
CANADA / JUDGMENT

R. v. Davies

2019 BCCA 359

COURT

British Columbia Court of Appeal

DECIDED

23 October 2019

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2019 BCCA 359 R. v. Davies

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Davies,

2019 BCCA 359

Date: 20191023

Docket: CA46124

Between:

Regina

Respondent

And

Colton Davies

Appellant

Before:

The Honourable Mr. Justice Goepel

The Honourable Mr. Justice Butler

The Honourable Mr. Justice Abrioux

On appeal from: An order of the Provincial Court of British Columbia, dated
May 30, 2019 (R. v. Davies, 2019 BCPC 107, North Vancouver Docket 64681-3-C).

Counsel for the Appellant:

K.A. Blok

Counsel for the Respondent:

C.W. Greenwood

Place and Date of Hearing:

Vancouver, British Columbia

August 14, 2019

Place and Date of Judgment:

Vancouver, British Columbia

October 23, 2019

Written Reasons by:

The Honourable Mr. Justice Butler

Concurred in by:

The Honourable Mr. Justice Goepel

The Honourable Mr. Justice Abrioux

Summary:

Following a guilty plea, the appellant was sentenced to an effective sentence of 32 months for trafficking in fentanyl. On appeal, he says the sentencing judge erred in principle by finding, in the absence of any evidence, that he had actual knowledge he was trafficking in fentanyl and treating that as an aggravating factor. He further argues that the judge erred in principle by failing to give effect to relevant mitigating factors. Held: Appeal dismissed. While the judge erred in concluding the appellant had actual knowledge that he was trafficking in fentanyl, the error had no impact on the sentence imposed.

Reasons for Judgment of the Honourable Mr. Justice Butler:

- [1] On March 31, 2018, the appellant, Colton Bram Davies, pleaded guilty to one count of possessing cocaine for the purpose of trafficking and one count of possessing fentanyl for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c.19. He was sentenced on May 30, 2019 to a 16 month custodial sentence which reflected credit of 16 months for time served. Effectively, the appellant was sentenced to 32 months in prison.

- [2] The appellant applies for leave to appeal the sentence and advances the appeal on two grounds. First, he says the judge erred in principle by finding that he knew he was trafficking in fentanyl and treated that as an aggravating factor. Second, he says the judge failed to consider or give effect to mitigating factors, and in particular his significant efforts at rehabilitation. He seeks a reduction of his sentence to time served or, alternatively, to 22 months' imprisonment.
- [3] For the reasons that follow, I would grant leave to appeal and dismiss the appeal.

Reasons for Sentence

- [4] The judge's reasons for sentence were delivered on May 30, 2019, and are indexed as R. v. Davies, 2019 BCPC 107. I will summarize those reasons in some detail as they set out the relevant circumstances of the offender and the offence and thoroughly canvass the positions of the parties at sentencing and the issues raised by those arguments.

Circumstances of the offence

- [5] The appellant's trafficking activities came to the attention of the police early in 2017, when he was put under surveillance. Over several days in early June, he was seen leaving a stash house and engaging in behaviour consistent with dial-a-dope trafficking. He was arrested on June 13, 2017. The police seized drugs and offence-related items from his vehicle, the stash house, and his residence. The items seized included more than 30 grams of cocaine, 9.53 grams of fentanyl, \$2,774 in cash, several cell phones, scales, cutting agents, and score sheets.

Circumstances of the offender

- [6] The judge had the benefit of a positive pre-sentence report and letters of reference favourable to the appellant. As a young teen, he left a dysfunctional family situation with his mother and moved in with his father who had become sober. The appellant had a difficult time in high school and suffered from anxiety and depression. He attempted suicide on several occasions. He began abusing substances, including cocaine and alcohol, in his early teens. When he was 18, he left his father's home and became estranged from his father and siblings. He continued to use drugs and alcohol throughout his teens and up to the time of the offence, when he was 23 years old. The judge found that while he used a variety of drugs, alcohol, and steroids, his substance abuse was not debilitating. He was able to continue to work, pursue education, and actively participate in the mid-level dial-a-dope trafficking scheme. He obtained his certification as a fitness trainer in the spring of 2017, at the same time he was involved in the trafficking activities. He was able to stop using street drugs and steroids when he went into custody after his arrest.

