

CANADA / JUDGMENT

R. v. Clow

2023 BCSC 2234

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 2234 R. v. Clow

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Clow,

2023 BCSC 2234

Date: 20231030

Docket: 16613-2

Registry: Powell River

Rex

v.

Skyler Thomas Clow and Chloe Mary Rose Thompson

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Before: The Honourable Justice A. Ross

Oral Reasons for Sentence

(Re Accused Skyler Thomas Clow)

Counsel for the Crown:

J.A. Cramer

Counsel for the Accused Skyler Thomas Clow:

S.J. Runyon

Place and Date of Trial/Hearing:

Powell River, B.C.

October 30, 2023

Place and Date of Judgment:

Powell River, B.C.

October 30, 2023

- [1] THE COURT (by videoconference): The accused, Skyler Clow, is before the court today to be sentenced for convictions on three offences arising under one indictment. I received joint submissions on sentencing indicating that an appropriate concurrent sentence for the three counts would be 4.5 years' imprisonment less credit for time served. For the reasons described below, I accept those joint submissions.
- [2] The events relating to the indictment took place in Powell River, British Columbia, on or about June 24, 2020, following a brief police investigation. Mr. Clow was charged alongside Ms. Chloe Thompson with a number of offences. Those charges proceeded to the voir dire stage, wherein Mr. Clow argued that the investigation breached his Charter rights. Upon my dismissal of that application, Mr. Clow pled guilty to the following offences:
- 1) Counts 1 and 3, possession of a controlled substance for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c.19 [CDSA]. The controlled substances included in respect of each count were fentanyl and methamphetamines;
 - 2) Count 4, possession of a loaded prohibited firearm without holding any required licence or authorization, contrary to s. 95(1) of the Criminal Code, R.S.C. 1985, c. C-46. The firearm in question was a Ruger SR22 semiautomatic rifle.
- [3] In these reasons, I refer to the drug offences collectively as "the PPT Offences" or "the Drug Offences", and the weapon offence as the "Weapon Offence".
- [4] I deal first with the nature of the drug trafficking offences. The drug trafficking was clearly on a scale higher than street level. Mr. Clow and Ms. Thompson were engaged in a mid-level drug-trafficking operation, albeit a relatively unsophisticated one. The Drug Offence pleas are in relation to Counts 1 and 3. The amount of controlled substances located during the search of the premises of Mr. Clow and Ms. Thompson was one gram of fentanyl and 21 grams of methamphetamines.
- [5] In relation to the firearm, as noted, a loaded Ruger SR22 semi-automatic rifle was found in their possession. That rifle had a sawed-off barrel and an over-capacity clip.

- [6] In my reasons below, I note that the presence of a firearm plus other weapons including a machete, as well as a "debt list", scales, safes, and empty packaging materials were indicative of the mid-level drug-trafficking operation. I also note that there were text messages exchanged suggesting that Mr. Clow was involved in selling more than individual units of drugs to other members of the Powell River community.
- [7] The joint submission indicates, and I accept, that the operation was clearly unsophisticated. The two accused did not have a dedicated stash site. The operation was based out of their shared residence: a small one-bedroom cabin.
- [8] As to the aggravating factors, the joint submission notes the following:
- 1) The firearm was a sawed-off semi-automatic rifle with an over-capacity magazine;
 - 2) Possession of the firearm was for an illicit purpose; it was clearly possessed for the protection of the drug-trafficking enterprise and possibly for sale;
 - 3) Third, the drugs in question are clearly dangerous. Fentanyl is highly toxic. It has altered the landscape of the substance abuse crisis in Canada, revealing itself as a public enemy according to the decision of the Supreme Court of Canada in *R. v. Parranto*, 2021 SCC 46.
 - 4) Fourth, it is clear that the sales in this case were to a vulnerable community, that being Powell River, which is a relatively small and remote community. I take that into consideration;
 - 5) Fifth, there was a combination of drugs and firearms. As noted, this is a concurrent sentence; hence, the combination of drugs and firearms constitutes an aggravating factor;
 - 6) Sixth, there were other weapons found in the residence. There was a machete, two large knives, three flare guns, a baton, and a stun gun;
 - 7) Seventh, the accused was clearly moving forward with a profit motive. His co-accused was found with \$1,445 in her purse which was clearly more than subsistence-level trafficking; and
 - 8) Eighth, the trafficking enterprise was clearly ongoing. I say that based upon the number of texts and emails or communications from March, April, and May 2020, prior to the arrests.
- [9] As to the mitigating factors, the joint submission indicates that Mr. Clow has now pleaded guilty and, hence, taken some responsibility for his actions. I note that that guilty plea followed the unsuccessful Charter challenge.
- [10] I also note that Mr. Clow is a relatively youthful offender. He is currently 28 years old. He was 24 at the time he committed the offences. Mr. Clow has a limited criminal record as an adult, consisting of failing to comply with a summons, resisting arrest, and failing to attend court, all of which resulted in a fine and one day in jail.

