

CANADA / JUDGMENT

# R. v. Desbiens

2020 BCSC 884

## COURT

Supreme Court of British Columbia

## DECIDED

25 May 2020

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2020 BCSC 884 R. v. Desbiens IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Desbiens, 2020 BCSC 884 Date: 20200525 Docket: 169433-2; 169450-2 Registry: Victoria Regina v. Michael Phillip Desbiens and Marin Elyse Marie Gillis AND Regina v. Michael Phillip Desbiens, Jeremiah James Hackland and Dezmond Anthony White Restriction on publication: Publication ban pursuant to s. 517 of the C.C.C. Corrected Judgment: The text of the judgment was corrected at paragraphs 4, 39, 42, 50, 51 and 56 where changes were made and paragraph numbering was corrected throughout the judgment on November 7, 2022 Before: The Honourable Mr. Justice Myers (Appearance via teleconference) Oral Reasons for Sentence Counsel for the Crown, appearing via telephone: Thomas J. Corsi Counsel for the Accused, Michael Phillip Desbiens, appearing via telephone: Jeremy W. D. Mills Place and Date of Hearing: Victoria, B.C. June 3, 2019 and May 25, 2020 Place and Date of Judgment: Victoria, B.C. May 25, 2020 I. Background

- [1] Due to the COVID-19 emergency situation, this sentencing, by agreement, is done by way of video conference pursuant to s. 715.26 of the Criminal Code (R.S.C., 1985, c. C-46). In my view, a remote hearing is necessary due to the COVID-19 pandemic. Mr. Desbiens is in custody on Vancouver Island, his counsel is located in Victoria and I am in Vancouver. The sentencing has been subject to a series of delays due to no one's fault and it is important to bring this matter to a resolution.
- [2] Mr. Desbiens is before me for sentencing on two indictments.
- [3] First, at the start of a trial with a co-accused, Mr. Desbiens plead guilty to the following offences which took place on October 25, 2016, contained in indictment no. 169433: · Count 1: Possession of cocaine for purposes of trafficking contrary to s. 5(2) of the CDSA; · Count 2: Possession of fentanyl for the purposes of trafficking; · Count 4: Possession of MDMA for purposes of trafficking; and · Count 6: Unauthorized possession of the semi-automatic handgun contrary to s. 95(1) of the Criminal Code. The weapon was a 380 semi-automatic handgun. I will refer to this as the first indictment.
- [4] Second, on October 5, 2018, I convicted Mr. Desbiens of the following offences which took place on June 28, 2017, contained in indictment no. 169450-2:

- a) Count 1: Possession of cocaine for the purposes of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act;
  - b) Count 2: Possession of methamphetamine for the purposes of trafficking;
  - c) Count 3: Possession of Controlled Substance, contrary to s. 4(1) of the Controlled Drugs and Substances Act;
  - d) Count 4: Possession of an unloaded sawed-off shotgun with readily accessible ammunition without a license, contrary to s. 95(1) of the Criminal Code.
  - e) Counts 5 & 6: Possession of credit cards which knowingly were obtained by an offence, contrary to s. 342(1)(c) of the Criminal Code; and
  - f) Count 7: Possession of another person's identity document without lawful excuse, contrary to s. 56.1(1) of the Criminal Code. I will refer to this as the second indictment.
- [5] When Mr. Desbiens committed the offences on June 28, 2017, he was on recognizance for the earlier offences. Those conditions included prohibitions against possession of a weapon and of controlled substances.
- [6] The circumstances of the October 25, 2016 offences, as set out in the Crown's submission and accepted by Mr. Desbiens, are: On October 25, 2016 at approximately 2:10 am Constable LeQuesne observes a black Hyundai which he was aware that the vehicle was owned and in the past had been operated by Mr. Desbiens and that Mr. Desbiens is a prohibited driver. Cst. LeQuesne also notes that there appears to be three people in the vehicle but is unable to identify the driver. A traffic stop is conducted and the vehicle pulls into the parking lot of the Howard Johnson Hotel on Gorge Road East. When stopped the rear passenger exits the vehicle and the officer recognizes this passenger as Mr. White. When Cst. LeQuesne approaches the vehicle he observes something shiny within the rear passenger door immediately next to Mr. White. Cst. LeQuesne takes two steps forwards and observes that the item appears to be a handgun placed in the rear driver's side door pocket with the handle facing up such that it could easily be grabbed by Mr. White. As a result, Cst. LeQuesne advises all occupants of the vehicle that they are under arrest for possession of a firearm. Back-up members arrive and each party is removed from the vehicle and arrested without issue. The front passenger in the vehicle is identified as Mr. Desbiens and the driver as Mr. Hackland. All three of the males are searched incidental to arrest. Mr. Desbiens has a cellphone. The vehicle is searched and a loaded Bryco 380 Auto semi-automatic handgun with a 70 mm barrel, making it prohibited, is located. The serial number on the firearm has also been scratched out and the number is unreadable. Also located in the vehicle is identification for Mr. Desbiens, \$3915, cellphones, 33.9g of fentanyl (ranging from 6.4%-9% purity), multiple weapons including knives and batons, 11.8 g of heroin/MDMA/fentanyl (2.1% purity) and 15.9 g of powder cocaine. The drugs located have a combined approximate value of \$8,093 broken down as follows:

