Citation: *R.* v. *Blanchard*, 2011 YKTC 86

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10-00087
11-00430
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Chief Judge Cozens

REGINA

v.

DEVIN LEE ARTHUR BLANCHARD

Appearances:
Joanna Phillips — Counsel for the Crown
Lynn MacDiarmid — Counsel for the Defence

REASONS FOR SENTENCING

[1] COZENS C.J.T.C. (Oral): Devin Blanchard is before the Court on ten Informations covering 17 charges. Nine of these Informations contain breach of undertaking charges flowing from Mr. Blanchard's breach of the terms of the undertaking.

[2] Pursuant to a plea agreement between Crown and defence, Mr. Blanchard has entered guilty pleas to six charges, the most serious of which is an assault causing

bodily harm committed on March 21, 2009. The guilty plea to this charge was made on July 8, 2009, and it was this offence which first brought Mr. Blanchard into contact with the courts. The facts related to several of the charges the Crown is not seeking guilty pleas on were read in as aggravating factors pursuant to s. 725 of the *Code*. The Crown has elected to proceed summarily on all charges.

[3] Although my task as a sentencing judge in this case is far from simple, the facts of the offences themselves are not particularly complex. On March 21, 2009, the police were called to the house of William Dawson, who was Mr. Blanchard's uncle. When the police arrived, Mr. Blanchard was repeatedly punching the defenceless Mr. Dawson in the face. Mr. Blanchard did not respond to verbal commands from the police officer to stop and was physically restrained, with some measure of force required due to his combative nature at the time. Mr. Dawson received a one-inch laceration above his left eye and a two-inch laceration behind his left ear, both of which required sutures to repair. Mr. Dawson's face was covered in blood and there were pools of blood on the floor. He also had minor scratching and bruising to his chest, arms, and face.

[4] Since that date, Mr. Blanchard has been charged with 11 counts of breaches of recognizance or undertaking, one charge for failing to attend court, two charges of criminal harassment, and one charge of causing a disturbance. He has pled guilty to two breaches of alcohol abstention clauses for breaches committed on September 15, 2009; May 6, 2010; December 23, 2010; and September 8, 2011; one charge of breach of recognizance for not abiding by his curfew on June 2, 2009; one rolled-up charge of failing to report to his Bail Supervisor between February 1st and 15th, 2010, and one charge of causing a disturbance by being drunk on September 17, 2011. He has

acknowledged his failure to attend court as required on October 21, 2009.

[5] I note that Mr. Blanchard was significantly intoxicated on some of these occasions and generally acted somewhat aggressively with respect to the RCMP and his family's property. Although Mr. Blanchard had no involvement with the criminal courts before the assault bodily harm offence committed in March 2009, he is certainly now having trouble extricating himself from the justice system.

[6] Mr. Blanchard has spent a total of 89 days in pre-trial custody, 83 of these were between his arrest on May 6, 2010, and his release into the Adult Resource Centre on July 26, 2010, and six were spent between his most recent arrest on September 17, 2011, and his release on September 22, 2011. Counsel are agreed that in the circumstances, Mr. Blanchard is entitled to pre-trial custody credit at the rate of 1.5 to 1; accordingly, he has 134 days credit.

[7] The Crown's position is that Mr. Blanchard should spend additional time in jail, most notably for the assault bodily harm charge. On that charge, Crown submits an appropriate disposition is six months jail, followed by 18 months probation on terms as set out in the pre-sentence report. On the other charges, Crown is asking for 30 days on each of three of the breaches, the two abstains and the reporting, 22 days on the curfew breach, and 15 days for the cause disturbance conviction. Because all of these offences took place on different dates, the sentence should be calculated consecutively, resulting in a total sentence of 307 days, followed by the 18-month probation order. Less credit for time served, this would result in Mr. Blanchard spending an additional 173 days in custody. Crown counsel is opposed to the sentence being served

conditionally in the community. Counsel emphasizes the need to protect the community in opposing the imposition of a conditional sentence.

