences have been breached. A great deal of effort has been put into addressing [EF]'s placements which have largely been unsuccessful. As I have said, [EF] continually undermines his placements and that has meant that therapeutic intervention has been very difficult to put in place.

The law

[17] A transfer to the District Court should be made only if the Youth Court response is clearly inadequate. That is a high threshold. It is not particularly useful to look at

other, particularly older, decisions that are based on their own facts. The Youth Court and higher Courts have in the last few years developed a greater understanding about the working of the adolescent brain and in particular the Court of Appeal has noted the growing body of scientific evidence which shows that adolescents have deficiencies in decision making ability, an increased vulnerability to external coercion, are more orientated towards peers and therefore responsive to peer influence, have diminished ability to control impulsive behaviour, are more prone to react with gut instincts and impulsive and aggressive behaviour and are less future orientated than adults, illustrated by a focus on the here and now, rather than long term consequences.[1] In that particular case, the Court considered rehabilitative prospects and followed an earlier decision in finding that a young person should not be regarded as beyond help, even after serious offending, unless there is no escape from that conclusion.[2]

[18] That approach and the principles that I have already referred to, in many ways reflect the international obligations which New Zealand has accepted and that includes the United National Convention on the Rights of the Child and The Beijing Rules, United Nations Standard Minimum Rules for the Administration of Juvenile Justice. The United Nations Convention on the Rights of the Child at Article 37B identifies that detention or imprisonment shall be used only as a measure of last resort and for the shortest appropriate period of time. Rule 19 of The Beijing Rules reflects that same principle and the commentary notes the adverse influences of institutional settings, particularly for juveniles, and the importance of correctional or educational facilities over prison.

[19] Judge Cooper, when he saw [EF] on 26 February 2019, questioned whether [EF] was able to effect change and what he said was that there needed to be intensive work done with him to effect change and noted that he wanted to give [EF] a bit more time in residence just to see how he was progressing, before a decision was made in relation to transferring him to the District Court.

[20] The Crown say primarily two things. First, that [EF] has re-offended while subject to sentence - that none of the Youth Court orders that have been put in place

---

[1] *Churchward v R* [2011] NZCA 531.
[2] *R v Cuckow* CA312/91, 17 December 1991 at 10.

have been able to change his behaviour and that that shows that the Youth Court measures are not adequate. They also point to the seriousness of this offending and the need for the Court to consider the public interest and public safety.

[21] Mr Simpkins for [EF] and in opposition to the transfer, concedes that [EF] has a history of previous offending but submits that it is not in the public interest to have [EF] transferred to the District Court where he would receive a likely sentence of imprisonment. He submits that a further order in the Youth Court will enable [EF] to address the reasons behind his offending noting all of the particular circumstances and factors that are referred to in *Churchward*. He invites me to put in place a further supervision with residence sentence.

[22] One of the factors that is relevant is [EF]'s age. He is still 16 and was 16 when the offending was committed. He will be 17 towards the end of [month deleted]. Any measure in the Youth Court will conclude when [EF] is 18 years old.

[23] The question really for me is whether there is sufficient resource and time to enable motivation to change to be generated and then to enable the therapeutic intervention to be put in place. What is sad about this situation is that we have known for at least 10 years that significant therapeutic intervention was required. At this time, I want to look in more detail at the psychological reports. The two most current reports are that of Mr Nick Marseilles of 9 August 2017 and Dr Kevin Austin of 13 July 2018.

[24] Mr Marseilles' report noted a statement in a Hub referral which realistically assessed [EF]'s needs. This is still relevant.

> "Community and whānau placement cannot meet [EF]'s needs. He needs specialised care in a secure setting for a minimum of six months with therapeutic input on attachment relationships, emotional regulation, pro social behaviour, alcohol and drug cessation and empathic response and remedial schooling. Over time, [EF] could be moved to a specialist placement with a behavioural component."