- a. 15.9 grams of cocaine if sold by the gram would have a street value of \$1272-\$1590;
  - b. 11.8 grams of heroin/MDMA/fentanyl if sold by the gram would have a street value of \$1736-\$2232;
  - c. 33.9 grams of fentanyl if sold by the gram would have a street value of \$5,085. As a result of these circumstances Mr. Desbiens is placed on a recognizance with 11 conditions. These 11 conditions include condition 9, a condition to not possess any controlled substances, and condition 10, a condition to not possess any weapon. This recognizance was in place on June 28, 2017.
- [7] The circumstances of the June 28, 2017 offences were set out in my reasons for conviction, and I will not repeat them here. Suffice it to say that the police followed Mr. Desbiens, who made several stops in a vehicle owned and driven by a co-accused in order to sell drugs. When the police stopped the vehicle they found drugs, a weapon, and ammunition in the vehicle which I found amounted to possession by Mr. Desbiens.
- [8] The total street value of the drugs seized was approximately \$38,000, consisting of: · 119 grams of fentanyl at \$23,800; · 31.54 grams of fentanyl at \$6,300; · 55 grams of methamphetamine at \$5,600; and · 27 grams of cocaine at \$2,760. II. Mr. Desbiens
- [9] Mr. Desbiens is 35 years old. He has three children with two former partners.
- [10] Mr. Desbiens had a very difficult childhood. Prior to turning eight, he resided with his abusive and alcoholic mother. Although he moved in with his father at eight years old, he continued to experience the abuse and alcoholism during visits with his mother. He moved out or was expelled from home at the age of 15 or 16 and fell into a lifestyle of substance abuse and criminality.
- [11] Mr. Desbiens has a substantial number of prior convictions, but all are for less serious offences than the present ones. Twelve convictions were for failing to comply with court orders. He has five convictions relating to resisting arrest, including assaulting a police officer. He has two convictions for breaking and entering and several convictions for possession of scheduled drugs.
- [12] Although Mr. Desbiens has had no connection with any First Nations community, he identifies as First Nations, because his mother had told him that she was First Nations. His father could not provide any information beyond that. Mr. Desbiens did not know what nation his mother came from and the Gladue report writer could not find any band membership for his mother in the Campbell River area, where Mr. Desbiens said his mother was from. On the assumption that Mr. Desbiens was First Nations, the Gladue report writer opined that Mr. Desbiens suffered from the inter-generational trauma that First Nations are subject to and as noted in *R. v. Gladue*, [1999] 1 S.C.R. 688 and *R. v. Ipeelee*, 2012 SCC 13.

