

CANADA / JUDGMENT

R. v. Byrne

2020 BCSC 811

COURT

Supreme Court of British Columbia

DECIDED

6 April 2020

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2020 BCSC 811 R. v. Byrne

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Byrne,

2020 BCSC 811

Date: 20200406

Docket: 82728-3

Registry: Nanaimo

Regina

v.

Kelsie Rose Boutilier,

Michael Damien Byrne,

Curtis Jesse Gordon Houle

and Bailey Ann Martin

Before: The Honourable Mr. Justice Thompson

Oral Reasons for Sentence

for Michael Damien Byrne

Counsel for the Crown

(via telephone):

J. Farenholtz

Counsel for the Offender

(via telephone):

C. Hodson

Place and Dates of Hearing:

Nanaimo, B.C.

April 10, 2019

April 2, 2020

Place and Date of Judgment:

Nanaimo, B.C.

April 6, 2020

- [1] THE COURT: Mr. Byrne was charged with four counts of possessing various controlled substances for the purpose of trafficking and a fifth count of occupying a vehicle containing brass knuckles, a prohibited weapon. Mr. Byrne entered guilty pleas mid-trial following an adverse voir dire ruling. Upon commencement of the sentencing hearing, the Crown directed a stay of proceedings on two counts. What remains is to sentence Mr. Byrne in relation to three counts: possession for the purpose of trafficking in a mixture of fentanyl/heroin (Count 2); possession for the purpose of trafficking in a mixture of fentanyl/carfentanil (Count 3); and possession of the brass knuckles (Count 10).
- [2] This sentencing began on 10 April 2019. Mr. Byrne, on bail at the time, absconded during the mid-morning break. A warrant issued and he was arrested in due course. He has been in custody awaiting the completion of his sentencing. Taking account of the period before he was admitted to bail prior to trial, and the period since his arrest on the bench warrant, Mr. Byrne has been in custody for 372 days, and the parties agree that he ought to receive time and a half credit -- this comes to 558 days.
- [3] The Crown's position is that a prison sentence in the range of four to five years, less 558 days' credit, is appropriate. Mr. Byrne submits that a time-served disposition, together with a three-year probation order, is fit and proper.

Circumstances of the Offences

- [4] In April and May 2017, the Nanaimo RCMP received information from confidential informants about Mr. Byrne trafficking drugs in Nanaimo. An investigation began. Surveillance was conducted in May 2017 -- most of this surveillance centred on a motel parking lot outside a room registered to Mr. Byrne. The surveillance also included following Mr. Byrne's car to stops at addresses associated with the Nanaimo drug trade. On May 24, 2017, police observed what they concluded was a dial-a-dope transaction. They also

observed the comings and goings at Mr. Byrne's motel room of persons known to be drug users or traffickers.

- [5] On 25 May 2017, Mr. Byrne was observed to engage in what appeared to be a dial-a-dope transaction. The vehicle to which Mr. Byrne had made an apparent delivery was stopped and drugs found. Mr. Byrne's car was trailed to an address known to the police to be associated with the drug trade. When Mr. Byrne's car left that location, the decision was made to arrest Mr. Byrne for possession of a controlled substance for the purpose of trafficking.
- [6] Mr. Byrne was arrested moments later, after being extracted from the driver's seat of his car, as part of a takedown conducted by an emergency response team. There were three others in the car. Mr. Byrne was searched following the arrest, and this yielded \$130 in one pocket, \$500 in another, and \$765 more in his wallet. A search of the vehicle yielded a notebook that appeared to contain score sheets, a frequently-ringing phone, controlled substances (including the combinations of drugs that the accused pleads guilty to possessing), a set of brass knuckles, and an extendable baton.
- [7] The police obtained a warrant to search Mr. Byrne's motel room. They located small amounts of cocaine/fentanyl, heroin/fentanyl, and methamphetamine. They also seized score sheets, Ziploc bags, a mortar and pestle, mixing bowls and scales with residues, some dye, \$9255 in cash, a pellet gun, two hatchets, and some dog spray.
- [8] Mr. Byrne has pled guilty to possession of the heroin/fentanyl and the fentanyl/carfentanil in his vehicle. The heroin/fentanyl weighed out at just less than 16 grams, most of which was in a baggie containing 13.35 grams. The remainder was in smaller baggies. The fentanyl purity differed in each baggie, ranging from 3.3 percent to 4.9 percent. The fentanyl/carfentanil mixtures were in three baggies with a total weight of just over 1.5 grams.
- [9] Mr. Farenholtz submits that while it appears that Mr. Byrne was not the operating mind of this trafficking operation, he ought to be characterized as being above a street-level dealer having regard to the quantity of drugs, the mortar and pestle, mixing bowls and dye, packaging, and the presence of significant quantities of cash on his person and in his motel room.

