

CANADA / JUDGMENT

R. v. Bird

2025 BCCA 300

COURT

British Columbia Court of Appeal

DECIDED

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2025 BCSC 300 R. v. Bird

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Bird,

2025 BCCA 300

Date: 20250829

Docket: CA50312

Between:

Rex

Appellant

And

Kyle Robert Bird

Respondent

Before:

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Mr. Justice Grauer

The Honourable Justice Warren

On appeal from: An order of the Provincial Court of British Columbia, dated
November 12, 2024 (sentence) (R. v. Bird, Surrey Docket 242008-1).

Counsel for the Appellant:

R. Leong

J.A. Billingsley

Counsel for the Respondent:

S. Wright

Place and Date of Hearing:

Vancouver, British Columbia

July 17, 2025

Place and Date of Judgment:

Vancouver, British Columbia

August 29, 2025

Written Reasons by:

The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:

The Honourable Mr. Justice Grauer

The Honourable Justice Warren

Summary:

The Crown appeals a conditional sentence order of two years less one day and three years' probation for two counts of possessing illicit drugs for the purpose of trafficking. One of the counts involved fentanyl. The Crown says the cumulative sentence fails to give meaningful effect to the sentencing principles of denunciation and deterrence and is demonstrably unfit. HELD: Leave to appeal is granted; the Crown's appeal is allowed; and the cumulative sentence is increased to five years' imprisonment. Mid-level trafficking in fentanyl attracts a generally applicable sentencing range of four to seven years' imprisonment or higher. The respondent was a mid-level dealer who committed his offences for profit, had high moral culpability, and diminished mitigation. A conditional sentence of two years less one day and three years' probation is demonstrably unfit in these circumstances and constitutes an unreasonable departure from the principle of proportionality. A substantial penitentiary sentence is warranted.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

Introduction

[1] Appeals from sentence attract a highly deferential standard of review. This Court will not vary a sentence unless the appellant establishes an error in principle that impacted the sentence or persuades us the sentence is demonstrably unfit. To be "demonstrably unfit", a

sentence must unreasonably depart from the principle of proportionality: *R. v. Lacasse*, 2015 SCC 64 at paras. 52-53. In other words, it must be so manifestly excessive (or inadequate) that it cannot reasonably be seen as proportionate to the gravity of the offence and the personal responsibility of the offender.

- [2] The Crown appellant says that test is met here. The respondent, Kyle Robert Bird, was found guilty of two counts of possessing illicit drugs for the purpose of trafficking under the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA]. One of those counts involved fentanyl. The Crown sought a cumulative eight-year prison term. The respondent sought a conditional sentence ("CSO") of two years less one day for each count (concurrent), followed by three years' probation. The judge accepted the defence position.
- [3] The Crown says the judge erred in doing so, resulting in a cumulative sentence that is markedly out of step with other sentences imposed for fentanyl-related offences involving large amounts and mid-level conduct and gives no meaningful effect to the principles of denunciation and deterrence.
- [4] The Crown asks that the cumulative sentence be increased to six years' imprisonment. The respondent says doing so would require that we disregard the deferential standard of review.

Factual Background

- [5] The offences occurred in April 2019. The respondent was charged in February 2021. He pleaded not guilty and was tried in Provincial Court. Convictions were entered and sentencing occurred in November 2024.
- [6] In her reasons for sentence (*R. v. Bird* (12 November 2024), Surrey 242008-1 (B.C.P.C.)), the judge described the circumstances surrounding the offences:
- The police received a Crime Stoppers tip stating the respondent was a drug dealer.
 - They investigated Mr. Bird and conducted surveillance. Among other things, they witnessed a meet at a gas station consistent with drug trafficking.
 - The police executed a search warrant on the respondent's home in April 2019. He was living upstairs with his young daughter.
 - A significant volume of drugs was found in the respondent's bedroom.
 - The police seized a box from the bedroom with nine plastic bags containing a total of 8.68 kilograms of MDMA. A locked safe contained 834 fentanyl pills, 35.13 grams of MDMA, and small baggies.
 - According to an expert Crown witness, eight of the bags containing MDMA were consistent with wholesale amounts and trafficking at the kilo level. The MDMA in the locked safe consisted of multiple baggies, was packaged in random amounts, and reflected different types of MDMA. The use of small baggies is consistent with street-level distribution. The fentanyl pills in the safe

"were being held out as counterfeit Percocet" and made to resemble prescription drugs. The fentanyl had a street value of \$8,690-\$17,380. Depending on the level of the user, it would provide a 173-434-day supply. The MDMA had a street value of \$155,000-\$232,000 and would provide a nine-year supply, again depending on the level of the user: at para. 4.

· If Mr. Bird believed the pills resembling Percocet were, in fact, Percocet, he was "wilfully blind to the actual content of the pills and was putting the public at even more risk": at para. 39.

[7] The judge's reasons for conviction noted that in addition to the drugs in the bedroom, the police located "items of significance" in the kitchen, including: a scale; "cocaine kilo wrappers"; a "kilo press"; approximately 1000 small baggies; and sealed bottles of a liquid determined to be benzodiazepine: R. v. Bird (3 November 2023), Surrey 242008-1 (B.C.P.C.) at para. 39. The respondent "occupied the entire upstairs of the house" and had access to the kitchen: at para. 67.

[8] At sentencing, the judge received information about the respondent's personal circumstances:

· He was 37 years old at the time of sentencing.

· He had no criminal record.

· As a child, he suffered "significant trauma" in the form of sexual abuse by an adult friend of his family: sentencing reasons at para. 5.

· He experienced difficulties in school and was diagnosed with an attention deficit disorder and learning disabilities.

· For the three years prior to sentencing, he was self-employed as an ironworker and welder.

· He has two children. At sentencing, his then 14-year-old daughter lived with him. He also had a four-year-old son living with a maternal uncle.

· Mr. Bird reported "partying a lot and using recreational drugs" at the time of the offences. He has used different illicit substances; however, the judge did not accept he has addiction issues: at paras. 8-9, 12.

· He has support in the community. Letters of reference at sentencing described him as "hard-working, caring, compassionate, and a good father": at para. 10.

· Due to his offences, Mr. Bird's vehicle (a Jaguar) was seized under British Columbia's civil forfeiture program.

[9] At sentencing, the Crown filed a June 2024 information bulletin from the BC Coroners Service confirming that in the preceding eight years, at least 14,582 people had died in this province from toxic drug use. According to the bulletin, fentanyl "continues to be the primary driver" of toxic-drug deaths: cited at para. 13.