- [13] Mr. Desbiens has availed himself of several programmes while in custody. Instructors of those course have given him favorable references. He also has favourable references from his former girlfriend.
- [14] Mr. Desbiens ran a drywall business for two years and hopes to return to that after his release. III. Position of parties
- [15] The Crown asks for an eight-year sentence for the first indictment and a consecutive sentence of nine years for the second indictment, for a total of 17 years. It relies on the seriousness of both the fentanyl trafficking and the weapons offences and the fact that the second offences took place while Mr. Desbiens was out on bail for the earlier offences.
- [16] Mr. Desbiens relies on Gladue and Ipeelee and says that he has less moral culpability because of negative familial and cultural circumstances that were created by colonization. He has also expressed remorse and strong hopes for his rehabilitation.
- [17] Mr. Desbiens has been in custody for three years since his arrest in October 2016, the equivalent of four-and-a-half years after enhanced credit of one-and-a-half to one is applied. He argues for a further sentence of two years less a day, which would amount to the equivalent total sentence of approximately six-and-a-half years. IV. Relevant case law and other background factors
- [18] Courts at the trial and appellate level have emphasized the gravity of fentanyl trafficking due to the number of deaths it has caused to users and its addictive properties. The cases also have emphasized the deleterious impact of the drug to communities. It has been referred to as a "scourge".
- [19] The Crown filed a report from the BC Coroner's Service which states that: · There were approximately 62 suspected illicit drug toxicity deaths with fentanyl detected in August 2019; · Fentanyl or its analogues were detected in approximately 85% of illicit drug toxicity deaths in 2019 and 87% of illicit drug toxicity deaths in 2018; and · From January-August 2019, carfentanil has been detected in 119 suspected illicit toxicity deaths. This is more than three times as many toxicity deaths where carfentanil was detected compared to all of 2018 (35). Prior cases referred to earlier versions of this report.
- [20] The Crown also filed a 2016 opinion letter from Dr. Kennedy, in which he opines on the nature of fentanyl, its addictiveness and its fatal propensities. This letter has been referred to frequently in other judgments.
- [21] In 2016, the Provincial Health Officer for British Columbia declared a Public Health Emergency because of the increase in overdoses and deaths caused by the fentanyl and its analogues.
- [22] The cases indicate that the tide has not been stemmed.

- [23] Denunciation and specific and general deterrence are to be given primacy for fentanyl trafficking: *R. v. Smith*, 2017 BCCA 112 at paras. 45 and 49. This recognises that the risk of overdose for users is not the only danger of fentanyl. First responders, healthcare workers, citizens wielding naloxone kits and others are put in harm's way through the risk of contamination with the substance. There is also the heavy burden on a healthcare system struggling to respond to this epidemic: *R. v. Toth*, 2017 BCSC 501 at para. 44.
- [24] The Court of Appeal has also referred to weapons as a "scourge": *R. v. Zhu*, 2013 BCCA 416 para. 21, referred to more recently in *R. v. Swales*, 2016 BCCA 502 at para. 20.
- [25] Turning to sentences imposed in some relevant authorities, *Smith* dealt with the sentence for an accused trafficking fentanyl at the street level. The majority, and the dissenting judge, endorsed higher sentences for fentanyl trafficking than for other drugs because of its death-causing propensities and harm to the community. Where they disagreed was with respect to the sentence for the accused who had committed his offence before the harm of fentanyl was widely known.
- [26] In *R. v. Emery*, 2019 BCSC 1789, Justice Ker analysed *Smith* and later cases and stated:
- [70] I say first that the range for an offender who is more than a street-level trafficker must start at the upper end of the *Smith* range. Although the Court of Appeal has not pronounced on what that range is, in my view, the authorities provided suggest that the range would be somewhere between 36 and 72 months, with the 36 months being the low end of the range for those offenders only slightly above the street-level trafficker. . . .
- [27] *R. v. Mann*, 2018 BCCA 265 dealt with two accused brothers. The trafficking was done at higher than street level, but was not sophisticated. The brothers knowingly and recklessly mixed fentanyl with other substances.
- [28] One of the accused, *Karan-Jit*, pleaded guilty to the possession for purposes of trafficking fentanyl, uttering threats and occupying a vehicle with a non-restricted firearm. He was 19 years old at the time of the offence. He had no previous record and expressed remorse at the sentencing hearing. The trial judge imposed a four-year concurrent sentence on *Karan-Jit* for the trafficking counts, and a one-year consecutive sentence for the firearm offence, for a global sentence of five years. The firearm offence was not related to the drug offences.
- [29] His brother, *Sarabjit*, pleaded guilty to possession of a loaded firearm and possession of fentanyl, carfentanil and other drugs for the purposes of trafficking and also to uttering threats and occupying a vehicle for the purpose of trafficking. He received a seven-year global sentence. This had been reduced from the total of the following sentences:
- a) Concurrent sentences of four years for the counts relating to trafficking in fentanyl or possessing fentanyl for the purpose of trafficking;
  - b) Concurrent sentences of imprisonment of five years on the three counts relating to trafficking in carfentanil or possessing carfentanil for the purpose of trafficking;