- [7] At the time of his arrest, he was subject to a curfew under terms of a judicial interim release order relating to a serious outstanding charge against him. His trafficking activities put him in breach of the bail terms of that charge. Accordingly, he was detained in custody after his arrest and remained in custody until April 18, 2018, when the other charge was stayed by the Crown. At that time, he was released on bail pending trial and was found to have done well after his release.
- [8] At paras. 14-15, the judge concluded her review of the appellant's personal circumstances:
- [14] Mr. Davies no longer associates with negative peers. He has a pro-social partner and spends his time with her and with his family. He practices Buddhism, which he began to pursue in custody, and otherwise engages in fitness related activities. He is involved in kick boxing [sic] and volunteers as a personal trainer for a fitness class for people with Parkinson's. Since his release in April 2018 he has been attempting to develop his own business as a fitness trainer. He has taken a course in sports nutrition and hopes to open a retail store selling dietary supplements and other health related items. Mr. Davies is remorseful and according to the preparer of the PSR, demonstrates "vast" insight into the harm caused by illicit drugs, in particular, Fentanyl and other forms of opioids. He wishes to perform Community Work hours to make reparations to society. He has also developed insight into the choices he made which led him to engage in trafficking and drug abuse.
- [15] The evidence and the submissions satisfy me that the ten months he spent in custody motivated him to develop a better understanding of his past choices and challenges and to reorient his life in a fully prosocial direction. The primary change in his life since being arrested is abstinence from alcohol, cocaine and steroids. Should he remain clean and sober, there is a high probability that Mr. Davies will not commit further offences of any kind in the future.

Positions of the parties

- [9] The Crown took the position that the appellant should receive a sentence of 32 months less credit for time served. The defence argued the appellant should be sentenced to time served and placed on probation for two years. The judge described the primary issue as whether the appellant "should receive a sentence in accord with the range of sentence of 18 to 36 months as set out in *R. v. Smith* 2017 BCCA 112 or whether the circumstances of this offender and this offence are exceptional, as described in *R. v. Voong* 2015 BCCA 285, and therefore justify a sentence outside of that range": at para. 18. She further noted that she had to consider what weight to give to the fact that the appellant had spent 10 months in custody and made significant progress toward his rehabilitation, and "whether it is in accord with all the principles of sentence and society's interest to interrupt that progress by returning him to prison at all or for up to 16.5 months if I accede to the Crown's position": at para 18.

Aggravating and mitigating factors

- [10] The judge then turned to aggravating and mitigating factors which she identified at paras. 20-21:
- [20] The aggravating factors are that Mr. Davies knowingly trafficked in Fentanyl and did so by way of a dial-a-dope operation. I find his primary motivation was profit. I find he was directing a mid-level operation and had rented a specific premise from which to operate. He had another person working for him in the operation. His involvement was ongoing. He committed the offences while on judicial interim release relating to a serious offence.
- [21] The mitigating circumstances are that he entered a guilty plea in this matter shortly after the other outstanding charges were dealt with. He has no prior criminal history and is a relatively youthful first time offender. He has effectively addressed his rehabilitation by becoming clean and sober. He enjoys support from his family and his community. He has been subject to bail conditions for a year and has been fully compliant.

[Emphasis added.]

Law

- [11] The judge referred in some detail to the relevant law including ss. 718, 718.1, and 718.2 of the Criminal Code, R.S.C. 1985, c. C-46, and s. 10 of the Controlled Drug and Substances Act. She referred to *R. v. Lacasse*, 2015 SCC 64, for the principle that there will be situations that call for a sentence outside a particular range because sentencing is an individualized exercise that requires a court to consider the gravity of the offence, the offender's degree of responsibility and the specific circumstances of the offence and the offender. She also referred to *Lacasse* for the principles that the rehabilitation of offenders is one of the main objectives of Canadian criminal law, and that a range of sentence is not a straightjacket to the exercise of discretion of a sentencing judge: at paras. 26-28.
- [12] The judge referred to para. 45 of *Voong* for the proposition that "exceptional circumstances must engage principles of sentencing to a degree sufficient to overcome the principles of deterrence and denunciation by way of a prison sentence." She also referred to para. 59 of *Voong* to note that exceptional circumstances may include a combination of no criminal record, significant and objectively identifiable steps towards rehabilitation, gainful employment, remorse and acknowledgement of the harm done to society.
- [13] The judge referred to *R. v. Dragani*, 2018 BCCA 225, to further explain the concept of exceptional circumstances. She then referred to *R. v. Nohr*, 2013 BCSC 2145 and *R. v. Ansari*, 2008 BCSC 1709, for the principle that a sentence of imprisonment for a first-time offender should be as short as possible and tailored to the individual circumstances of the offender.