Reasons for Sentence

- [10] Before imposing sentence, the judge instructed herself on the relevant legal principles. She noted that denunciation and deterrence are mandated as paramount in drug trafficking cases. However, the principles of rehabilitation and restraint remain relevant. The "goal in every case is a fair, fit, and principled sanction": at para. 17, citing *R. v. Parranto*, 2021 SCC 46 at paras. 9-10.
- [11] The judge correctly noted it is appropriate to consider generally applicable sentencing ranges when deciding on a fit sentence. However:
- [18] There is no such thing as a uniform sentence for a particular crime. A sentence outside the usual range can be imposed so long as it is in accordance with the principles and objectives of sentencing.
- [12] The Crown and the defence cited various authorities in support of their positions. The judge found that these decisions shared some similarities to the case before her, but also significant differences. The cases were helpful to understanding the purposes and principles of sentencing. They "also provide[d] guidance in how the courts have balanced varying factors in determining a fit sentence": at para. 19. However, some of the authorities were "very dated" and the judges in those cases did not have the benefit of information related to the "continuing drug crisis" involving opioids: at para. 34. Nor did they have the benefit of the Supreme Court of Canada's approach to fentanyl-related offences, which "may be expected to attract more significant sentences given the devastating consequences": at para. 23.
- [13] After reviewing the authorities, the judge turned to the specifics of the case. She found that:
- Mr. Bird offered "no explanation no remorse or insight into his involvement in the drug trade other than an explanation of holding the drugs for someone [else]". He also said that some of the drugs were for personal use. The judge did not find these explanations credible and rejected them in a "Gardiner hearing" (*R. v. Gardiner*, [1982] 2 S.C.R. 368, 1982 CanLII 30): at paras. 12, 35.
 - The nature of the offence and the volume and type of drugs involved were aggravating, as was the "impact of [those] drugs on the community in the midst of a public health crisis": at para. 37.
 - The fact that Mr. Bird's young daughter lived in the house where the drugs were located was an aggravating factor: at para. 37.
- [14] The judge characterized the respondent as a mid-level dealer motivated by profit:
- [39] Mr. Bird possessed a significant amount of MDMA and fentanyl that had significant value. He was in control of those drugs that were located in his home. I accept the Crown's submission that the only reasonable explanation is that Mr. Bird was involved in the drug trade for profit. He was not just a street-level drug dealer. He was in a trusted position higher up the chain to possess that amount of drugs. I also accept the Crown's submission that, if Mr. Bird believed the pills were Percocet, he was wilfully blind to the actual content of the

pills and was putting the public at even more risk.

[Emphasis added.]

[15] The judge identified various mitigating factors, including:

- The respondent did not have a criminal record.
- His pre-sentence report was not "positive"; however, it did not "describe any negative factors": at para. 35.
- He adduced positive letters of reference, although "most [did] not state what offence led to [his] conviction[s]": at para. 36.
- Mr. Bird was gainfully employed and not personally using or involved with drugs at the time of sentencing: at para. 36.
- He is the primary caregiver to his daughter and engaged with a son from a different relationship, hoping to increase access and eventually seek custody. The son's mother is deceased.

[16] The judge found that Mr. Bird has suffered a collateral consequence because of his offences; namely, he lost his vehicle to civil forfeiture.

[17] Finally, the judge noted that sentencing occurred more than five years after Mr. Bird's arrest in 2019 and he had not committed other offences.

[18] After identifying these factors, the judge assessed the appropriate length of sentence. She noted that the "serious circumstances" surrounding the respondent's conduct and his level of personal responsibility "require[d] a significant jail sentence to meet the primary principles of denunciation and deterrence": at para. 41. However, she then said:

[41] Of importance here is the fact that Mr. Bird has been in the community since his arrest for this offence five years ago. He had no criminal record before, and he has not committed any crimes since. He is gainfully employed, raising a teenaged daughter, engaging with a young son who lost his mother, and has significant family and community support.

[42] Having considered all of the factors in this case relating to the offence and Mr. Bird, and with some reluctance given the quantity of drugs, I find that a proportion[ate] sentence on Count 1, which is the fentanyl, is two years less a day. The same sentence will apply to Count 2 concurrent.

[Emphasis added.]

[19] The judge next asked whether it was appropriate to impose a CSO. She answered the question in the affirmative. A CSO was statutorily available (s. 742.1, Criminal Code, R.S.C. 1985, c. C-46), and having the respondent serve:

- [46] his sentence in the community would not endanger the safety of the community. He has been in the community for the last five years since the offence date. In all of the circumstances, which I have carefully considered, I find that a CSO is appropriate. It will be followed by three years' probation.
- [20] The terms of the CSO include "house arrest" for the first 18 months, with specified exceptions, including employment. For the remaining six months of the CSO, the respondent must obey a daily curfew of 6:00 p.m. to 6:00 a.m., again with certain exceptions. The judge also ordered three years' probation. She made various ancillary orders, including a mandatory firearms prohibition, a DNA order, and forfeiture of the drugs found in Mr. Bird's home.
- [21] Sentence was imposed on November 12, 2024. On January 27, 2025, the CSO was suspended in this Court, pending the Crown's appeal, and the respondent was released on bail. Accordingly, he has served just over two months of the CSO.

Issues on Appeal

- [22] The Crown alleges errors in principle that impacted the sentence, namely: (a) failing to give sufficient weight to denunciation and deterrence; and (b) overemphasizing the principle of rehabilitation. The Crown says Mr. Bird's personal circumstances unreasonably overwhelmed the sentencing analysis, resulting in an abjectly skewed proportionality assessment that ultimately undermined the paramount principles of denunciation and deterrence.
- [23] The Crown also says the sentence is demonstrably unfit given the gravity of the respondent's offences and his high moral culpability. The judge imposed a cumulative sentence consistent with street-level drug trafficking in fentanyl. The respondent was not a street-level trafficker and given the conclusion reached about his level of personal responsibility, the sentence is wholly inadequate.
- [24] The respondent opposes appellate intervention. He emphasizes that sentencing is an inherently individualized process in which a judge has considerable latitude in identifying and weighing relevant factors. From the respondent's perspective, the Crown's appeal inappropriately asks this Court to set aside the deferential standard of review, step into the shoes of the judge, and substitute its own view of a fit sentence. The respondent argues in his written statement:
12. [The judge] correctly noted that "denunciation and deterrence and the primary principles in cases related to drug trafficking". She also correctly noted that while these were the paramount principles she could not lose sight of rehabilitation, restraint and proportionality. In considering the cases provided by the defence at the sentencing hearing, she noted that given their age, those sentencing courts did not have the current knowledge with respect to the continuing drug crisis. Others did not have the benefit of hearing the Supreme Court of Canada's comments on the need for increasing sentences in fentanyl cases

as outlined in *R. v. Parranto*, 2021 SCC 46. Further she identified various aggravating factors which have not been challenged by the [Crown] as being deficient. Finally she observed that the "serious circumstances of the offences and Mr. Bird's degree of responsibility requires a significant jail sentence to meet the primary principles of denunciation and deterrence".

