
CANADA / JUDGMENT

R. v. D'Allesandro

2019 BCSC 1810

COURT

Supreme Court of British Columbia

DECIDED

8 October 2019

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2019 BCSC 1810 R. v. D'Allesandro

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. D'Allesandro,

2019 BCSC 1810

Date: 20191008

Docket: 175317-3

Registry: Victoria

Regina

v.

Richard Anthony D'Allesandro

Before: The Honourable Madam Justice Horsman

Oral Reasons for Sentence

Counsel for the Crown:

T. Corsi

Counsel for the Accused:

M. Munro

Place and Date of Trial/Hearing:

Victoria, B.C.

September 23, 2019

Place and Date of Judgment:

Victoria, B.C.

October 8, 2019

[1] THE COURT: These are my reasons for sentencing.

Circumstances of the offence

[2] On September 3, 2019, I found Mr. D'Allesandro guilty of three counts of possession of a controlled substance for the purpose of trafficking, namely heroin and fentanyl, cocaine and methamphetamine, and one count of possession of property of a value not in excess of \$5,000 that was obtained by the commission of an indictable offence.

[3] The circumstances, briefly, are as follows:

- On October 2, 2018, the Victoria Police Department [VPD] received information from a confidential informant that Mr. D'Allesandro was dealing drugs from his apartment at suite 425-844 Johnson Street in Victoria. 844 Johnson is a low barrier housing complex run by the Portland Hotel Society. The residents are the former residents of tent city in Victoria.
- Members of the VPD obtained and reviewed eight hours of surveillance video of the hallway outside Mr. D'Allesandro's suite that took place over a two-day period. The video review depicted an unusually high volume of visitors to Mr. D'Allesandro's suite, most of whom stayed in the suite no longer than a few minutes.
- The police applied for and obtained a search warrant to search Mr. D'Allesandro's suite. The warrant was executed on October 4, 2018.
- The controlled substances seized from Mr. D'Allesandro's suite consisted of approximately 21.71 grams of a heroin/fentanyl mixture, 5.83 grams of methamphetamine and 9.71 grams of cocaine.
- Other items seized included a cell phone, three scales, empty plastic dime bags, a collection of knives, a video surveillance camera, and a book safe, that is a safe disguised as a dictionary, containing approximately \$25,000 in small bills.
- Police also seized a number of cards, such as identification, banking, gift cards that did not belong to Mr. D'Alessandro. Mr. D'Alessandro's possession of one of these cards, a Camosun College ID card, resulted in his conviction on the charge of possession of property obtained by the commission of an indictable offence. Mr. D'Alessandro admitted in his evidence at trial that the card was in his possession as a result of what he referred to as "car hopping" - that is taking items from other people's vehicles.

- [4] Mr. D'Alessandro is currently 40 years old. It is clear from the evidence at trial that he has had a long-standing addiction to drugs. He has resided at 844 Johnson since the facility opened in 2016, other than periods of time he was incarcerated, and he previously resided with his girlfriend at tent city. Defence counsel submits that it is evident that Mr. D'Alessandro engaged in trafficking to support his own drug addiction.
- [5] The aggravating circumstances on the sentencing include:
- i. the substances that Mr. D'Alessandro was trafficking include fentanyl. The dangers of fentanyl and the public health crisis that has resulted from its use in British Columbia has been the subject of frequent judicial comment in recent years. I refer in particular to the comments of our Court of Appeal in *R. v. Smith*, 2017 BCCA 112.
 - ii. Mr. D'Alessandro was trafficking multiple substances in this case. Although Mr. D'Alessandro appears to have been engaged in street level trafficking, the volume of controlled substances that were seized from his suite are not insignificant. Further, the items seized from his suite included a large amount of cash in small bill denominations, which suggests a level of sophistication to his trafficking activity.
 - iii. Mr. D'Alessandro has a lengthy criminal record dating back to 2003 which includes three previous convictions for possession for the purpose of trafficking, the most recent one in 2008. Since 2008, Mr. D'Alessandro's record includes numerous convictions for crimes such as break and enter, possession of a controlled substance, theft, breach of probation, breach of undertaking and failure to appear, assault and resisting a police officer.
- [6] The mitigating factors on sentence include:
- i. Mr. D'Alessandro has an entrenched drug addiction and appears to have engaged in trafficking to support his own addictions. Defence counsel points out that Mr. D'Alessandro's criminal history reflects his struggles with addiction, and his most recent record consists of summary convictions rather than serious trafficking offences.
 - ii. The barriers that Mr. D'Alessandro has faced in his life are reflected in his residence at 844 Johnson and his former residence at tent city. It is apparent that Mr. D'Alessandro has struggled with issues of poverty and addiction. His struggles have become particularly acute in the past two years with the death of his grandmother and girlfriend.