Range of sentence

- [14] At paras. 34-47, the judge referred to the authorities cited by counsel on the range of sentence. These included Smith and R. v. Mann, 2018 BCCA 265. She found the authorities relied on by the Crown to be instructive. The defence referred to numerous cases but the judge found them of limited assistance because many of them did not involve trafficking in fentanyl and others were decided prior to Smith or involved offences committed prior to Smith: see paras. 45-46. The judge found R. v. Homan, 2017 BCSC 2503, the one post-Smith decision relied on by the defence, to be unhelpful. The offender received a sentence well below the Smith range as he was involved in street-level trafficking in order to feed his addiction which developed after he suffered a work injury and was prescribed opiates.
- [15] In considering the appropriate range, the judge noted that the appellant was not trafficking solely to support an addiction. Further, she found that the appellant was not a street-level dealer but was involved in the dial-a-dope operation as a mid-level trafficker. At para. 44, she concluded that the appropriate range for a first offender trafficking in fentanyl at the mid-level was 30-48 months:
- [44] In my view, the authorities for the Crown support a range of sentence for a mid-level Fentanyl trafficker who is not trafficking solely to feed a habit and has no criminal history to be 30 to 48 months or beyond depending on the circumstances. I find this to be appropriate taking into account the upper end of the range set out in Smith for low level traffickers. Based on the authorities just reviewed, low level dealers of Fentanyl who are addicts have received sentences of 24 to 36 months while in Mann a sentence of 48 months was imposed for a mid-level trafficker albeit in more aggravated circumstances given their utter disregard for the lives of those using their product.

Analysis

- [16] The judge was not persuaded that it was fit and appropriate to impose a sentence below the range set out in Smith. She arrived at this conclusion for a number of reasons. First, unlike the offender in Smith, the appellant was involved in mid-level trafficking. Second, it was not possible to find that there were exceptional circumstances. This is because the appellant had a "good life" when he was engaged in trafficking. She found at para. 51:
- [51] ... He had a home with his sister, education, employment, the support of family and friends and good health. It is much to his credit that he has ceased using drugs of any kind, is pursuing a healthy lifestyle, is employed and is engaged in a spiritual practice. However, I find he cannot be found to have "truly turned his life around" by ceasing to abuse drugs.
- [17] The judge reminded herself that she should not conflate exceptional circumstances with an offender's sympathetic circumstances. At para. 52, she expressed some regret at having to impose a custodial sentence even though the appellant had made concrete steps towards rehabilitation:

- [52] ... Indeed, I find the prospect of returning Mr. Davies to custody given his efforts at rehabilitation to elicit great sympathy. I find my duty to apply the law as I have found it to be to the circumstances as I have found them very troubling. I deeply regret that the sentence I find I must impose may potentially interfere with Mr. Davies [sic] rehabilitation and might well cause him harm. I have carefully considered whether the public interest would be best served by not returning Mr. Davies to custody. Regrettably, I find the public interest requires I impose a strongly deterrent and denunciatory sentence.
- [18] Finally, at para. 53, the judge distinguished between wilful blindness to trafficking in fentanyl which is not a mitigating factor, and knowingly trafficking in fentanyl which elevates an offender's moral culpability:
- [53] The authorities make clear that being ignorant or willfully blind to trafficking in Fentanyl is not mitigating. However, I find that knowingly trafficking in Fentanyl must be seen to significantly elevate an offender's moral culpability. Mr. Davies [sic] moral culpability in profiting from the sale of a substance he well knew to be deadly is very high. There is simply no reasonable explanation for his failure in judgement in this regard or for his callous disregard for the lives of those he trafficked to accept that his desire for easy money and easy access to drugs vanquished his humanity. I accept Mr. Davies takes full responsibility for his depraved conduct and that his insight and understanding of his moral failing is sincere and deep.
- [Emphasis added.]
- [19] She concluded that the sentence proposed by the defence was demonstrably unfit and well below the appropriate range. She found the sentence suggested by Crown to be fair and to appropriately reflect the mitigating circumstances and the need for restraint. Indeed, the judge stated that, but for the Crown's position she would have imposed a sentence above the upper range set out in Smith.