14. There is nothing in the reasons for sentence to suggest that there was any sort of overemphasis of rehabilitative concerns or singular focus on personal circumstances. She explicitly said otherwise.

[Footnotes omitted.]

- [25] The respondent acknowledges that in the British Columbia Supreme Court, an identified sentencing range of three to ten years' imprisonment has emerged for mid-level involvement in fentanyl-related offences. In his factum, he notes that had he been sentenced to a penitentiary term, he "would have been hard pressed to argue that [it] was outside the range". However, the fact that he received imprisonment of less than two years does not mean his sentence is demonstrably unfit.

Discussion

- [26] I do not consider it necessary to address the errors in principle alleged by the Crown because I am satisfied the sentence imposed in the Provincial Court is demonstrably unfit given the volume and nature of the drugs involved, the respondent's mid-level status in distributing fentanyl for profit, and his diminished mitigation. On its own, a demonstrably unfit sentence allows for appellate intervention.
- [27] Given his significant moral culpability and the palpable risks of serious harm fentanyl presents to the public, including accidental overdose, a non-penitentiary disposition is markedly disproportionate. On the judge's findings of fact, a sentence of under two years' imprisonment is manifestly disproportionate to the gravity of the offences and the respondent's degree of personal responsibility. Although the judge was correct to ensure that the respondent's personal circumstances informed the search for a proportionate sentence, this was a case in which the principles of denunciation and deterrence were paramount, and a substantial penitentiary term was necessary to give those principles meaningful effect.
- [28] Denunciation "requires that a sentence express society's condemnation of the offence". The principle of deterrence has two aspects to it--general and specific. General deterrence is at the forefront in fentanyl-related cases and "intended to discourage members of the public who might be tempted to engage in the criminal activity for which the offender has been convicted". In those cases, the offender is "punished more harshly in order to send a message to the public or, in other words, to serve as an example". The Supreme Court of Canada has acknowledged that the effectiveness of general deterrence is a subject of ongoing academic and societal debate; however, it remains a principle Canadian trial and appellate courts are legally bound to apply: *R. v. Bissonnette*, 2022 SCC 23 at paras. 46-47.

Range for street-level trafficking in fentanyl

[29] Until now, this Court has declined to establish a range of sentence for mid-level involvement in fentanyl-related offences. It has, however, identified a range for street-level trafficking in fentanyl. The leading case is *R. v. Smith*, 2017 BCCA 112, in which the Court set a range of 18 months to three years' imprisonment or higher, depending on the circumstances. Writing for the majority in *Smith*, Justice Harris noted that:

[48] fentanyl is a scourge. It poses intolerable risks of accidental overdosing because it is so much more powerful than morphine. Illegally manufactured fentanyl can be particularly and unpredictably potent, even tiny amounts of fentanyl mixed into other drugs such as cocaine or heroin may be fatal; often street drugs have fentanyl cut into them, and it is practically impossible for drug users to recognize whether the drugs they buy contain fentanyl

[Emphasis added.]

[30] Justice Harris went on to hold that fentanyl distribution carries "enhanced risks" of harm that are generally known to the public, including drug dealers. Consequently, in the absence of a finding of diminished moral blameworthiness, an offender's personal responsibility for a fentanyl-related offence is significant: *Smith* at para. 49. From the majority's perspective:

[65] the continuing escalation in the number of fentanyl-detected deaths, the enormity of the total numbers of accidental overdosing, the increasing percentage of fentanyl detected deaths as a proportion of the total, and the currently ubiquitous awareness of the risks posed by illicit fentanyl, in combination, justif[ied] a recognition of a very substantial increase in the sentencing range applicable to street-level dealing in fentanyl

[Emphasis added.]

[31] This does not mean, of course, that any sentence imposed for street-level trafficking will be automatically unfit unless it involves at least 18 months' imprisonment. As appropriately emphasized by the respondent, sentencing is highly individualized and informed by both the circumstances of the offence and the offender. Consequently, there can be significant differences between cases and some circumstances will justify a sanction below the *Smith* range. As one example, see *R. v. Ellis*, 2022 BCCA 278, in which this Court sentenced afresh after finding material errors in principle and imposed a suspended sentence and three years' probation for street-level trafficking in fentanyl in the context of significantly reduced moral blameworthiness, a longstanding and debilitating substance use disorder, and expert medical evidence showing that the "greatest hope" for rehabilitation lay in continued engagement with medical treatment: at paras. 12-13. Ms. Ellis was someone with a previous related conviction. See also *R. v. Schneider*, 2019 BCCA 310.

Range for wholesale and high-level trafficking in fentanyl

- [32] The Supreme Court of Canada has identified a generally applicable range of eight to 15 years' imprisonment for offenders who participate in the wholesale distribution of fentanyl in a leadership (high-level) role: *Parranto* at paras. 63-68.
- [33] Writing for the majority in *Parranto*, Justices Brown and Martin held that a seven-year sentence for a first-time, 34-year-old "directing mind" of a wholesale drug trafficking operation with a positive pre-sentence report was demonstrably unfit. Mr. Felix, the offender in question, engaged in transactions involving 2385 fentanyl pills (almost three times the amount at issue in this case). The sentencing judge was found to have erred in applying a range of five to seven years' imprisonment. The majority held that:
- [68] A more accurate range based on a review of reported case law nationally would be in the region of 8 to 15 years. For example, eight-year sentences were imposed in *Smith* (2019) (1834 pills, as part of an 11-year sentence), as well as *R. v. Leach*, 2019 BCCA 451 (11,727 pills, as part of a 16-year sentence); *R. v. Sinclair*, 2016 ONCA 683; *R. v. Solano-Santana*, 2018 ONSC 3345 (5000 pills); *R. v. White*, 2020 NSCA 33, 387 C.C.C. (3d) 106 (2086 pills); and *R. v. Borris*, 2017 NBQB 253 (4200 pills). Other sentences imposed include: an 8-year and two-month sentence in *R. v. Sidhu*, C.J. Ontario, No. 17-821, June 16, 2017, aff'd 2019 ONCA 880, in which the offender trafficked 89 g of fentanyl and other drugs soon after being released on parole; a 10-year sentence in *R. v. Petrowski*, 2020 MBCA 78, 393 C.C.C. (3d) 102, for trafficking 51 g fentanyl where the offender used a co-accused to insulate himself from detection; 11 years for trafficking 204.5 g of a fentanyl blend in *R. v. Vezina*, 2017 ONCJ 775; 13 years for trafficking 232 g fentanyl and large quantities of other drugs as part of a sophisticated drug trafficking operation in *R. v. Mai*, [2017] O.J. No. 7248 (QL) (Ont. S.C.J.); and 15 years for a profit-motivated offender who was the directing mind of "a large-scale drug trafficking operation involving an enormous amount of fentanyl" in *R. v. Fuller*, 2019 ONCJ 643 (the offender possessed about 3 kg of fentanyl in the course of the conspiracy).