Positions of the parties on sentencing

- [7] The duty of a sentencing judge is to fashion a just and appropriate punishment that addresses the principles of sentencing, and is proportionate to the culpability of the offender, having regard to the fundamental principles of sentencing set out in s. 718 of the Criminal Code, and the fundamental principle of proportionality set out in s. 718.1.
- [8] It does not appear to be in dispute between the parties that the paramount considerations on this sentencing are deterrence, both general and specific, and denunciation.

- [9] The Crown says that an appropriate sentence for Count 1, possession for the purpose of trafficking heroin and fentanyl, is a term of five years imprisonment, less credit for time served in pretrial custody. The Crown seeks sentences of 18 months for each of Count 2, possession of cocaine for the purpose of trafficking, and Count 3, possession of methamphetamine for the purpose of trafficking, and a sentence of four months for Count 5, possession of property obtained in the commission of an indictable offence.
- [10] All of these sentences should, in the Crown's submission, be served concurrently.
- [11] The Crown argues that the range established in *R. v. Smith*, supra for street-level dealing in fentanyl - that is a range from 18 to 36 months and possibly higher - does not apply here because Mr. D'Alessandro has previous convictions for possession for the purpose of trafficking, even if they may not be fentanyl related. The Crown says that the range established in *Smith* applies only to a first time trafficker. The Crown relies on the following cases, in addition to *R. v. Smith*, in support of a five year sentence for the heroin and fentanyl trafficking conviction: *R. v. Forsberg*, Victoria Registry No. 1687638-4-C BCPC; *R. v. Brown*, 2018 BCPC 228; and *R. v. Lloyd*, 2019 BCCA 128.
- [12] In each of *R. v. Forsberg* and *R. v. Brown*, the Provincial Court imposed a sentence of four years following an accused's conviction for possession of fentanyl for the purpose of trafficking. The common feature of both cases is that the accused had previous convictions for possession for the purpose of trafficking. In *R. v. Lloyd*, the Court of Appeal upheld a six year sentence for possession of fentanyl for the purpose of trafficking. The accused in that case had 10 prior convictions for possession for the purpose of trafficking and had committed the subject offences only five months after release from prison on a previous trafficking conviction.
- [13] The defence says that a sentence in the range of two to three years for the conviction on the count of possession of heroin and fentanyl for the purpose of trafficking is appropriate. The defence says that the range established in *R. v. Smith* is 18 to 36 months, and there is no obligation from a precedential perspective to reach beyond that range. I did not understand the defence to take issue with the sentences proposed by the Crown on the remaining counts.
- [14] Defence counsel relies on the decision of Madam Justice Power in *R. v. Tucker*, 2019 BCSC 961, in support of the proposed range of sentence. In *Tucker*, the accused was sentenced to a global sentence of two years' imprisonment on convictions for possession for the purpose of trafficking, including the trafficking of fentanyl, and convictions for dangerous driving, obstructing arrest, and wounding a law enforcement animal. The accused in that case had a lengthy criminal record, including 10 prior convictions for possession for the purpose of trafficking. The last such conviction was from 2008 and the maximum sentence that the accused had received for similar offences was six months in custody.

- [15] In determining an appropriate sentence in Tucker, Madam Justice Power considered the "step-up principle" to be relevant; that is, the principle that there must be a relationship of proportionality between the sentence to be imposed and past sentences for similar offences. She stated:
- [25] However, I am also of the view that I must keep in mind all of the sentencing principles, including the step-up principle and the significance of this sentence relative to the previous sentences that Mr. Tucker has received. I must also keep in mind the support that Mr. Tucker has from his family, some of whom were present in court, and the letters of support that were filed on the proceedings, as well as the fact that the material before me supports that he does have support from those in authority that he has dealt with and who know him. Dr. Greenspoon is quoted in the presentence report as confirming that Mr. Tucker has been a star patient on the methadone program and that he now has his addiction under control.
- [16] Notably, the sentence in Tucker included a three year period of probation for the accused following his release from custody.
- [17] Defence counsel argues that the step-up principle should also apply here, given that the longest sentence that Mr. D'Alessandro has served to date for a conviction for the purpose of trafficking is 12 months.
- [18] The parties agree that Mr. D'Alessandro had served 323 days in custody as of the date of the sentencing hearing on September 23, 2019. This means that, as of today's date, he has served 338 days in pretrial custody. He therefore will receive credit for 507 days in custody.

Analysis

- [19] In considering an appropriate sentence in the present case, I begin by observing that the range established in *R. v. Smith* is not 18 to 36 months, but rather 18 to 36 months or higher. The range was proposed by Madam Justice Newbury at para. 45 of *Smith*, and endorsed by the majority at para. 48. The relevant passage from the judgment of Madam Justice Newbury is as follows:
- [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.