[8] Defence counsel, on the other hand, submits that the appropriate disposition for Mr. Blanchard is one of time served, mostly to be reflected in the sentence on the assault causing bodily harm conviction, plus a further period of strict probation. In the alternative, she suggests that a conditional sentence would be appropriate. In support of this, she points to the fact that the assault bodily harm charge was Mr. Blanchard's first offence and that he has abided by strict conditions without incident between his release on September 22, 2011, and the sentencing hearing on November 4, 2011, and so is capable of complying with a community disposition.

Background:

[9] I have received fairly extensive pre-sentencing material on Mr. Blanchard. He received a diagnosis of Fetal Alcohol Spectrum Disorder, (FASD) in May 2008, and at the same time he was also diagnosed with Attention Deficit Hyperactivity Disorder. There is some indication that Mr. Blanchard has also received diagnoses of Obsessive Compulsive Disorder and Panic Disorder. It is clear from the material before me that Mr. Blanchard suffers from often-debilitating anxiety. I heard from his mother, Tracey Blanchard, that Mr. Blanchard is on a number of medications to control his depression and anxiety. The author of the pre-sentence report also notes that Mr. Blanchard suffers from a severe alcohol abuse problem, and this is certainly reflected in the offences for which he is being sentenced today, and acknowledged through Mr. Blanchard's own admissions. Further, his inability to finish school, attend programming,

and maintain employment are largely a result of his struggles with alcohol.

[10] Mr. Blanchard has taken advantage of a number of substance abuse and counselling options since becoming involved with the justice system, many of which are outlined in the pre-sentence report. Although his attendance was often sporadic, in both individual and group settings, some programs he was able to complete while others he did not. He often missed appointments. The author of the pre-sentence report notes that while Mr. Blanchard has good intentions of wanting to work with counsellors and attend groups, he often cannot follow through with the required work to be successful.

[11] Mr. Blanchard was a participant in the Community Wellness Court for approximately a year, from July 2010, before his involvement was terminated due to his inability to comply with the requirements of the court. The author of the Community Wellness Summary, dated June 29, 2011, noted that Mr. Blanchard had, "Successfully completed most of the identified areas of his wellness plan." The writer also noted that Mr. Blanchard's chances of being successful in the Community Wellness Court depended largely on whether his living environment was a supported and structured one.

[12] While he has considerable family support, the living arrangements and environment his family provides can lack structure and be problematic at times. There is an indication that at least some of his difficulty in various programs was due to challenges he had with the material or in relating to other individuals. Mr. Blanchard is noted to be immature and have difficulty fitting in in adult environments, most notably at the YARC. Of considerable significance is the observation in the pre-sentence report

that his non-compliance and problematic behaviours could be a direct result of organic brain damage and disability. Mr. Blanchard has the opportunity to attend a ten-week substance abuse program in January 2012 geared towards offenders who suffer from FASD, mental health concerns, and other cognitive issues.

[13] Mr. Blanchard is currently 21 years old. He grew up in Whitehorse. While he appears to be close to and receive support from his mother, sister, and step-father, as well as his grandparents, he says the dynamic in the family can be tense, with arguing and fighting when they spend too much time together. His mother, Tracey Blanchard, notes that Mr. Blanchard's childhood was traumatic; notably, as an eight or nine-year-old, Mr. Blanchard was present when the man he believed to be his father suddenly collapsed and died of a heart attack. Mr. Blanchard is close to his grandparents, Carol Dawson and Norm Blanchard, and to his uncle, Ralph Blanchard. It seems that all three of these adults are currently sober, and Norm Blanchard, in particular, encourages Mr. Blanchard to pursue sports interests and other recreational activities. I also heard that Mr. Blanchard can be very supportive of, and of considerable assistance to, his mother and younger sister.

[14] Mr. Blanchard appears to have struggled in school, especially socially. He admits to bullying other kids and arguing with his teachers. He was placed in the working educational life skills program but dropped out in Grade 12, and he now regrets not having completed high school. Mr. Blanchard's difficulty getting along with people has continued in the workplace, where he has been let go from jobs for problematic behaviour, including fighting with managers. He is currently unemployed. He acknowledges having anger management issues.