[Emphasis added.]

- [34] Concurring in the result in *Parranto*, Justice Moldaver wrote separately for himself and Justice Côté, noting that significant penitentiary sentences have long been imposed for offenders who traffic in large amounts of "hard drugs" such as heroin and cocaine: at para. 92. This fact reflects the many dangers associated with that offence, including:
- "addiction, debilitating adverse health effects, and, all too frequently, death by overdose": at para. 88;
 - "an increase in all manner of crime, committed by those seeking to finance their addiction, as well as by organized crime syndicates": at para. 89;

· " Families can be torn apart by either the loss of the individual to the addiction itself or to the violence that all too often accompanies the drug trade Children suffer immense harm from the effects of addiction in their home, whether this addiction be from pre-natal impact or from physical and/or emotional violence in the homes that they should be safe in. The future of these children and their families is damaged and all of society pays the price": at para. 90, quoting from *R. v. Profeit*, 2009 YKTC 39 at paras. 25-26; and,

· "the trafficking of hard drugs leads to 'significant if not staggering' costs to society in terms of health care and law enforcement expenses, as well as lost productivity": at para. 91.

[Internal references omitted.]

[35] Justice Moldaver went on to hold that trafficking in fentanyl exacerbates these already significant risks because it carries an even greater potential for harm:

[93] As grave a threat as drugs such as heroin and cocaine pose, that threat pales in comparison to the one posed by fentanyl and its analogues. Indeed, over the past decade, fentanyl has altered the landscape of the substance abuse crisis in Canada, revealing itself as public enemy number one.

[94] Synthetically produced and readily available on the illicit market, fentanyl is an extremely dangerous and powerful painkiller and sedative. As with other opioids, such as heroin and morphine, it is a highly addictive substance, which, when taken outside of controlled medical environments, puts its users at risk of serious harm, including brain damage, organ damage, coma, and death. Fentanyl's potential for harm is, however, significantly greater than other opioids. It is, for example, estimated to be 80-100 times more potent than morphine and 25-50 times more potent than pharmaceutical grade heroin. Given its strength, a lethal dose will often be less than two milligrams, an amount as small as a single grain of salt (*R. v. Smith*, 2016 BCSC 2148, 363 C.R.R. (2d) 365, at para. 24). The risk of overdose and death from fentanyl is thus extremely high, particularly for naïve users or where it is taken in combination with other substances, such as alcohol or other opioids. The risk of overdose is also one that can be difficult to guard against, as traffickers often surreptitiously mix small amounts of fentanyl with other substances to create a cheaper product with the same effects, thereby drastically increasing their profitability (H. Hrymak, "A Bad Deal: British Columbia's Emphasis on Deterrence and Increasing Prison Sentences for Street-Level Fentanyl Traffickers" (2018), 41 Man. L.J. 149, at p. 153). This deceptive practice leaves users vulnerable and unaware, especially as fentanyl is physically indistinguishable from other hard drugs, such as heroin, oxycodone, and cocaine (C. C. Ruby, *Sentencing* (10th ed. 2020); *Smith*, at para. 24; *R. v. Joumaa*, 2018 ONSC 317, at para. 12 (CanLII)).

[96] Beyond its mere potential to cause harm, however, fentanyl has had -- and continues to have -- a real and deadly impact on the lives of Canadians. Indeed, trafficking in fentanyl is so deadly that various courts have described it as a national crisis, reflective of an increased understanding of the gravity of the harm it causes (see, e.g., *R. v. Smith*, 2017 BCCA 112, at

para. 50 (CanLII); *R. v. Vezina*, 2017 ONCJ 775, at para. 58 (CanLII); *R. v. Aujla*, 2016 ABPC 272, at para. 1 (CanLII)). This heightened understanding is supported by the available statistical evidence. The expert evidence on the record before us establishes, for instance, that fentanyl-related deaths in Alberta increased by 4,858 percent between 2011 and 2017, rising from 12 deaths in 2011 to 583 deaths in 2017. More broadly, federal statistics on opioid-related deaths show that, between January 2016 and March 2021, approximately 23,000 Canadians lost their lives due to accidental apparent opioid-related deaths, with fentanyl involved in 71 percent of these deaths (Special Advisory Committee on the Epidemic of Opioid Overdoses, *Opioid and Stimulant-related Harms in Canada* (September 2021) (online)). The epidemic also shows no signs of abating, with over 6,000 accidental deaths occurring in 2020 alone, 82 percent of which involved fentanyl (Government of Canada, *Federal actions on opioids to date* (June 2021) (online)). These figures throw into stark relief the dark and inescapable reality that "[e]very day in our communities, fentanyl abuse claims the lives of Canadians" (*R. v. Loor*, 2017 ONCA 696, at para. 33 (CanLII)).

[Emphasis added.]

The harms noted in *Parranto* were recently reiterated by the Supreme Court in *R. v. Campbell*, 2024 SCC 42 at para. 132. They remain a live issue. See also *R. v. Tim*, 2022 SCC 12 at para. 99.

[36] Given the devastating individual, familial, community, and societal effects of fentanyl, Justice Moldaver concluded that "heavy penitentiary sentences will be appropriate where offenders have trafficked in large quantities of fentanyl and assumed leadership roles in the trafficking operation": at para. 100.

[37] Mr. Felix ultimately received a sentence of 10 years' imprisonment for his fentanyl offence (the Crown's bottom line). Mr. *Parranto*, the second offender involved in the case and someone with a lengthy criminal record, including a prior conviction for trafficking, possessed a cumulative 512 grams of fentanyl. The Supreme Court held that his counts involving fentanyl appropriately attracted nine and 12-year sentences, respectively.

[38] *Parranto's* recognition of fentanyl's pernicious effects underscores the necessity of ensuring that sentences imposed in these cases give meaningful effect to denunciation and deterrence, both specific and general. It is not enough for a judge to acknowledge these principles in passing. The application of denunciation and deterrence must tangibly influence the assessment of quantum such that the sentences discernably respond to the wrongfulness and readily foreseeable harms of the proscribed conduct: *Parranto* at para. 101.

Sentencing range for mid-level trafficking in fentanyl

[39] As noted, this Court has not yet pronounced on a range of sentence for mid-level trafficking in fentanyl. In understanding what is generally meant by mid-level, I find the comments of Justice Mainella in *R. v. McLean*, 2022 MBCA 60 helpful:

[6] While not a perfect paradigm, the distinctions of street-level, mid-level and high-level trafficking highlight the drug trade's chain of distribution beginning with the sourcing of the drug by either importation or domestic production through a series of transactions to its ultimate consumption. Street-level trafficking refers to activities focused on the back end of the chain of distribution--direct sale to drug users. Mid-level trafficking refers to the wholesale trade where one trafficker supplies another trafficker lower down the chain of distribution. This subset commonly has many layers of entrepreneurs. Finally, there is high-level trafficking, whose distinguishing attribute is the significant scale of the trafficking and, in particular, the quantity, purity or value of the drugs; the ability to obtain the drugs at their source; and/or the sophistication and organization of the drug operation.