- [11] I also accept that it is a mitigating factor that Mr. Clow was clearly struggling with substance abuse at the time of the offences. I discuss below the steps that Mr. Clow has taken to address his addiction. However, I accept the joint submission that his efforts are not a strongly mitigating factor in this case, because there is no credible evidence that Mr. Clow has made sustained efforts to overcome his addiction.
- [12] I also note that Mr. Clow clearly misled the psychiatrist about his addiction in the preparation of the psychological report. He advised the psychiatrist that he had been clean of substances since 2020, with the exception of cannabis. I witnessed evidence of Mr. Clow using or withdrawing from hard drugs in 2022 while in court. Mr. Clow has not been forthright with the court or with himself about his drug abuse disorder and, therefore, has not taken the sorts of steps that would be necessary to address it as a true mitigating factor. However, I accept the fact that his judgment at the time of the offences may have been impaired to some extent and that that fact has a modest mitigating effect on his moral culpability.
- [13] I also accept the submission that there are inconsistencies in the various presentence reports about Mr. Clow's upbringing. I attribute those inconsistencies to Mr. Clow's inconsistent reporting. I accept that Mr. Clow had a disjointed upbringing. However, I do not accept that he was raised by a grandmother who was mentally unstable and left him alone for long periods of time, or that he moved out of her residence when he was 13. In a prior presentence report, Mr. Clow had indicated that his grandmother was his primary caregiver between ages two and 17, and that she cared for him well and she provided to his physical and emotional needs and disciplined him appropriately.
- [14] It is my impression that Mr. Clow is attempting to embellish the difficulties he experienced as a child. Regardless, I accept that Mr. Clow had some difficulty during childhood. I also note that Mr. Clow reports that he has recently taken steps towards rehabilitation and reconnecting with his mother, including taking some Grade 12 courses while incarcerated. He advised the court that he is attending courses and AA meetings to address addictions.
- [15] I now turn to the principles of sentencing.
- [16] I note the principles of s. 718 of the Criminal Code indicating the purposes of sentencing, and I keep those in mind during this sentencing hearing. The fundamental sentencing principle is proportionality which requires the court to craft a sentence that reflects both the gravity of the offence committed and the moral blameworthiness of the offender. I remind myself that sentencing ranges established by appellate courts are useful and important considerations, but they are merely guidelines. Sentencing is a highly-individualized process based on the gravity of the offence, the offender's degree of responsibility, and the specific circumstances of each case.

- [17] In this case, I am imposing concurrent sentences. First dealing with the drug offences, I note that specific considerations apply when determining the appropriate sentence for that type of offence. Section 10(1) of the CDSA provides additional guidance for the purpose of sentencing offences under that Act, and I keep those provisions in mind.
- [18] I also note that denunciation and deterrence are paramount in sentencing individuals for trafficking fentanyl. The British Columbia Court of Appeal has provided guidance wherein fentanyl trafficking is a significant offence that attracts increased sentencing ranges: *R. v. Mann*, 2018 BCCA 265 at para. 73.
- [19] The joint submission presented a number of cases to provide comparison sentences and ranges. I will not go into those cases in detail, except to note the following:
- 1) In *R. v. Davies*, 2019 BCCA 359, the court indicated that the range for mid-level fentanyl trafficking is 30 to 48 months.
 - 2) In *Mann*, the Court of Appeal dealt with the sentencing of two brothers in a mid-level trafficking operation involving fentanyl. The two also pled guilty to firearm charges. The operation was unsophisticated. The fentanyl sentence for the lesser-involved brother was four years, and the firearms sentence was three years to be served consecutively. There were other factors in that case that were both more and less serious than the present case: the guilty plea came earlier, but the total amount of drugs was greater. The joint submission indicates that the *Mann* decision is an example of a fit sentence where the offender was dealing fentanyl and in possession of a firearm.
- [20] As noted above, the joint submission proceeds on the basis that Mr. Clow was involved in a mid-level trafficking operation involving fentanyl. Crown submits in the joint submission that this operation was on the unsophisticated and low end of the scale. On that basis, the joint submission indicates that the low end of the sentencing would be 30 months' imprisonment before addressing aggravating and mitigating factors.
- [21] The joint submission proposes that the sentence to be attributed to each of the Counts 1 and 3 is as follows:
- 1) Count 1, fentanyl, three years;
 - 2) Count 3, methamphetamines, one year.

I accept those submissions.