Standard of Review

- [20] On a sentence appeal, this Court can intervene where: (1) the sentencing judge has committed an error in principle, failed to consider a relevant factor, or erroneously considered an aggravating or mitigating factor that impacts the sentence; or (2) the sentence is demonstrably unfit: Lacasse at paras. 40, 44; R. v. Agin, 2018 BCCA 133 at para. 5. If an error in principle is found, intervention is justified where the error was material in the sense that it impacted the judge's analysis in imposing the sentence: Agin at para. 52; R. v. Eakins, 2016 BCCA 194 at para. 21. Where appellate intervention is justified, this Court may, after examining the fitness of the sentence imposed, replace it with a sentence it considers appropriate without deference to the sentencing judge's disposition: Agin at para. 55. However, this Court cannot impose its own view of a fit sentence simply because it would have weighed the relevant factors differently: Lacasse at para. 49.

Discussion

[21] The appellant does not argue that the sentence imposed is demonstrably unfit, rather he says the judge erred in principle first, by concluding that he knew he was trafficking in fentanyl and second, by failing to give effect to mitigating factors. The appellant says that these errors had an impact on the sentence such that this Court may set aside the sentence and conduct its own analysis to determine a fit sentence.

Did the judge err in principle by finding that the appellant knowingly trafficked in fentanyl? Did that error impact the sentence imposed?

[22] The appellant says the judge erred in concluding that the appellant knowingly trafficked in fentanyl when there was no evidence to support that finding and the Crown never alleged actual knowledge as an aggravating factor. Had the Crown done so, the sentencing judge would have been required to hold a Gardiner hearing to prove that beyond a reasonable doubt: *R. v. Gardiner*, [1982] 2 S.C.R. 368; *R. v. Pahl*, 2016 BCCA 234 at paras. 53-54. That did not occur. The appellant says it is evident from the reasons that the judge's finding of actual knowledge significantly elevated her assessment of the appellant's moral culpability and thus impacted her analysis.

[23] The Crown argues that it is not clear that the judge made a finding of actual knowledge that the appellant was trafficking in fentanyl. Rather, the judge merely found that the appellant was aware of the deadly nature of fentanyl. In any event, the Crown says it is clear that the appellant was, at a minimum, wilfully blind to the risk that he possessed and sold fentanyl. That wilful blindness combined with his knowledge of the deadly nature of fentanyl is sufficient for the court to conclude that his moral culpability was elevated. Accordingly, the Crown says that if there was any error, it did not have any impact on the sentence.

[24] I would conclude that the judge erred in finding that the appellant had actual knowledge he was trafficking in fentanyl: see paras. 20, 53. As the appellant argues, there was no evidence of that fact. Further, the subject was not directly raised at the sentencing hearing either by the Crown or the defence. In these circumstances it was not open to the judge to make that finding and rely on it as an aggravating factor for sentencing. However, I am of the view that this error did not impact the sentence imposed. This is because the judge was entitled to find that the appellant had a high level of moral culpability for trafficking in fentanyl. He pleaded guilty to that offence and was reckless as to whether or not the drugs he trafficked contained fentanyl. That is particularly the case as the appellant admitted to knowledge of the harm that could be caused by fentanyl. Further, the sentence imposed was not unfit given the appellant's level of moral culpability.

[25] The issue raised by the appellant has been considered from slightly different perspectives in *Smith, Mann* and *R. v. Lloyd*, 2019 BCCA 128. Those decisions are instructive.