[Emphasis added.]

[40] A range for mid-level trafficking has been identified in the British Columbia Supreme Court. Citing *R. v. Campbell*, 2021 BCSC 853, the respondent acknowledges an identified range of three to 10 years' imprisonment. Mr. Campbell was a first-time offender with mid-level trafficking status and received a cumulative prison sentence of two years based on extraordinary personal circumstances, including significant rehabilitation by the time of sentencing, guilty pleas and genuine remorse, and "Gladue factors" (*R. v. Gladue*, [1999] 1 S.C.R. 688, 1999 CanLII 679): at paras. 86-87, 91. While assessing a fit sentence in *Campbell*, Justice Ker canvassed various authorities specific to mid-level dealers and concluded:

[65] The sentence for a mid-level dealer of fentanyl can range between three years to 10 years' imprisonment depending on the amount of fentanyl involved, the duration of the enterprise covered by the offences (be it a day, months, or longer), the level of moral blameworthiness of the offender, and other factors

[Emphasis added.]

See also para. 75 of *Campbell* (BCSC).

[41] This range has been acknowledged in subsequent cases in the trial courts. See, for example: *R. v. Coty*, 2024 BCSC 1485 at para. 66; *R. v. Campagna*, 2025 BCSC 349 at paras. 76, 80-81; *R. v. Singh*, 2023 BCPC 70 at para. 101; *R. v. Stulec*, 2022 BCPC 301 at paras. 19-20.

[42] At sentencing in this case, the Crown suggested that an appropriate range for mid-level involvement in fentanyl-related offences is 8-15 years. However, on appeal, it has tempered that view, accepting that sentences for mid-level involvement properly fall somewhere between the Smith and Parranto ranges. Consequently, it seeks a six-year sentence for Mr. Bird's fentanyl offence.

[43] In my view, a range for mid-level involvement with fentanyl that starts above the top end of the Smith range (36 months or higher), makes good sense. Indeed, Justice Newbury's reasons in *Smith* (dissenting in the result), flagged the likelihood of a "different" range for offenders who are "higher up the [fentanyl] chain of sale or distribution":

[45] I agree with the many judges who have stated that denunciation and deterrence must generally be given primacy in sentencing in cases involving Fentanyl. To this end, I would suggest a normal range beginning at 18 months' imprisonment, as the Crown suggests. I would place Mr. Smith's offences at the bottom of this range, in light of the mitigating factors discussed by the court below. I do not believe it is necessary for us to specify the top of the range, although I would suggest it might well exceed 36 months, especially where the offender has a substantial record involving the sale of Fentanyl or otherwise demonstrates an indifference to the human lives he or she is putting at risk. This is a matter that can be worked out in future cases. Obviously, the 'range' may also increase beyond 36 months, or a different range will apply, where the offender is higher up the chain of sale or distribution.

[Emphasis added.]

[44] A range that starts above the top end of Smith is also consistent with appeals involving mid-level participation that have been resolved post-Smith, in which this Court has consistently declined to reduce sentences imposed for first-time fentanyl traffickers that exceed the Smith range or fall close to its top end.

[45] For example, in *R. v. Mann*, 2018 BCCA 265, this Court upheld sentences of four years' imprisonment for two youthful, first-time co-appellants who pleaded guilty to fentanyl-related offences committed by way of a small and unsophisticated dial-a-dope operation. The operation had characteristics of "mid-level distribution", a fact that materially affected the sentences: at paras. 53, 56. On appeal, the appellants argued the judge erred by exceeding the top end of the Smith range. The Court rejected that argument, holding that the Smith range does not apply to offenders engaged in more than street-level trafficking: "[o]n the facts found by the judge, the sentencing range identified in Smith was not applicable to this case". Writing for the Court, Justice Fitch noted that the Smith range was not "capped" at 36 months' imprisonment. Smith recognized that aggravating circumstances in the street-level context could require a longer sentence: at para. 87. Justice Fitch also noted that:

[98] the moral culpability of offenders who traffic in fentanyl and its analogues is very high. The public health crisis that followed the introduction of synthetic opioids in the illicit drug trade continues unabated. As Newbury J.A. observed in Smith (at para. 44), "fentanyl abuse continues to claim lives every day in our communities" and "British Columbia has one of the worst, if not the worst, problems of fentanyl abuse in Canada". General deterrence and denunciation must feature prominently in sentencing cases of this kind.

[Emphasis added.]

- [46] In *R. v. Davies*, 2019 BCCA 359, this Court upheld a sentence equivalent to 32 months' imprisonment for possession for the purpose of trafficking in fentanyl and cocaine (the maximum term sought by the Crown). The police seized 9.53 grams of fentanyl and 30 grams of cocaine. The defence sought probation on the basis that the appellant's time in pre-sentence custody equated to 16 months' jail and amounted to a sufficient custodial disposition.
- [47] Mr. Davies was a first-time offender operating as a mid-level dealer. He pleaded guilty. He had a troubled youth, had struggled with drug addiction, and lacked family support. He was found to have good rehabilitative prospects and by the time of sentencing, had taken concrete steps towards rehabilitation. This Court held the judge did not err in concluding that 32 months' imprisonment appropriately accounted for the appellant's mitigating circumstances and the need for restraint. If not for the Crown's position, the judge would have imposed a sentence above the upper end of the Smith range: at para. 19. This Court did not take issue with that proposition.
- [48] In *R. v. Bridgen*, 2023 BCCA 229, the appellant challenged a sentence of 36 months' imprisonment for possession of fentanyl and other controlled substances for the purpose of trafficking. The sentence was imposed following a trial. The appellant was a "low or mid-level drug trafficker" without a criminal record: at para. 2. She did not demonstrate remorse and there was no evidence of rehabilitation: at para. 27. This Court dismissed the appeal: "[t]he facts found by the Court in assessing the moral blameworthiness of the appellant in 'reloading' street-level sellers with fentanyl and cocaine justified the conclusion that three years' imprisonment was a proportionate sentence for this offender": at para. 30.
- [49] Having reviewed these authorities, as well as other cases from this Court cited by the Crown (including *R. v. Leach*, 2019 BCCA 451, *R. v. Lloyd*, 2019 BCCA 128, and *R. v. Lee*, 2018 BCCA 428), I am satisfied a generally applicable range of four to seven years' imprisonment for mid-level participation in the illegal distribution of fentanyl is appropriate for British Columbia, with the upper end of that range or potentially longer sentences constituting a fit sentence for cases involving particularly aggravating facts, significant moral culpability, and/or one or more related convictions. In *Lee*, this Court described fentanyl as a "scourge that imposes intolerable risks on society" and noted that "sentences of four to six years' imprisonment have been imposed for offences involving trafficking in fentanyl alone": at para. 22, emphasis added.
- [50] A canvass of jurisprudence in other jurisdictions reveals sentences well above the Smith range for mid-level offenders. The Crown put a number of these cases before us. See, for example: *R. v. Lynch*, 2022 ONCA 109 (six to eight-year range applied to a first-time mid-level dealer), and *McLean* (six to eight-year range applied to first-time "mere courier[s]" in a mid-level operation). In *R. v. Laird*, 2024 SKCA 61, the Court upheld eight-year sentences for two appellants involved in mid-level trafficking who were found in possession of 310 grams of fentanyl. Both had related records. In *R. v. White*, 2020 NSCA 33, the appeal court increased a six-year sentence to eight years for possessing 2086 pills of fentanyl made to look like