The Offender's Circumstances

- [10] Mr. Byrne is 42 years old. Through his counsel, he advises that he had a difficult childhood. His mother was an abusive and inattentive alcoholic, and his father -- a tugboat engineer who also abused alcohol -- was usually at sea. His parents separated when Mr. Byrne was 13 years old. He lived in his father's residence and had the place to himself most of the time, although his older sister and his grandmother looked out for him. Mr. Byrne moved out at age 16, and left school with a grade 9 education to work in construction.
- [11] Mr. Byrne reports that he has struggled with addictions. He began drinking when he was 11 or 12 years old, with some of the alcohol provided by his parents.

[Mr. Hodson's telephone connection was lost in the midst of para. 4 of these reasons. Once the connection was re-established, paras. 4-11 were repeated for his benefit.]

- [12] Mr. Byrne began using cocaine as a teenager. At age 22, he fell asleep at the wheel and suffered serious orthopaedic injuries as well as a closed head injury. He was treated with narcotic medications, and began to use street opioids thereafter. With some periods of abstinence, he has continued opioid misuse for the past 20 years.
- [13] Mr. Byrne has held down various jobs in construction. He has also worked on the oil rigs and in the logging industry. At one point he worked in vacuum cleaner sales. However, he says that his addiction led to cycles of losing jobs and housing, and he would end up on the street.
- [14] Mr. Byrne has a criminal record, the salient parts of which include six PPT convictions: in 2006, 2008, 2009, 2010, and 2011. He also has nine simple possession convictions. In 2011, he received a one-year jail sentence for PPT. There is a gap in his cognate criminal record after 2011, up until his 2017 drug trafficking activity that led to the present charges.
- [15] Mr. Hodson is instructed that this substantial gap is accounted for by important changes in his client's circumstances. Mr. Byrne met a woman at a Narcotics Anonymous meeting. They moved to Newfoundland where they cared for his new partner's sick mother. Twins, now seven years old, were born to the couple. The relationship fell apart, however, and the children were taken into the care of child protection authorities.
- [16] Mr. Byrne left Newfoundland for Nanaimo, planning to put his life in order such that he could get custody of the children and move them here. However, his savings were soon depleted and he fell into old habits. It is said that he engaged in drug trafficking, including the present offences, to support a heavy addiction and to keep a roof over his head.
- [17] While Mr. Byrne concedes that he was not on the lowest rung of this drug trafficking organization, he submits that the evidence does not support a characterization of his activities as being other than as a low-level operator. The evidence does not permit me to confidently make a finding about whether Mr. Byrne ought to be characterized as a drug trafficker at the upper end of the lower level or at the lower end of the mid-level. I proceed on the basis that he was close to but not at the mid-level of this operation.
- [18] Mr. Byrne has put to good use some of his time prior to this sentencing. Upon being granted bail, he completed a four-month course at an addiction treatment centre, and worked in the construction industry. He attended Narcotics Anonymous and was on the methadone program, working towards abstinence. Since his arrest for absconding in the midst of his sentencing, he has worked with an addiction counsellor and completed courses in substance abuse management, living without violence, and respectful relationships. He has also worked on communication and planning self-study courses.

[19] Mr. Byrne submits that his health is not of the best; he says that he has "weak lungs" that he attributes to working with concrete through the years. He submits that he is not able to socially isolate while in custody, and in this context the current COVID-19 epidemic adds to the case for a time-served disposition. While I accept the general proposition that being in custody during this epidemic may well lead to a more difficult sentence to serve than otherwise, I cannot make a finding -- in the absence of some medical evidence -- that Mr. Byrne is particularly vulnerable.

[Discussion to ensure that the telephone connections of both counsel were intact.]

Legal Framework

[20] The principles to be applied in sentencing for fentanyl and carfentanil can be discerned from recent Court of Appeal decisions: R. v. Smith, 2017 BCCA 112; R. v. Mann, 2018 BCCA 265, and R. v. Lloyd, 2019 BCCA 128. The presence of these substances is implicated in a majority of British Columbia drug overdose deaths in recent times. A sentencing judge must recognize the now notorious fact that these substances are killing their users in such large numbers that the problem is a public health crisis. Denunciation, deterrence, and protection of the public are the primary factors for consideration on sentencing, within the context of the overarching principle of proportionality: a just sanction is proportionate to the seriousness of the offence, and the degree of responsibility of the offender.