- c) Concurrent three-year sentence on the single count of possessing cocaine for the purpose of trafficking; and
  - d) Consecutive three-year sentence for the offence of possessing a loaded restricted firearm (a .38-calibre handgun). The gun was found where the drugs were being mixed.
- [30] The decision was upheld on appeal, which again emphasized the scourge of fentanyl trafficking. Justice Fitch noted, at para. 99: The judge was right to distinguish the range identified in Smith and impose significant penitentiary terms on both appellants. That the sentences are not even longer is attributable to the appellants' youth and the fact that neither of them had criminal records.
- [31] The Court of Appeal also dealt with fentanyl trafficking and possession of a loaded firearm in *R. v. Lee*, 2018 BCCA 428. Mr. Lee was 27 years old at the time of sentencing, had previous convictions and at the time of the offence was subject to several firearms prohibitions. The firearm was found in his vehicle at the same time as the drugs. The Court of Appeal upheld a sentence of four years for the drug trafficking and a consecutive sentence of three years for the firearms offence. Justice Dickson, for the court, stated:
- [22] As the Crown emphasized, citing, among other authorities, Mann and *R. v. Smith*, 2017 BCCA 112, fentanyl is a scourge that imposes intolerable risks on society and sentences of four to six years' imprisonment have been imposed for offences involving trafficking in fentanyl alone. Similar sentences have also been imposed in cases involving substantial quantities of cocaine and methamphetamine: *R. v. Francis*, 2008 BCCA 309; *R. v. Godbout*, 2015 BCCA 168; Borecky. In addition, a three-year sentence for a firearm conviction in "true crime" circumstances is near the bottom of the appropriate range of sentences: *R. v. Holt*, 2015 BCCA 302; *R. v. Kachuol*, 2017 BCCA 292. In my view, considered against this backdrop, taking into account the circumstances of the offences and Mr. Lee's recent, related criminal record and prohibitions, the seven-year global sentence imposed by the judge is manifestly fit. I would not disturb it on appeal.
- [32] In *Emery*, the total street value of the drugs involved was between \$2,000-\$2,360, which included cocaine and meth. Of that total, the heroin/fentanyl combination was approximately \$1,200. Justice Ker found that he was both a street-level trafficker but also someone higher up who supplied drugs to other street traffickers: see para. 19. As with Mr. Desbiens, Mr. Emery had a difficult upbringing by an alcoholic mother and cycled through various foster homes. He suffered sexual abuse and became addicted to drugs. He also had a criminal record. Justice Ker imposed a sentence of three years for each drug count, to be served concurrently.
- [33] In *R. v. Capot Blanc-Acko*, 2019 BCSC 2353, I sentenced Mr. Blanc-Acko for trafficking fentanyl and heroin and possession of dangerous weapons: an airgun and a baton. Mr. Blanc-Acko was 22 years old but had a substantial criminal record. He was a member of the Doig River Band and also had a most difficult upbringing. I found his trafficking to be above the street-level. I sentenced him to four years' imprisonment concurrent for drug offences and

120 days for the weapons charges concurrent to drug offence. I note the weapons were less serious than the weapons in this case.