- [26] At the sentencing hearing in *Smith*, the parties appeared to accept as a fact the appellant's statement to the author of the pre-sentence report that he did not know he was in possession of fentanyl. The sentencing judge treated that lack of knowledge as a "slight mitigating factor". The appellant's knowledge of the substance trafficked became a contested issue on appeal. Justice Newbury, in dissent, observed, that it would have been preferable for the trial court to have made an explicit finding or to hold a Gardiner hearing in order to resolve that issue: at para. 28. Nevertheless, she was of the view that lack of knowledge should not have been treated as a mitigating factor and observed at para. 30 that "the case law suggests that even being genuinely mistaken about the true identity of the illegal drug in one's possession does not serve as a mitigating circumstance in sentencing, provided the offender knew he or she was in possession of an illegal drug". She was also of the view that the judge placed little weight on the offender's knowledge so that the judge's error had only a slight impact on the ultimate sentence.
- [27] Justice Harris, writing for the majority in *Smith*, was also of the view that the sentencing judge placed little or no weight on the suggestion that the offender did not know he was selling fentanyl such that his state of knowledge played no material role in the sentence imposed. He "preferred not to comment on the relevance of his alleged personal knowledge of what he was selling" and to leave that to a case in which it is material to the outcome: at para. 66.
- [28] In *Mann*, the appellants appealed from the sentences imposed for drug trafficking and related offences. One of the appellants took the position that the sentencing judge erred in imposing a longer sentence for the carfentanil convictions because the Crown failed to prove he was aware of the presence of the drug. Justice Fitch, for the Court, rejected that argument on the basis that there is no error in principle in distinguishing for sentencing purposes between those offences involving carfentanil and those involving fentanyl: at para. 73. Further, he found that the judge did not rely on an unproven aggravating circumstance to elevate his assessment of the offender's moral culpability. Rather, relying on *R. v. Herrell*, 2014 BCCA 114, he found that the trafficker's ignorance as to the exact composition of drugs is not, as a general rule, a mitigating factor. That is particularly so where the offender took no reasonable steps to ascertain the nature of the trafficked substance: at paras. 74-76. Justice Fitch concluded at para. 79:
- [79] To the extent Sarabjit argues that the sentencing judge erred by failing to treat as a mitigating circumstance the failure of the Crown to prove beyond a reasonable doubt that he knew he was trafficking in carfentanil or a more powerful fentanyl analogue, his submission is not supported by the jurisprudence of this Court or, to my knowledge, any other appellate court. The failure of the Crown to prove this fact is not a mitigating circumstance. It is, at best, the absence of an aggravating circumstance.

- [29] Justice Fitch went on to note that he was attracted to the analysis of Justice Newbury in Smith on the question of onus and the need to hold a Gardiner hearing to determine that issue where an offender claims not to know they were trafficking in that substance. He concluded, at para. 81, by stating that it was "open to the judge to impose a more significant sentence on Sarabjit in recognition of the fact that he pleaded guilty to a more serious offence" (emphasis added).
- [30] In Lloyd, the offender was convicted of possessing heroin and fentanyl for the purpose of trafficking. Justice Stromberg-Stein, writing for the Court, considered whether the sentencing judge erred in finding that the offender, who did not testify at trial or at the sentencing hearing, had knowledge of the presence of fentanyl in the heroin. The judge concluded that the offender either knew he was in possession of fentanyl or was wilfully blind to the risk that the heroin contained fentanyl. At paras. 27-29, Justice Stromberg-Stein concluded:
- [27] In my view, an offender assumes the risk of the presence of fentanyl when selling illicit drugs. I agree with the judge that whether Mr. Lloyd specifically knew that the heroin he was selling contained fentanyl, either he should have known or he was wilfully blind and was willing to take the risk of selling fentanyl in the heroin.
- [29] In my opinion, the judge correctly identified, as an aggravating factor in sentencing, that the presence of fentanyl in the heroin impacted the seriousness of the nature and quality of the drugs involved in the offences.
- [31] While there appears to be some lack of consistency in these authorities, I do not think there are serious differences. I would take the following principles from the cases:
- a) Where the Crown wishes to rely on a fact that is not conceded by the defence as an aggravating factor, the court should conduct a Gardiner hearing to prove that fact beyond a reasonable doubt. This includes an allegation that an offender did not have actual knowledge of the presence of fentanyl in the trafficked substance: Gardiner at paras. 111-114; Pahl at para. 53; and Smith at para. 28;
 - b) Where the offence involves trafficking in fentanyl, given the prevalence of fentanyl in illicit drugs sold in this province, the court may infer wilful blindness of the actual content of the trafficked drugs and conclude that the offender was willing to take the risk of selling fentanyl: Lloyd at paras. 27-29; and
 - c) Where an individual is convicted or pleads guilty to possession of fentanyl (or carfentanyl) for the purpose of trafficking, the sentencing court should impose a sentence that is commensurate with the seriousness of the offence of trafficking in a highly dangerous substance. In other words, the court may take into account the offender's high level of moral culpability in profiting from the sale of a potentially deadly illegal substance: Mann at paras. 73, 81; Lloyd at para. 29.