OxyContin. Mr. White had prior drug-related convictions. His crimes were "motivated by greed and the potential for profit, without any regard for the health and safety of those whose very lives were put at risk by the respondent's operations": at para. 62.

- [51] Where a particular case falls in the mid-level range (or outside of it) will depend on the circumstances of the offence, the circumstances of the offender, and the relevant common law and statutorily codified principles of sentencing (ss. 10(1)-(2) of the CDSA and ss. 718-718.2 of the Criminal Code).
- [52] For instance, substantial mitigation may justify a sentence of less than four years' imprisonment. See, for example, *R. v. Mitchell*, 2022 BCSC 2321, in which three years' imprisonment was imposed for mid-level involvement to account for Gladue factors, significant efforts at rehabilitation, mental health challenges, and sincere remorse. See also *R. v. Thompson*, 2023 BCSC 1810. In the latter case, the offender pleaded guilty to possession of fentanyl for the purpose of trafficking and other offences. The judge found she was involved in a mid-level trafficking operation: at paras. 29, 120. Ms. Thompson was sentenced to 24 months' imprisonment for her drug offences; however, there were significant mitigating factors, including: guilty pleas; Gladue factors; a very difficult upbringing; she was the victim of intimate partner violence and other trauma; and there were substance abuse and mental health issues, including a personality trait disorder and bipolar disorder. Additionally, the offender worked at the "low end of a mid-level" trafficking operation: at para. 121, emphasis added.
- [53] Particularly aggravating facts, on the other hand, may require a sentence at the upper end of the four to seven years-plus range or one that exceeds it. In *R. v. Dinh*, 2024 BCSC 109, for example, the judge imposed an eight-year sentence on a first-time mid-level offender for one count of possession of fentanyl for the purpose of trafficking (994 grams with a purity level of 62-71%): at para. 2. He imposed this length of sentence because of the "quantity and purity of the fentanyl" and the fact that the offender was "at the upper end of the courier spectrum of intentional risk-taking": at para. 42. See also *Laird and White*, cited above.
- [54] The trial and appellate level decisions highlighted in these reasons are but some examples from a wide breadth of sentencing decisions. As the respondent has appropriately reminded us, ranges function as guidelines only and because of the fundamental obligation to impose a proportionate sentence, outcomes will necessarily move within a range and below or above a range depending on the circumstances. On its own, imposing a sentence that does not align with a generally applicable range does not constitute an error in principle. This point was discussed at some length in *R. v. Maslehati*, 2024 BCCA 207, leave to appeal to SCC ref'd, 41413 (December 19, 2024):
- [84] sentencing ranges represent guidelines only. It is trite law that they are "not hard and fast rules". Consequently, a judge's decision to depart from a range will not, standing alone, constitute an error in principle: *Friesen* at para. 37; *Parranto* at para. 36.

- [86] Sentencing ranges convey an appreciation of the gravity of the offence. With the applicable range in mind, the judge must then "individualize the sentence in a way that accounts for both aspects of proportionality: the gravity of the offence and the offender's individual circumstances and moral culpability": Parranto at para. 44, emphasis added.
- [87] An offender's "individual circumstances" may render a custodial disposition significantly harder for them to bear than for someone else: R. v. Hills, 2023 SCC 2 at paras. 135, 165. This can have a mitigating effect at sentencing.
- [88] An offender's "individual circumstances" might also reduce their moral culpability. For example, the evidence at sentencing may establish "mental disabilities that impose serious cognitive limitations" and "manifestly [interfere] with the offenders' ability to reason and [compromise] their volitional and decision-making capacity": [R. v. G.J.M., 2024 BCCA 82] at paras. 53-58. See also Ellis at para. 81.
- [89] Gladue factors (R. v. Gladue, [1999] 1 S.C.R. 688, 1999 CanLII 679), may also reduce moral culpability and in accordance with s. 718.2(e) of the Criminal Code, justify a sentence outside the generally applicable range. See for instance, the comments of Justice Paciocco in R.S. at paras. 53-64. See also, C.K. at paras. 104-106 and R. v. L.S.N., 2020 BCCA 109 at paras. 52-53.
- [55] Accordingly, nothing said in these reasons about a four to seven years-plus range should be interpreted as taking away from the all-important individualization of the sentencing process.

Application of range to this case

- [56] In this case, the judge found that the respondent was "not just a street-level drug dealer". He was "in a trusted position higher up the chain to possess that amount of drugs". She accepted that he was motivated by profit: at para. 39. Indeed, the drugs found in his home and under his control carried a cumulative street value of almost \$250,000.
- [57] The judge instructed herself that the "serious circumstances" of Mr. Bird's offences and his "degree of responsibility" required a "significant jail sentence" to meet the need for denunciation and deterrence: at para. 41. She accepted that many of the sentencing authorities relied upon by the defence were "very dated", decided at a time not impacted by the "continuing [opioid] drug crisis", and did not have the benefit of the Supreme Court of Canada's "reactions or reflections on the need for increasing sentences in these types of cases": at para. 34.
- [58] Yet, she imposed community-based imprisonment of two years less one day, concurrent on each count. This length of imprisonment is only six months higher than the bottom end of the Smith range. Respectfully, two years less one day, even when coupled with lengthy probation, is logically irreconcilable with the judge's findings of fact surrounding Mr. Bird's offences, the volume and value of the drugs involved, his high moral culpability, the

approach taken by this Court to mid-level fentanyl distribution post-Smith, and the significant harms associated with this offence. "[C]hoices which demonstrate a reckless disregard for human life increase not only the gravity of the offence but the moral culpability of the offender": Parranto at para. 70. Mr. Bird made this choice, and it must be reflected in his sentence.