[15] Mr. Blanchard has expressed regret for his actions and acknowledged that they were wrong. He reconciled with his uncle, William Dawson, who has since passed away from illness. Mr. Blanchard is prepared to continue to meet with mental health professionals and he is prepared to continue to take the medications that have been prescribed for him.

Just Sentence:

[16] Of particular relevance to my determination of a just sentence for Mr. Blanchard is his diagnosis of FASD. I understand that Mr. Blanchard has only recently become aware of this diagnosis, although it was made in 2008. He indicated to his case manager that he felt embarrassed and ashamed by it. It is noted that he once said he would kill himself if he had FASD. He should not feel this way. An FASD diagnosis can open doors for Mr. Blanchard in terms of ensuring his accommodation in the workplace and school and in other areas of his life. An FASD diagnosis does not mean that someone is stupid or incapable. FASD is a brain injury that presents challenges, but if Mr. Blanchard and the people around him try differently, he can accomplish things that he has struggled with up to this point. It may be that some of these accommodations will let Mr. Blanchard feel less frustrated and anxious, and thus make him less likely to act out negatively. It is clear from the various reports that have been filed that Mr. Blanchard needs to live in a supported living environment in order to have a chance to do well.

[17] While Mr. Blanchard has expressed an unwillingness to work with FASSY, I expect that this has largely been as a result of his difficulty accepting his FASD

diagnosis. I would urge him to reconsider, as FASSY can assist with providing him support and structure and opening doors to employment and education.

Principles of Sentencing:

[18] Section 718 of the *Code* states that:

> The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct;
> (b) to deter the offender and other persons from committing offences;
> (c) to separate offenders from society, where necessary;
> (d) to assist in rehabilitating offenders;
> (e) to provide reparations for harm done to victims or to the community; and
> (f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community.

In addition, s. 718.1 states:

> A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[19] The impacts of FASD can, and generally will, result in an offender being found to have a lower degree of moral culpability than an offender who does not suffer from FASD or other similarly limiting cognitive difficulties. With respect to the objectives set out in s. 718, as has been canvassed in other judgments, not all of these are a good fit when applied to individuals with FASD. As explained by Lilles J. in *R.* v. *Harper*, 2009 YKTC 18; “Denunciation and deterrence are often less applicable to someone with brain damage caused by FASD.”

[20] Indeed, and possibly in recognition of this, the Crown has based its submission for custody on concerns about community safety and the need to separate Mr. Blanchard from the community in order to ensure this safety. I do not believe we are at this point in this case.

[21] As acknowledged by counsel, the most serious offence committed by Mr. Blanchard is that of assault causing bodily harm. While in the pre-sentence report, the LS/CMI rates him as a medium-high risk to reoffend, it is unclear just what type of offence he would be likely to commit were he to reoffend. There is no reliable indication that any reoffending would result in an act of violence. The reoffending could be, and most likely would be, that of non-compliance with court orders. I note that Mr. Blanchard has not been found to have committed an act of assaultive physical violence since March 2009. His behaviour has remained fairly constant in the more than two and one half years that have elapsed since this charge was laid. While it is clear from the information I have about Mr. Blanchard that he goes off the rails when he drinks, he currently presents as more of nuisance than a danger to society. I am not saying this to minimize his behaviour because, left unchecked, he may well become a community safety concern, but rather to acknowledge that he is a young man who, prior to being charged in March 2009, had no contact with the criminal justice system. As such, I do not consider Mr. Blanchard to pose a threat to the safety of the community.

[22] It is clear that Mr. Blanchard needs to stop drinking alcohol if he wants to stay out of trouble. His pre-sentence report indicates that he has an easier time doing this when he has the structure of either school or employment. Now, with an FASD diagnosis he

is aware of, if employers or teachers are able to accommodate some of his particular needs, he may be able to better maintain this structure.

[23] One more thing needs to be mentioned prior to passing sentence. Mr. Blanchard's pre-sentence report has provided me with some background information about Mr. Blanchard's childhood and family. From this limited information and other observation, it appears, although it is nowhere explicitly stated, that Mr. Blanchard is aboriginal. Section 718.2(e) of the *Criminal Code*, requires me to consider:

> "… all available sanctions other than imprisonment that are reasonable in the circumstances … with particular attention to the circumstances of aboriginal offenders."