- [32] The circumstances here are somewhat similar to those in *Smith*. At the sentencing hearing, there was no reference by either party to the state of knowledge of the offender. There was no evidence presented on that issue at the sentencing hearing. The Crown did not take the position that the appellant had actual knowledge that he was trafficking in fentanyl. This is presumably because the appellant pleaded guilty, expressed remorse for his actions and acknowledged to the pre-sentence report author "his awareness of the dangers of these drugs and his own horror at being involved in it " As in *Smith*, the appellant's state of knowledge only became an issue on appeal.
- [33] In light of the evidence before the court on sentencing and the positions of the parties, it was not open to the judge to find as a fact that the appellant had actual knowledge that he was trafficking in fentanyl. Nevertheless, I am of the view that the judge's error was not material and does not warrant intervention by this Court. As explained in *Agin* at para. 52, an error that does not have an impact on the sentence imposed is not material in the sense of requiring appellate intervention:
- [52] In our view, the question is whether the error was material in that it had an impact on the sentence imposed and the sentence would have been different had there been no error. In other words, did the error impact the judge's analysis in imposing the sentence: *R. v. Eakins*, 2016 BCCA 194, at para. 21. This accords with the rationale, outlined at para. 43 of *Lacasse*, that requiring an impact aims to prevent appellate courts from intervening where an error cannot be said to have impacted the sentence, as to do so would undermine the deference owed to sentencing judges as well as public policy goals animating appellate review, including finality.
- [34] I arrive at this conclusion for two reasons. First, the judge was entitled to find that the appellant had a high degree of moral culpability even if he did not have actual knowledge that he trafficked drugs containing fentanyl. In *Smith*, this Court established a higher range for street-level trafficking in fentanyl because of the tragic consequences from its illegal sale and distribution. As Justice Newbury noted at para. 37, "[t]hese consequences inform the 'circumstances of the offence' and the culpability of the offender." As Justice Fitch stated in *Mann* at para. 81, it is open to a judge to impose a more significant sentence where the offender pleads guilty to a more serious offence such as, for the trafficking of fentanyl.
- [35] Second, the trial judge found that the range for a first offender who is a mid-level trafficker in fentanyl was 30-48 months. The judge's choice of a sentencing range falls within her discretion and cannot itself constitute a reviewable error: *Lacasse* at para. 51. The appellant does not directly challenge that range. As Justice Fitch noted in *Mann* at para. 100, it is somewhat premature to identify a range for mid-level traffickers in fentanyl. At paras. 96-98, Justice Fitch summarizes some of the authorities relied on by Crown in that case which suggest a sentencing range well in excess of the *Smith* range to conclude that the sentence imposed was not demonstrably unfit. He also concluded that the trial judge did not err in imposing a sentence that exceeded the range identified in *Smith* because *Smith* did not place a hard cap at 36 months and there were aggravating factors that called for a sentence

beyond 36 months: at para. 87. I would arrive at a similar conclusion here. I see no error in the judge's finding that the circumstances of the offence put this case outside of the Smith range.

- [36] Having identified the range, the judge imposed a sentence of 32 months. She also indicates that she would have imposed a sentence in excess of 36 months but for the mitigating factors and the need for restraint. In other words, even though the judge found that the appellant's moral culpability was heightened because he "knowingly trafficked in fentanyl", the sentence she imposed was at or near the low end of the range for similarly situated offenders. In these circumstances, I am of the view that the judge's error did not impact the sentence imposed. I would dismiss this ground of appeal.