- [20] I have already reviewed the aggravating factors in this case, particularly that the traffic substances included fentanyl, and I will not repeat them.
- [21] The main mitigating factor is the fact that Mr. D'Alessandro himself struggles with addiction. However, this is a mitigating factor that cuts both ways. If Mr. D'Alessandro traffics in part to finance his addiction, then there is reason to anticipate he may continue to do so as long as he remains addicted.
- [22] Unlike in *R. v. Tucker*, there is no information before the court on the present sentencing hearing to suggest that rehabilitation is a significant consideration. There is no evidence of steps that Mr. D'Alessandro has taken to address his addictions. Mr. D'Alessandro has numerous prior convictions for breach of a probation order and neither party has proposed a probation order as part of Mr. D'Alessandro's sentence. This is not a case, as in *Tucker*, where the principles of denunciation and deterrence could be met with a two-year sentence of imprisonment.
- [23] In my view, the paramount considerations of deterrence and denunciation require a significant term of imprisonment for Mr. D'Alessandro beyond the two to three year sentence proposed by defence counsel. The factors that appear most relevant to me are the fact that Mr. D'Alessandro was trafficking in fentanyl, he has a lengthy criminal history which includes convictions for possession for the purpose of trafficking, and there is no information before me on the sentencing hearing to suggest that Mr. D'Alessandro has taken steps to address the addiction issues that has led him here. I accept that Mr. D'Alessandro has faced barriers in his life, however, so have the people that he is selling fentanyl to, yet he has sold drugs to his neighbours and presumably friends knowing that he is putting them at risk in doing so.
- [24] In the circumstances, having regard to the principles of sentencing, the authorities cited by the parties, Mr. D'Alessandro's circumstances, and the circumstances of the offences of which he has been convicted, I am of the view that it is appropriate to sentence him to a four-year period of imprisonment on Count 1, possession of heroin and fentanyl for the purpose of trafficking, less credit for time served. I will otherwise adopt the Crown's sentencing submissions for the remaining counts, which I do not understand to have been seriously challenged by the defence.

Sentence

- [25] Mr. D'Alessandro, I would ask you to please stand, sir.
- [26] I impose the following sentence:
- i. On Count 1, possession of heroin and fentanyl for the purpose of trafficking, I sentence you to four years imprisonment.
 - ii. I sentence you to 18 months on each of Counts 2 and 3 of the indictment, possession of cocaine and methamphetamine for the purpose of trafficking.

iii. I sentence you to four months imprisonment on Count 5, possession of property obtained by the commission of an indictable offence.

[27] All of these sentences will be served concurrently.

[28] You will be given credit for 507 days of pretrial custody. By my calculation, this means the period of additional time to be served is two years and 233 days.

[29] I will also make the two ancillary orders sought by the Crown and not opposed by the defence: one, pursuant to s. 487.051(1) of the Criminal Code, a DNA sample will be taken, and pursuant to s. 109, of the Criminal Code, there will be a lifetime firearms prohibition.

[30] You may sit down sir.

[31] Is there anything that the parties require of me?

[32] MR. MUNRO: I don't think so. I take it, if there were any stays on the latter counts, that was done some time ago, so I think that is all that would have been -- yes?

[33] THE COURT: There was a --

[34] THE CLERK: Count 4 was withdrawn or -- or he was acquitted.

[35] MR. MUNRO: Right.

[36] THE COURT: He was acquitted on Count 4 and convicted on the remaining counts.

[37] MR. MUNRO: Very good. And no, nothing further.

[38] THE COURT: All right. Mr. Corsi?

[39] MR. CORSI: Thank you, My Lady. No, I don't think so. I can't remember if I mentioned forfeiture when we did the sentencing submissions. I think that probably has already been done with the civil forfeiture office, I'm not quite sure. If there is --

[40] THE COURT: That is what you told me last time --

[41] MR. MUNRO: That's right.

[42] MR. CORSI: Is that right? I think we have looked into that.

[43] THE COURT: -- so I assumed you would raise it again if circumstances changed.

[44] MR. CORSI: If there is something that is there, perhaps if I can -- if I do a desk order, but I don't think there is anything you want me to --

[45] THE COURT: Well, I am not going to deal with it today then.

[46] MR. CORSI: Right.

[47] THE COURT: All right. Thank you, we are adjourned.

[48] THE CLERK: My Lady, if I may just clarify -- is the DNA mandatory or is it conditional?

[49] MR. CORSI: Well, it's a secondary designation.

[50] THE COURT: It is secondary -- yes.

"Horsman J."

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