- [59] The respondent says the aggregate sentence he received is not difficult to rationalize--one need only look at the mitigating factors identified by the judge and the weight she assigned to them. Those factors are summarized at paras. 35-36 of her reasons for sentence. For ease of reference, they consist of: (a) an absence of negative factors in the pre-sentence report (reducing his risk); (b) there has been a "limited" showing of remorse; (c) Mr. Bird has family support; (d) he submitted positive letters of reference at sentencing; (e) he is gainfully employed; and (f) he does not currently use substances. The judge also found there were other circumstances attenuating the need for a penitentiary term: (a) no criminal record; (b) his vehicle was forfeited because of his offences; (c) he is the primary caregiver for his now teenage daughter; (d) he is seeking increased access to his son; and (e) he has not reoffended since his initial arrest in April 2019. This latter factor was assigned considerable weight by the judge. She described it as an "important" counterbalancing factor to his "degree of responsibility" for the offences: at para. 41.
- [60] I do not question the judge's entitlement to consider all these things in deciding on a proportionate sentence. The pre-sentence report described the respondent's daughter as "extremely vulnerable" and likely to experience considerable difficulty if her father was sentenced to conventional jail. (She struggles in her relationship with her mother.) Time in custody was also noted to carry the potential for substantial disruption to the ongoing bonding process between the respondent and his son. Furthermore, the respondent is correct that it was up to the judge to decide how much weight to assign to them. Judges have considerable latitude when assessing a fit sentence and this was a case in which the judge heard a trial (with admissibility voir dres), a Gardiner hearing, and comprehensive sentencing submissions from the parties before imposing sentence. She was familiar with the entire context of the case and uniquely positioned to assess and weigh relevant competing factors. The respondent is correct to say that a judge's "front-line" advantage matters when assessing the fitness of a sentence on appeal: *R. v. Kehoe*, 2023 BCCA 2 at para. 65.
- [61] However, the significant deference owed to the judge does not render the sentence invincible.
- [62] I appreciate a sentence is not rendered demonstrably unfit simply on the basis that it seems more consistent with one identified range of sentence as opposed to another. The majority judgment in Parranto emphasized this point:

[30] It bears emphasizing that the sentencing judge's discretion includes the choice of a sentencing range or of a category within a range, and that this exercise of discretion cannot in itself constitute a reviewable error (Lacasse, at para. 51). It is an error of law for an appellate court to intervene merely on the ground that it would have placed the offence in a different range or category. Unless a sentence is demonstrably unfit or the sentencing judge made an error in principle that impacts the sentence, an appellate court must not vary the sentence on appeal (paras. 11 and 67). The focus of the demonstrable unfitness inquiry is on whether the sentence is proportionate, not whether the sentencing judge applied the correct starting point, sentencing range or category within a range (Lacasse, at paras. 51 and 53; Friesen, at para. 162).

[Emphasis added.]

[63] I also acknowledge "there is no single sentence that is clearly preferable to all others": R. v. Ramage, 2010 ONCA 488 at para. 70.

[64] Nonetheless, the sentences imposed in other cases involving mid-level fentanyl distribution for profit are relevant to the proportionality assessment: Parranto at paras. 11-12. With reference to those cases in British Columbia and other jurisdictions, the respondent's mitigation and other attenuating factors may have reasonably justified a sentence towards the lower end of a four to seven years or higher range, but not one so markedly below that, in its effect, it renders the principles of denunciation and deterrence largely meaningless.

[65] I agree with the Crown that there was nothing extraordinary or highly unusual about the respondent's personal circumstances, such that they would justify a marked departure from sentences imposed for similarly situated offenders who commit similar offences. There was no finding of diminished moral blameworthiness, mental health or other personal challenges that would render a penitentiary term especially hard for the respondent, or significant efforts at rehabilitation between the offences and sentencing. In fact, the judge stated it is "not clear that rehabilitation is an issue for Mr. Bird": at para. 40, emphasis added. At sentencing, the defence did not argue that Mr. Bird's involvement in drug trafficking arose from an addiction or was in any way connected to childhood trauma. The judge did not accept that Mr. Bird had any addiction issues at the time of the offences. The only real difference between Mr. Bird's conduct in April 2019 and at sentencing was the fact that he had not reoffended. This is, of course, important. However, from 2021 to the date of sentencing, he was before the courts with a strong incentive to remain compliant.

[66] The Crown has persuaded me that the judge's reasons and the record placed before her do not support a sentence towards the lower end of the Smith range for street-level traffickers. In my view, this sentence is so manifestly inadequate in the circumstances of the case that it cannot reasonably be viewed as proportionate.

[67] In support of his sentence, the respondent has cited Campbell (BCSC), in which Justice Ker imposed two years' imprisonment for mid-level dealing involving 627.5 grams of fentanyl with a street value of \$94,125: at paras. 8-10. However, as noted, Campbell involved

extraordinary personal circumstances that render the case plainly distinguishable from the one before us. Mr. Campbell's circumstances included significant rehabilitation by the time of sentencing, guilty pleas, genuine remorse, demonstrated insight into the harmfulness of his actions, and Gladue factors: at paras. 86-87, 91. Justice Ker found a "significant likelihood that intergenerational trauma encompassed by Gladue considerations had a role to play in Mr. Campbell being before the Court" at para. 81. As such, s. 718.2(e) of the Criminal Code was engaged. Both of Mr. Campbell's parents were addicted to crack and drug abuse manifested itself in Mr. Campbell's childhood home: at para. 15. He personally had "significant addiction difficulties" from when he was a teenager until 2019, the year following his offences: at para. 29.

- [68] The respondent has also cited *R. v. Nesbitt*, 2012 BCCA 243, in which this Court dismissed a Crown appeal from a CSO of two years less one day for possessing 17 kilograms of cocaine for the purpose of trafficking. Mr. Nesbitt was 20 years old when he committed his offence. The sentencing judge found his culpability to be "somewhat less egregious" than that of someone who engages in more frequent drug activity and is involved in transporting significant quantities: at para. 38. Mr. Nesbitt pleaded guilty and was "very cooperative" with the police after his arrest, which the Court noted may warrant a sentence that is "clearly outside the low end of the range": at paras. 6 and 22, citing *R. v. Hein*, 2008 BCCA 230 at para. 23. Six years passed between the offence and sentencing, with no further reoffending. The record demonstrated that Mr. Nesbitt had rehabilitated himself, addressing the criminogenic factors that contributed to his offending. This was a significant factor on appeal: at para. 30. The Court described the case as "unique": at para. 30.
- [69] In my view, *Nesbitt* is also plainly distinguishable. More critically, resolution of the Crown's appeal in *Nesbitt* predated *Smith and Parranto*, and the offence did not involve fentanyl, which is now jurisprudentially accepted to significantly increase the risk of harm and call for a more severe sentence. As with Mr. Nesbitt, significant time has passed between the respondent's offences and sentencing without further reoffending. However, the public health crisis caused by the illicit distribution of fentanyl remains unabated. In that context, the importance of a sentence that denounces and deters like-minded people who find the prospect of mid-level dealing financially attractive cannot be understated.
- [70] At sentencing, the defence relied upon *R. v. Ali*, 2022 BCPC 35, as an example of the "balancing" inherent to the sentencing process that can result in a CSO, even for a grave offence. That case involved a first-time street-level trafficker in fentanyl who pleaded guilty, expressed genuine remorse, and whose "involvement in the drug trade was driven by her own addiction to crystal methamphetamine" at para. 40. Again, *Ali* presents a qualitatively different factual matrix from the one before us.
- [71] When addressing the cases cited by the Crown at sentencing, defence counsel described *R. v. Toth*, 2017 BCSC 501, as the "closest, factually" to the one before us. Mr. Toth pleaded guilty to one count of possessing cocaine, fentanyl, and heroin for the purpose of trafficking. He was a "mid-level trafficker, supplying street-level traffickers": at para. 16. Mr. Toth was 34