That was what was needed. In his report at paragraph 56, he says that:

"[EF] has not shown motivation to change."

It says this:

> "He has come to rely on intoxication as a key means of managing his emotional state, reporting heavy use of cannabis from the time he wakes up. Given the historical information demonstrating the presence of significant anxiety and distress, the use of cannabis as a means of self-medicating is understandable. However, the need for funds that he cannot obtain through legal means has resulted in substance use being one of the significant drivers for his offending."

[25] At paragraph 58 he went on to say that:

> "[EF] did not currently show remorse but had a sense of victim entitlement which I have already referred to, originating from his own accurate perception of frequent experience of victimisation during his upbringing. He has narrowed his circle of concern to a few people close to him and views himself as entitled to breach the rights of others for his own gratification."

He also identified [EF] as having post-traumatic stress disorder symptoms. It did not matter, he said, whether there was a formal diagnosis, but it was clear that [EF] has been subject to severe and repeated trauma and subsequently demonstrates chronic problems in functioning.

[26] The difficulty with giving [EF] the assistance that he needs has been his reluctance to engage more lately. He has not been motivated to change but I do note that in Dr Rosston's report at paragraph 56 that Dr Rosston's opinion is that [EF] has not received offence-focused interventions that are likely to make any substantive difference in lessening his risk of re-offending. He goes on to say:

> "This has clearly been hampered by his lack of motivation to engage in such interventions."

[27] With that in mind, the real issue for me today is whether there is any prospect that [EF] can be motivated to change and kept in a place where intervention is possible. Part of the reason why I am dealing with this matter today and Judge Cooper did not deal with it earlier was because that Judge wanted [EF] to have a bit more time to see if he could make some progress. When I heard the matter last week, I had a report from [EF]'s team leader at [the Youth Justice Residence] and I also had the opportunity to hear from [EF]'s teacher there. [EF]'s teacher sent an audio file which noted that he had been making good progress - that his behaviour, attitude and effort were all improved - that he had Level 1 work to do in numeracy and that that would be finished

shortly and, - that he was making good progress and also noted a very co-operative attitude. The notes from the team leader were attached to the social worker Mr Roberts' updated report. [EF] demonstrated settled behaviour. He had remained at Level 3 in terms of behaviour and therefore entitled to rewards, and on one occasion, he returned to Level 2 and worked hard to get back to Level 3.

[28] There was one incident on 21 March that had resulted in admission to secure care. That was an incident that clearly had been provoked by another young person but [EF]'s response was completely unacceptable. He has had very positive interactions with staff and peers. The report noted that [EF] is prepared to own up to his mistakes and to apologise and to offer assistance. It also noted that [EF] now had greater insight and was able to better manage his reaction when requests are not responded to instantly or are declined and he had shown great improvement in his patience in that area particularly. There was also noted some emerging leadership skills. His school attendance had been regular and [EF] was showing capacity to listen to reasons. What that says to me is that there is work in progress and [EF] has stepped up as Judge Cooper had suggested.

[29] When I look at what would be likely to happen if I transfer this sentencing to the District Court, I am aided by submissions from counsel. There is no question that the starting point for these two aggravated robberies is likely to be in the vicinity of five years' imprisonment, although there would be significant discounts for [EF]'s personal circumstances, for his youth and some account would be taken of the time that he has spent in residence. He would still not be below the threshold for a community-based sentence. That is so, even with a guilty plea. The possibility exists though that a community-based sentence on a principled basis would be imposed. That would be a home detention sentence. If a home detention sentence were imposed, [EF] would not be in the secure residential environment that he requires. If a sentence of imprisonment were imposed, [EF] would spend the first part of that sentence in a Youth Justice residence. While I am aware that it is the intention of the Department of Corrections to retain 17-year olds as much as possible in Youth Justice residences, I cannot be assured that that would happen in circumstances where there is significant pressure on Youth Justice beds for younger people. It is also possible that [EF], who is in general reasonably compliant and works well with others, may well be the very

type of person that Corrections would consider would be appropriately transferred to the Youth Unit of an Adult Prison. Although in Residence there is a strong rehabilitative focus, the same could not be said on transfer to the jurisdiction of Corrections.