- [34] In *Lee and Mann*, amongst other cases, the Court of Appeal noted that it was within the trial judge's discretion whether to impose consecutive or concurrent sentences for drugs and related weapons offences, provided the total sentence was fair. V. Sentence
- [35] Turning back to this case, aggravating factors are: · The drugs found on Mr. Desbiens were of a substantial quantity. The RCMP expert at trial testified that the quantities were inconsistent with only street-level dealing; · The conjunction of both the firearms and the drug offences; · The fentanyl he sold was of differing purity which meant that a user would be subject to unknown and varying degrees of potency even when purchasing from the same supplier; and · With respect to the second indictment, the offences were committed when Mr. Desbiens was out on interim release for the first series of the same offences.
- [36] Mitigating factors are: · Mr. Desbiens' difficult background, and the Gladue factors; · His remorse and efforts to take rehabilitative steps in custody, which I take to be sincere; and · The guilty pleas on the first indictment There are also the supporting letters he has submitted.
- [37] As the review of the case law indicates, both the weapons and drug offences are serious. The sentence proposed by Mr. Desbiens does not recognise this, even taking into account the mitigating and Gladue/Ipeelee factors.
- [38] In my view, subject to the overall fitness of the sentence, the weapons offences in each indictment should be served consecutive to the drug offences because they involve different public interests. The sentences for the second indictment should be served consecutive to those in the first because they are completely separate events. Further, the offences in the second indictment require a sterner sentence because they are nearly identical to those in first indictment, and were committed while on interim release. VI. Sentence Imposed
- [39] The sentence I impose is therefore: A. First indictment (no. 169433-2)
- [40] For the first indictment, for the drug counts I sentence Mr. Desbiens to the following concurrent sentences:
- a) Three years for Count 1 (cocaine trafficking);
  - b) Four years for Count 2 (fentanyl trafficking); and
  - c) Three years for Count 4 (MDMA trafficking).
- [41] For the weapons offence (Count 6), I sentence Mr. Desbiens to one-year, to be served consecutively to Counts 1-4.
- [42] This would be a total sentence of five years for this indictment. B. Second indictment (no. 169450-2)

[43] With respect to the second indictment, I sentence Mr. Desbiens to the following concurrent sentences:

- a) Four years for Count 1 (cocaine);
- b) Four years for Count 2 (methamphetamine); and
- c) Five years for Count 3 (fentanyl). Again, these are to be concurrent sentences.

[44] Regarding the weapons offence (Count 4), I impose a term of one-year, to be served consecutively to the other counts.

[45] On Counts 5, 6 and 7 (possession of stolen documents and credit cards) I sentence Mr. Desbiens to six months for each sentence all to be served concurrently with Counts 1-3.

[46] This would be a total sentence of six years for this indictment. C. Totality

[47] This would result in a total sentence of 11 years for both indictments.

[48] In my view this would be an overly harsh sentence and would detract from the prospect of rehabilitation which I take to be realistic. In my view, the global sentence should be eight years.

[49] I would achieve this by: · Having the weapons charge in the first count run concurrently with the other sentences in that indictment as opposed to consecutively; · Doing the same regarding the weapons charge in the second indictment; and · Reducing the fentanyl trafficking in the second indictment to four years. D. Final sentence after totality

[50] To repeat and summarise, in the end result, to account for the totality of the sentence, the final sentence is the following.

1. First indictment (no. 169433-2)

[51] On the first indictment, the final sentences are:

- a) Three years for Count 1 (cocaine);
- b) Four years for Count 2 (fentanyl);
- c) Three years for Count 4 (MDMA); and
- d) One year for Count 6 (weapons). Again, these are to be served concurrently with each other.

2. Second indictment (no. 169450-2)

[52] On the second indictment the final sentences are:

- a) Four years for Count 1 (cocaine);
- b) Four years for Count 2 (methamphetamine);
- c) Four years for Count 3 (fentanyl);

- d) One year for Count 4 (weapons); and
  - e) Six months each for Counts 5, 6 and 7 (credit cards and stolen i.d.). All sentences in the second indictment are to be served concurrently with each other, but consecutive to the sentences in the first indictment.
- [53] Once again, the global term is eight years. E. Credit for time served
- [54] As I said, Mr. Desbiens has served three years. He is entitled to four-and-a-half years' credit towards his sentence.
- [55] He therefore is to serve an additional global sentence of three-and-a-half years. F. Ancillary orders
- [56] I make the following ancillary orders which were requested by the Crown. Mr. Desbiens did not take a contrary position: On the first indictment, (no. 169433-2)
- a) Forfeiture Order pursuant to s. 16(1)(a) of the CDSA, in the form of the draft order provided by Crown;
  - b) Weapons and firearms prohibition for life pursuant to ss. 109(1)(b) and (3); and
  - c) DNA Order pursuant to s. 487.051(3)(b). On the second indictment, (no. 169450-2)
- a) Forfeiture Order pursuant to s. 16(1)(a) of the CDSA - in the terms of the draft order provided by Crown;
  - b) Weapons and firearms prohibition for ten years pursuant to ss. 109(1)(b) and (2); and
  - c) DNA Order pursuant to s. 487.051(3)(b). "E.M. Myers J."

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