[24] In the present case, I have little information regarding the impact of Mr. Blanchard's aboriginal status on his present circumstances. I am aware, however, of the disproportionate number of aboriginal individuals that come before this Court suffering from the effects of FASD in the Yukon, with FASD being a contributing factor to their commission of offences. In many of these cases, the Court has background information that links the offender's aboriginal heritage to the negative circumstances that contributed to their being born with FASD. Although my reasons for sentencing in this case have largely been informed by Mr. Blanchard's FASD diagnosis and information about his background as an aboriginal person was not required to help me make my decision, in most cases, *Gladue* information would be crucial to my determination of a truly fit and proper sentence.

[25] I note that the onus of ensuring sufficient information about an aboriginal individual's particular circumstances rests on all of us, Crown, defence, and the

sentencing judge. In the absence of a true *Gladue* Report, it is critical that pre-sentence reports contain some details about an offender's aboriginal status and circumstances. Where the pre-sentence report does not contain sufficient relevant information, defence and Crown should be prepared to make submissions and, if necessary, call relevant evidence. In *R.* v. *Kakekagamick* (2006), 81 O.R. (3d) 664, the Ontario Court of Appeal stated in paragraphs 52 and 53:

> The original pre-sentence report in this case was deficient in that it failed to address adequately aboriginal circumstances and alternative approaches (as described in the second report ordered by this court after the appeal was heard). I would note that the Criminal Code was amended in 1996 to include s. 718.2(e) and Gladue was decided in 1999. One would expect that Correctional Services, Probation and Parole would by now fully appreciate the nature and scope of the information required in a pre-sentence report for an aboriginal offender.
>
> Given the deficiencies in the pre-sentence report, counsel and the trial judge should have considered the desirability of a further report or other evidence. Counsel, and perhaps especially the Crown, could and should have raised the issue in this case. They did not, and it fell to the sentencing judge to consider whether or not further inquiries were either appropriate or practicable. No such inquiry took place.

[26] Again, in *R*. v. *Gladue*, [1999] 1 S.C.R. 688, the Court stated in paragraph 83:

> Where a particular offender does not wish to have such evidence to be adduced, [*Gladue* evidence] the right to have particular attention paid to his or her circumstances as an aboriginal offender may be waived. Where there is no such waiver, it will be extremely helpful to the sentencing judge for counsel on both sides to adduce relevant evidence. Indeed, it is to be expected that counsel will fulfill their role and assist the sentencing judge in this way.

[27] I am aware that, at present, some efforts are being made by the Council of Yukon First Nations (CYFN) to have workers provide *Gladue* reports to the Court. I am also aware that Probation Services has indicated that they are not prepared to engage

in the process of preparing full-scale *Gladue* reports. These reports are very labour intensive, and while the present efforts of CYFN should be encouraged and commended, from a purely logistical perspective it is not realistic at present to expect that every aboriginal offender that could or should be the subject of a *Gladue* report will have one prepared with respect to his or her personal circumstances. Where a *Gladue* report is not being prepared in such circumstances, the Court would find it highly useful to at least be provided some basic information in a pre-sentence report. In fact, in some circumstances, the Court may not properly be able to proceed without the benefit of such information. I would be concerned if Probation Services moved further away from providing such information in future reports regarding aboriginal offenders.

[28] I am also mindful of the principle of restraint, set out in s. 718.2(d) that says:

> an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances.

Sentence:

[29] I find that an appropriate sentence for these offences in these circumstances does not require that Mr. Blanchard serve any further custody than that already served while in remand. Notwithstanding that, generally speaking, an appropriate range of sentence for these offences could include further custody, I find that to do so would not accord with the principles of justice, including an order that would impose custody by way of a sentence to be served conditionally in the community. The struggles Mr. Blanchard has in complying with court orders, due in large part to his FASD diagnosis and other mental health issues, would, given the rebuttable presumption of custody that attaches to a conditional sentence order, almost, although not necessarily, be the

equivalent of imposing a further period of custody on Mr. Blanchard. I am not prepared to do so, given his personal circumstances, and also in recognition of the positive aspects of his behaviour since March 2009, notwithstanding the numerous breaches and other charges he faced.