[30] In a decision of Principal Youth Court Judge John Walker, *Police v SD* he had obtained information from the Department of Corrections for youth specific interventions that could be available if Corrections were to manage a young person's sentence.[3] The outcome, in short, of that inquiry was that rehabilitative sentences would be very limited.

[31] With that in mind, I need to consider what would be the most appropriate approach in the Youth Court and measure that against the outcome of a transfer. I do that with a focus on the public interest and public safety. There are two very clear aspects to public interest and public safety. There is a short-term view that removal of [EF] from the community for an extended period is in the short-term interest of the public. It prevents him from offending. The longer-term interest however is quite different. There is a real risk that without the active therapeutic intervention that has been described in numerous psychological reports there will be no change to [EF]'s offending behaviour. He will therefore remain in the same state as identified in the psychological report - that is, of high risk of re-offending of an escalating nature. Motivation to change is critical as I have said. The longer-term interest of the public and public safety is best effected by [EF] being motivated to change and being involved in therapeutic work.

[32] As a result of that primary consideration and having assessed that [EF] has not received therapeutic intervention to date of a nature which would enable change for him, I must retain some hope that that is possible. However, there needs to be both a carrot and a stick in this approach. Drug use has led to offending, but trauma has led to drug use. There are two parts to rehabilitation. The first part is address the drug use, the second part is address the trauma. [EF] has been, I consider, too afraid to address the trauma. His anxious physiological responses to questions about it and his

[3] *Police v SD* [2018] NZYC 169.

disengagement from that sort of counselling almost immediately, suggests that to be the case.

[33] The supervision with residence sentence that I intend to impose will include the conditions that are set out in the order. However, they will also include these conditions:

(a) The first is that [EF] is to undertake and fully engage in alcohol and drug counselling services to be provided to him while he is in residence.

(b) The second is that [EF] is to undertake and fully engage in psychological therapeutic counselling which he is to be offered in residence.

Those conditions will mean that if [EF] does not engage in that therapeutic assistance, he will not be entitled to early release.

[34] I put that in place because I know that counselling work, particularly for drug addiction, is effective whether a young person or a drug user is voluntarily engaged in counselling or compulsorily engaged in counselling. Both are effective.

[35] The supervision with residence sentence of six months must be followed by a supervision sentence which I do not impose at this time, but which will require significant planning. That supervision sentence will be for the length of time until [EF] is 18 years old. If he is entitled to early release, then that will be nine months approximately. If he is not, it will be seven months approximately. The planning for that must include consideration of attendance at residential rehabilitation.

[36] [EF] has been using drugs since he was eight years old. It is his primary source of comfort. He is self-medicating. On release, he will search for drugs if change is not effected.

[37] I intend to impose this supervision with residence sentence only on the first aggravated robbery in time. That will leave the second and the burglary. That will leave the second aggravated robbery live. I do that to ensure that once [EF] is released

from residence I, or whoever the Judge is, will have the tools available to put in place measures like electronic monitoring of bail to support him in his residential rehabilitation if that is what is planned for, or in relation to any supervision sentence that is undertaken. That means that effectively, [EF] will have control and a degree of incarceration I suppose, for as long as is needed, up till he is 18 years old. It also leaves open to me or any other Judge, the ability to deal with this matter differently if [EF] does not stick by the programmes and the rules.

[38] The supervision with residence sentence will have an early release date of 16 August 2019 and a final release date of 16 October 2019. Nominally, I direct that this matter be called for an early release hearing on 16 August 2019. It is likely that it will be called on the Tuesday prior to that date which is a Youth Court day, but that is the nominal date for the hearing.

A C Wills
Youth Court Judge