years old when sentenced, of Indigenous heritage, had no related convictions, and made "significant efforts at rehabilitation" before sentencing: at para. 27. The judge assumed a generally applicable range of sentence of 12 months to seven years: at para. 62. She imposed a three-year penitentiary term, one year longer than the sentence imposed in this case. In my view, rather than support Mr. Bird's cumulative sentence, the outcome in Toth--which preceded Smith, Parranto, and this Court's decision in Mann--makes clear its disproportionality.

Sentencing afresh

- [72] Having concluded that the sentence imposed in the Provincial Court is demonstrably unfit, this Court is entitled to sentence afresh: *R. v. Friesen*, 2020 SCC 9 at paras. 26-27; *R. v. J.W.*, 2025 SCC 16 at para. 52.
- [73] When doing so, we must defer to the judge's findings of fact and to her identification of aggravating and mitigating factors, except to the extent those findings are affected by an error in principle: *R. v. Nystrom*, 2023 BCCA 232 at para. 16, citing *Lacasse* at paras. 43-44; *Friesen* at paras. 27-29; and *Parranto* at para. 122.
- [74] Taking all those factors into account, along with the collateral consequence identified by the judge (see paras. 13-17, above) and the applicable principles of sentencing, I am satisfied a fit cumulative sentence for Mr. Bird's offences is five years in prison. Given the length of this sentence, a CSO is not available: s. 742.1, Criminal Code.
- [75] Mr. Bird possessed a large amount of fentanyl and MDMA for the purpose of trafficking. These drugs were kept in a home that he shared with his young daughter. Drug-related paraphernalia was displayed in the home and on the face of it, easily accessible. The MDMA was consistent with trafficking at the kilo level. The fentanyl pills were made to look like Percocet and deceptive. In *Parranto*, Justice Moldaver noted that practices such as this leave "users vulnerable and unaware, especially as fentanyl is physically indistinguishable from other hard drugs": at para. 94. Mr. Bird operated at the mid-level because it was financially worthwhile to do so. He committed objectively and subjectively grave offences, accompanied by high moral culpability.
- [76] I need not repeat here the destructive harms associated with fentanyl-related offences, including the palpable risk of serious injury and death that Mr. Bird enabled through his conduct, and the courts' ongoing condemnation of the distribution of fentanyl and its pernicious effects. Those issues have been addressed above. Mr. Bird's offences occurred well into the opioid crisis that continues to plague British Columbia. He must have been aware of that reality. Indeed, when explaining how some of the drugs found in his home were for personal use (an explanation rejected by the judge), he testified that he tried to get Percocet by prescription, however, this was "around the time where there was, like, a[n] opioid crisis" and prescriptions for Percocet were less available. He clearly understood what was happening on the streets but nonetheless chose to engage in conduct that carries a

significant risk of harm to others.

- [77] Some of Mr. Bird's personal circumstances were mitigating but, in my view, they have limited attenuating impact in the context of a case that clearly necessitates a denunciatory and deterrent sentence.
- [78] The judge herself noted the limited impact (which may explain her comment at para. 42 of her reasons for sentence that she imposed two years less one day with "some reluctance"). Mr. Bird was using illicit substances at the time of the offences but did not have a substance use disorder and drug use was not driving his behaviour. He showed "limited" remorse for his crimes, but no "insight into his involvement in the drug trade": at paras. 35-36. He has support from family and friends, but it was unclear from the letters adduced at sentencing whether they all know of or appreciate the extent of the circumstances underlying his convictions: at para. 36.
- [79] Mr. Bird was (and remains) the primary caregiver for his teenaged daughter and at the time of sentencing he was attempting to develop a relationship with his young son. However, as noted by this Court in *R. v. Herrell*, 2014 BCCA 114, a negative impact on family members resulting from incarceration is not unique. Unfortunately, it is "often an unavoidable consequence of criminal activity": at para. 24, citing *R. v. Sandher*, 2008 BCSC 263 at paras. 27, 57, and *R. v. Newsom*, 2008 BCCA 28 at para. 18. This factor's sympathetic nature cannot be allowed to overwhelm the sentencing analysis and result in a disproportionate sanction.
- [80] Because of his crimes, Mr. Bird lost his Jaguar to civil forfeiture. Appropriately, respondent's counsel did not press this fact as a compelling feature of the case. Finally, the judge assigned considerable weight to the fact that Mr. Bird had not reoffended between his offences in April 2019 and sentencing. Although certainly relevant to the sentencing analysis as indicative of lower risk and perhaps a reduced need for specific deterrence, this factor (something society reasonably expects from all members), is not so significant that it renders the need for denunciation and general deterrence less pressing. There was no suggestion here of prolonged compliance with strict bail conditions while awaiting sentence that, standing alone, can be said to have furthered the goals of deterrence and denunciation: *R. v. Nghiem*, 2009 BCCA 170 at paras. 9-21.
- [81] Mr. Bird's mitigation, although important to the sentencing analysis, is not compelling. The aggravating facts and features of the case, on the other hand, are compelling. His conduct calls out for a sentence in the four to seven years-plus range. His offending involved a: substantial volume of fentanyl; deceptive distribution motivated by profit; and, on this record, palpable indifference to the clearly foreseeable and significant harms flowing from his conduct. In my view, Mr. Bird's intentional choice to engage in fentanyl distribution calls for at least a five-year term.

Disposition

- [82] For the reasons provided, I would grant the Crown leave to appeal from sentence. I would set aside the respondent's cumulative sentence of two years less one day and three years' probation and impose five years' imprisonment on Count 1 of the Indictment (fentanyl), and four years concurrent on Count 2 (MDMA).
- [83] These sentences are to run from November 12, 2024. I would leave it to the correctional authorities to calculate the amount of credit the respondent is statutorily entitled to for time already served on the CSO. The intention is that for purposes of statutory release, Mr. Bird be treated as an offender who received a cumulative five-year penitentiary term when sentence was first imposed.
- [84] None of the ancillary orders imposed in the Provincial Court are under appeal. Consequently, they should remain intact.

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Justice Warren"

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