[30] Mr. Blanchard has not been found to have committed a further offence of personal violence in the ensuing 32 months, and he has participated in numerous programs to deal with his issues with varying degrees of success, including the Community Wellness Court.

[31] I find the appropriate disposition to be as follows: On the s. 267(b) charge, 90 days time served; on the s. 145(3) curfew, 15 days time served consecutive; on the first of the s. 145(3) abstention breaches, 15 days time served consecutive; on the second s. 145(3) abstention breach, 14 days time served consecutive. That brings us to 134 days. On the s. 175, cause disturbance, 15 days time served concurrent; and on the s. 145(3), fail to report, 15 days time served concurrent.

[32] Noting the considerable period of time Mr. Blanchard has been subject to court-imposed conditions, a period of probation of nine months will attach to the s. 267(b) charge. The terms will be as follows: the statutory terms are required, which are to:

1. Keep the peace and be of good behaviour;
2. Appear before the Court when required to do so by the Court;
3. Notify the Probation Officer in advance of any change of name or address and promptly notify the Probation Officer of any change of employment or occupation;

4. Remain within the Yukon Territory unless you obtain written permission from your Probation Officer or the Court;

[33] The remaining terms will be, with one exception, virtually identical to those recommended in the pre-sentence report.

1. Do not get into trouble;
2. Go to court when asked to go;
3. Report to your Probation Officer immediately and thereafter, when and in the manner directed by the Probation Officer;
4. Meet and talk with your Probation Officer when he or she tells you to do so;
5. Stay in the Yukon unless your Probation Officer says you can leave;
6. Live where your Probation Officer tells you to live, follow the rules of the home, and do not move out unless your Probation Officer says you can leave;
7. You are to remain in your home from the hours of 10:00 p.m. to 6:00 a.m., unless you have the prior written permission of your Probation Officer or if you are in the company of Norm Blanchard or another person approved in writing by your Probation Officer;
8. You must come to the door or answer the telephone during reasonable hours for curfew checks, and failure to do so will be a presumptive breach of this condition;

9. Do not have contact with Jim Smarch, Dale Sam, Aimee Bonderchuk and Angie Bonderchuk. Do not have contact with someone that your Probation Officer says you cannot have contact with;
10. See an alcohol and drug counsellor when your Probation Officer tells you to do so;
11. Take any other assessment, counselling or programming when your Probation Officer tells you to do so;
12. Do not buy, have in your possession, or drink alcohol; do not buy or have in your possession non-prescription drugs;
13. Do not go to bars or places where they sell alcohol, except restaurants;

Clause 14 will not be in there. There will be the following *Rogers* term, given the information I have with respect to the medications.

14. You must take reasonable steps to maintain yourself in such condition that your mental health will not likely cause you to conduct yourself in a manner dangerous to yourself or anyone else, and so that it is not likely that you will commit further offences;
15. You are to advise your Probation Officer of the name of your doctor, and you are to provide a copy of this order to your doctor. If you do not consent to the form of medical treatment or medication prescribed or recommended, you shall immediately notify your Probation Officer and you shall instruct your doctor that if you fail to take medication as prescribed by him or her, or fail to keep an appointment with him or her, he or she is to advise your Probation Officer immediately;

16. You are to provide your Probation Officer with consents to release information with regard to your participation in any assessments or counselling and programming that you have been directed to do pursuant to the terms of this order.

[34] Any other comments with respect to these terms?

[35] MS. PHILLIPS: No, Your Honour.

[36] THE COURT: This is a primary designated offence for the purpose of providing DNA, so that the order will be made. For clarity, that is speaking of the s. 267(b). I decline to make the discretionary s. 110 prohibition, and the victim fine surcharges will be waived.

[37] MS. PHILLIPS: Thank you.

[38] THE COURT: The remaining counts?

[39] MS. PHILLIPS: Stay of proceedings.

[40] THE COURT: They are stayed.

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COZENS C.J.T.C.