- [22] I now move to the Weapon Offence. Similarly, the sentencing for that offence deals with principles of denunciation, deterrence, and protection of the public. The sentencing cases discuss a range of possible types of offences under s. 95(1) of the Criminal Code ranging from situations of "true crime" such as carrying a loaded prohibited firearm in a public place for a criminal purpose, down to crimes of a more regulatory nature such as a licenced firearm owner storing an unloaded restricted firearm in an area close to accessible ammunition.

- [23] In this case, the firearm offence falls closer to the true crime end of the spectrum, given that the firearm was found in the location of a drug-trafficking operation. The gun had been modified to make it more concealable. It was loaded with a prohibited magazine. Again, I will not go into the cases in detail. I accept the guidance from the decision in *R. v. Kachuol*, 2017 BCCA 292 at para. 26, where the Court of Appeal indicated that a fit sentence at the bottom end of the range is three years' imprisonment for this type of offence.
- [24] In *R. v. Mills*, 2021 BCCA 86, the Court of Appeal recently confirmed a six-year global sentence for firearm-related offences as a mid-point which does not offend the principles of proportionality or parity (at para. 22). I note that in *Mills*, the accused had a lengthy criminal record and was prohibited from possessing firearms. However, he had also taken strides towards recovery while incarcerated.
- [25] The joint submission points to a number of cases that provide further guidance as to the range of appropriate sentences for similar firearm offences. The joint submission indicates that the appropriate concurrent sentence for this firearm offence is 4.5 years' imprisonment. I accept that submission.
- [26] Mr. Clow, would you please stand.
- [27] THE ACCUSED: I'm standing.
- [28] THE COURT: Thank you. I sentence you to a period of incarceration of 4.5 years. You have been in pre-sentence custody for 202 days. Pursuant to s. 719(3) of the Criminal Code, you are entitled to credit of 303 days for that time served. As a result, I sentence you to a period of incarceration of 1,340 days.
- [29] I also impose upon you a firearms ban of 10 years under s. 109(2) of the Criminal Code, and I require you to provide a DNA sample pursuant to s. 487.051 of the Criminal Code.
- [30] I will say, Mr. Clow, that I am encouraged by the steps that you have taken while in custody, and I encourage you to continue along that track. It will increase your chances of being a productive member of society upon release.
- [31] Counsel, I note that we have not addressed the forfeiture order.
- [32] CNSL S. RUNYON: That's correct, Justice, and I'll just advise that moving forward, after having some contact with Ms. Whynot [counsel for Ms. Thompson], I'm appearing as her agent for the purposes of this forfeiture application.
- [33] THE COURT: Very well. Since we last talked half an hour ago, I have received a copy of the forfeiture order. Is there any objection to my -- is there any opposition to the forfeiture order?
- [34] CNSL S. RUNYON: There is not, Justice. It's been signed by both parties.
- [35] THE COURT: Mr. Clow, I saw you raise your hand?

- [36] THE ACCUSED: I'm wondering what a forfeiture order is. I just -- I just never heard about what it is.
- [37] CNSL S. RUNYON: Justice, this is the forfeiture order that we discussed at length at the last hearing when the pleas were entered and nothing has changed since that point in time, Justice. So, this was reviewed with Mr. Clow, that everything that was in the exhibit flowchart was likely going to be forfeited.
- [38] THE COURT: Okay. Thank you for that, Mr. Clow, and I am glad we could clarify that for you. That being the case, I will sign the forfeiture order and return it to Mr. Cramer, or Mr. Cramer can obtain it from the registry in Vancouver.
- [39] CNSL J. CRAMER: Thank you, yes, if that can be added to the court file, and I'll get a copy from the court file sent to my office for execution.
- [40] THE COURT: Very well. Is there anything else we need to deal with today?
- [41] CNSL J. CRAMER: So just -- oh, I think I was about to pre-empt Madam Clerk to say what she's about to say, I suspect, which is that formally she has advised that it would be pref -- what is required is that we call the Thompson matter separately because of a quirk of the computer system that would require that we finish with the Clow matter that's previously been called, and then call the Thompson matter separately and simply reiterate that the forfeiture order would apply.
- [42] THE COURT: All right, and before we do that, is there anything else we do need to deal with in respect of Mr. Clow's matter?
- [43] CNSL J. CRAMER: Not as far as the Crown is concerned, Justice.
- [44] THE COURT: Ms. Runyon?
- [45] CNSL S. RUNYON: No, Justice, not on the part of Mr. Clow.
- [46] THE COURT: All right.
- [47] THE CLERK: Justice, it's the court clerk. There's just the Count 2, I see is still outstanding.
- [48] CNSL J. CRAMER: Thank you, yes, if that count could be marked stayed, please, at the direction of the Crown.
- [49] THE CLERK: Thank you.
- [50] THE COURT: Thank you for that, Madam Registrar.

"A. Ross J."

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