Did the judge err by failing to give effect to mitigating factors?

- [37] The appellant submits the sentencing judge erred in failing to give effect to the relevant mitigating factors. He argues that the judge made the error because she framed the issue incorrectly. In making that argument, he refers to the judge's statement of the "primary issue" at para. 18: "whether Mr. Davies should receive a sentence in accord with the range of sentence of 18 to 36 months as set out in *R. v. Smith* 2017 BCCA 112 or whether the circumstances of this offender and this offence are exceptional, as described in *R. v. Voong* 2015 BCCA 285, and therefore justify a sentence outside of that range." The appellant says that requiring an offender to establish extraordinary circumstances as a precondition to imposing a sentence outside of a range is an error in principle. By concluding that there were no "exceptional circumstances", he says the sentencing judge ignored the many mitigating factors that applied and imposed a purely denunciatory and deterrent sentence with no consideration of the need for restraint, proportionality or rehabilitation.
- [38] If the passage from para. 18 is considered in isolation, it could be concluded that the sentencing judge approached the sentencing on an incorrect principle. However, the reasons must be read as a whole. When that is done, it is clear that the judge did not err in her approach to determination of a fit sentence. Indeed, the section of the reasons in which the judge sets out her analysis begins at para. 48 with a somewhat different statement of her approach to the "primary issue". I see no error in that statement:
- [48] As noted above, the primary issue for determination is whether, in all the circumstances, a sentence below the range set out in *Smith*, which applies to low or street-level trafficking, is fit and appropriate for this offender who was involved in a mid-level trafficking operation. Because the offender is a relatively youthful adult first offender, the court must address how to balance the need for general deterrence and denunciation against the need to exercise restraint, acknowledge the importance of the offenders rehabilitation, consider any potential for reparation and determine what disposition will best serve to protect the public and also meet the fundamental principle of proportionality.

[39] In arriving at a sentence of 32 months in custody, the judge considered all of the mitigating circumstances highlighted by the appellant including that he was a young, first-time offender who has made considerable progress towards rehabilitation. She noted the following mitigating circumstances:

- The appellant pleaded guilty;
- He no longer associates with negative peers;
- He has a stable and pro-social family life;
- He practices Buddhism;
- He has performed valuable community service;
- He is working to build a business as a personal trainer;
- He has expressed genuine remorse for his criminal activities; and
- He has remained clean and sober: at paras. 13-14, 21, and 48.

She concluded he would probably not commit further offences: at para. 15. However, the judge also recognized the importance of denunciation and deterrence given the circumstances of the offence and the offender's level of moral culpability for trafficking in fentanyl.

[40] In my view, it cannot be said that the judge erred in principle by failing to properly consider the mitigating factors applicable to the appellant. She acknowledged the appellant's significant steps towards rehabilitation. While she was not required to consider whether the appellant's personal circumstances amounted to "exceptional circumstances" as described in the authorities, her conclusion that his circumstances were not exceptional cannot be questioned and, on a reading of the whole of the reasons, did not impact the sentence imposed. The judge considered the personal circumstances of the appellant and, in particular, the relevant mitigating factors and fashioned a sentence at the lowest end of what she considered to be the range for a first offender, mid-level trafficker in fentanyl. She indicated that but for the mitigating circumstances and the need for restraint, she would have imposed a sentence of at least 36 months.

[41] As indicated above, the judge eloquently explained the difficult balancing act that she had to undertake when considering those principles of sentencing most relevant to the appellant's circumstances: deterrence, denunciation and rehabilitation. She found her duty to apply the law in the circumstances to be "very troubling" given that a return to custody for the appellant could potentially interfere with his rehabilitation: at para. 52. In arriving at what she considered to be a fit sentence, she "carefully considered" how the public interest would be best served. Of course, the weight to be attributed to aggravating and mitigating factors is within the sentencing judge's discretion and is entitled to deference on appeal. I cannot say that the judge erred in principle or failed to take into account any relevant factor in her approach to considering the mitigating circumstances.

[42] I would dismiss the appeal.

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Mr. Justice Goepel"

I AGREE:

"The Honourable Mr. Justice Abrioux"

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