Discussion

[21] I agree with the Crown position that Mr. Byrne's PPT offences are very serious. The quantities of fentanyl and carfentanil found in his possession are significant and the variation and extent of purity levels of fentanyl in the heroin/fentanyl mixture is alarming. Mr. Byrne was operating "higher up the chain" than a street-level dealer. The presence of the mortar and pestle in Mr. Byrne's motel room indicates a rudimentary mixing method that exposes users to risk at a level that shows disregard for human life; even if someone other than Mr. Byrne was actually doing the mixing, the presence of the mortar and pestle in his motel room speaks to Mr. Byrne's knowledge of the method by which at least some of the drugs were prepared for sale. I treat the presence of the brass knuckles in the car as an aggravating circumstance, as is the dial-a-dope character of the operation.

[22] I turn to circumstances that bear on the extent of moral blameworthiness. Mr. Byrne has highly relevant previous convictions, albeit somewhat dated and not in relation to trafficking of fentanyl or carfentanil. I give weight to the difficult circumstances of his childhood and youth, and the steps he has taken over the years to come to grips with the addictions that are likely at least in part the result of his misfortunes. I am prepared to accept that his principal motivation for these 2017 offences was to feed his expensive habit.

- [23] I agree with the Crown that the Mann case, while not on all fours, is useful as a rough comparative guide and supports the Crown position that the appropriate range of sentence in the case at bar is four to five years. In Mann, one offender was sentenced for trafficking in fentanyl and uttering a threat, the other for trafficking in fentanyl and carfentanil, and possession of a loaded handgun. While their dial-a-dope operation was small and unsophisticated, it had some features of mid-level trafficking and was motivated by profit. Neither offender had a criminal record. The respective sentences for the trafficking charges were four years' and five years' imprisonment. In each case, consecutive sentences were imposed for the uttering a threat conviction (one year) and weapons offence (three years). At para. 100 of his reasons for the division, dismissing both appeals against sentence, Fitch J.A., concluded that it is premature to identify a range applicable to this type of case -- the range "will develop over time, guided by judicial experience and the need for public protection."
- [24] Mr. Byrne places particular reliance on R. v. Creuzot, 2017 BCSC 1075, a case decided soon after Smith. The offender was sentenced for possession in 2015 of methamphetamine, cocaine and heroin for the purpose of trafficking, as well as possession of prohibited devices and a prohibited weapon. Traces of fentanyl were found in the heroin. He was 51 years old, and a long-term addict with muscular sclerosis. He had a significant record dating back to 1989. The Crown sought a total sentence, including the weapons offences, of 3.5 years less credit for time served. Justice Jenkins imposed a 14-month sentence less credit for time served, plus a term of probation.
- [25] There are important distinctions between Creuzot and the case at bar. First, Mr. Creuzot was not being sentenced for PPT fentanyl -- the presence of trace amounts of fentanyl in the heroin was argued by the Crown as an aggravating factor. Second, following Smith, Jenkins J. found that when Mr. Creuzot committed his crimes there was not widespread awareness that heroin could be laced with fentanyl. Third, Mr. Creuzot's trafficking activity was found to be "small time" at the street level. Fourth, his longest previous sentence was three months' imprisonment.
- [26] Mr. Byrne makes an alternative submission with reference to Smith that, in any event, he ought not to be sentenced to more than three years' imprisonment. However, I do not read Smith as indicating a "top end" of three years in cases such as Mr. Byrne's; he has a significant if dated record of drug trafficking offences, he was more than a street-level operator, and he was indifferent to the lives he was putting at risk.

Sentence

- [27] Stand up please, Mr. Byrne.
- [28] Each sentence imposed on you will be served concurrently.
- [29] On Count 2 on the indictment, charging possession of fentanyl/heroin for the purpose of trafficking, I sentence you to four years' imprisonment.

- [30] On Count 3 on the indictment, charging possession of fentanyl/carfentanil for the purpose of trafficking, I sentence you to four years' imprisonment.
- [31] On Count 10 of the indictment, charging the occupation of a vehicle knowing of the brass knuckles in the vehicle, I sentence you to six months' imprisonment. This latter sentence is concurrent because I have taken into account the possession of the brass knuckles as an aggravating factor on the PPT counts.
- [32] Against these concurrent sentences, you shall have credit for 558 days.
- [33] As for ancillary orders, a forfeiture order will go for the material indicated by the Crown. You will provide a DNA sample, to be taken by the least intrusive means practicable. And, you are prohibited for life from possessing firearms and other weapons as defined by the Criminal Code. The DNA and firearms orders are attached to Counts 2 and 3 on the indictment.

[Discussion about the effective date of the ancillary orders. They are effective this date, 6 April 2020.]

"Thompson J."

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