

Consensus Development Conference Legal Issues of FASD

Considerations in Making Effective Sentences for Persons with FASD

Judge Sheila P. Whelan

Provincial Court of Saskatchewan

Edmonton, September 18 – 20, 2013

Introduction

- Provincial Court of Saskatchewan at Saskatoon
- Ordering FASD diagnosis & assessments since about 2001, for persons up to age 25
- Greatest progress in Youth Justice Court
- Nov 2013 starting a Mental Health docket for adults with FASD, other cognitive impairments & mental disorders

Vulnerability to the criminal justice system

- High risk for repeated contact with the criminal justice system as victims & offenders
- Vulnerable to being taken advantage of by those they trust
- Share characteristics making them susceptible to encounters & unfair treatment in the criminal justice system

Younger than they seem

Chronological age 18

Skills

Developmental age equivalent

Expressive Language =====> 20

Understanding Ideas ===> 6

Money, time concepts =====> 8

Emotional maturity=====> 6

Physical maturity =====> 18

Reading ability =====> 16

Social skills =====> 7

Living skills =====> 11

Source: Dianne Malbin

Difficulty with court orders

external brain needed

Problem

Solution

lack internal structure	supported supervision
limited life skills	realistic conditions
enforcing conditions	use discretion
breaches & consequences	think safety
falls through the cracks	continuity needed

Criminal Law Sentencing & FASD

not an easy match

Principles

- deterrence - - - - - ➤ impulsive & at risk with peers
- rehabilitation - - - - - ➤ difficulty learning from mistakes
- remorse - - - - - ➤ lacking insight & immature
- role & foreseeability - - - - - ➤ linking actions & outcomes
- compliance - - - - - ➤ poor social/life skills

Disabilities

Sentence ends - - - - - Resources end

FASD - poor fit with criminal justice system

- Not well understood
- Missed in busy dockets
- First hint often at sentence
- Diagnosis not trusted
- Traditional corrections approaches ineffective
 - success in custody - doesn't transfer to community
 - pick up on bad behaviour in custody
 - fail to provide FASD centred support & supervision

Traditional approaches & FASD reality

- Lack of remorse routinely commented upon
- Expectations don't accommodate cognitive impairment
- Advocacy model can conflict with desirability of diagnosis & assessment
- Diagnosis & assessment doesn't translate into understanding by justice/corrections
- Programs/resources don't fit the FASD individual

FASD assessment & shift in thinking

Shift From

To

Blame Understanding

Risk Prevention

Despair Hope

Dependant Upon

- Leadership
- Widespread system education & understanding

Timely diagnosis & assessment

Blueprint for just & effective sentences

- Justice can't wait on Health, Education or Corrections to provide assessments
- Serve as blueprint for crafting FASD/individual focussed sentence
- Transcript of sentencing important to corrections
- Agreed upon sharing of reports with corrections & beyond, important for short & long term prospects

Not just any diagnosis will do

- Diagnosis & assessments by FASD qualified professionals are essential
- It`s more than a learning disability
 - Umbrella term describing a unique set of cognitive & behavioural difficulties
 - Far more than a low IQ
 - ADHD/ADD - often co-existing - doesn't describe it
 - A defining element - susceptibility to environment

Diagnosis/assessment difficult to obtain

- Jurisdictional objection to court ordered assessments
- limitations: access to professionals, geography, funding & supportive resources
- sensitive nature of information required – alcohol ingestion during pregnancy
- reluctance of communities/individuals to be labeled & risk negative repercussions
- distrust & attitude of futility – question of resources to make a difference

Youth Criminal Justice Act & FASD

Best addressed between ages 12 to 18 years

- ❖ maternal drinking information – more available for youth
- ❖ more resources - diagnosis, assessment & support & supervision
- ❖ youth more agreeable to assessment & supervision

YCJA mandates Judges to:

- ❖ address underlying causes of behavior & special needs
- ❖ work with family & community to arrive at effective lasting solutions

Search for FASD diagnosis - then what?

- Difficult to obtain confirmation of maternal drinking
- Search leads to awareness/examination of cognitive skills, depression & other mental disorders
- Still difficult to obtain cooperation of young adults - history of failure - need a reason to cooperate
- No clear legislative mandate for consideration in sentencing
- require cooperation of justice system participants

Specialty courts or problem solving

- Widespread presence of FASD
- Few locales have the population & resources for specialized courts.
- Increasingly justice communities turn to problem solving approaches.
- Combine the benefits of:
 - a small community (everyone knows you) with
 - an understanding of underlying problems & available resources.

Teamwork & problem solving strategies

- Guided by crime prevention: focus on needs of offender & community
- Be alive to the challenges of offenders & complainants
- Focus on the person to address underlying problems
- Provide consistency in personnel, support, & supervision
- Inform & collaborate for effective individual & systemic responses
- Follow-up: before, during & after sentence
- Collect meaningful data & share lessons learned

FASD centred resources in custody

- Paradigm shift to “what works”
- Individualized approaches
- Ongoing reminders of importance of FASD
- Awareness & training of all staff & professionals
 - effects of FASD on behaviour
 - effective techniques for response & programs
- Focus on release plans & continuum in community

Community support & supervision

Without stable housing

- Best laid plans fall apart
- Routine is disrupted
- Behaviour is not directed

A person experiences

difficulty coping with daily living &
susceptibility to environment

What do judges have in their toolkit?

- Ensure a process that accommodates communication & processing limitations – check for comprehension
- Slow it down – not satisfied, ask for more.
- Fashion safety first community based sentences, limiting expectations/conditions
- Call for reporting back or follow up to reinforce the plan
- Ask practical questions . . . who will drive him to the Dr?
- Seek connection with community resources

What should we aim for?

- Education: persons working with persons with FASD & the community
- Early screening, diagnosis & assessment in health, school & justice
- Accessible holistic diagnosis & assessment
- Information & statistics gathering
- Integration & coordination of programs
- A seamless approach to support, beyond the justice system
- Advocates & supports for FASD sufferers & families

***Thank you for the opportunity
to contribute***