

CANADA / JUDGMENT

R. v. Downey

2022 BCSC 1596

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2022 BCSC 1596 R. v. Downey

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Downey,

2022 BCSC 1596

Date: 20220408

Docket: 40737-2

Registry: Duncan

Regina

v.

James Otis Downey

Before: The Honourable Mr. Justice Veenstra

Oral Reasons for Sentence

Counsel for the Crown:

B. Lansdowne,

appearing on September 24, 2021

and March 4, 2022

C.J. Gibson,

appearing on April 8, 2022

Counsel for the Accused:

D.J. McKay

Place and Dates of Hearing:

Duncan, B.C.

September 24, 2021

and March 4, 2022

Place and Date of Judgment:

Duncan, B.C.

April 8, 2022

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[1] THE COURT: On October 27, 2020, Mr. Downey entered a guilty plea to the following count on Duncan Indictment 40737-2:

James Otis DOWNEY, on or about the 31st day of March, 2018, at or near Crofton, in the Province of British Columbia, did unlawfully traffic in a controlled substance, to wit: Ketamine and Fentanyl, contrary to Section 5(1) of the Controlled Drugs and Substances Act.

[2] Specifically, the evidence indicated that on March 31, 2018, Mr. Downey sold 7.0 grams of a substance to an undercover officer for \$600. That substance was later analyzed to contain a mixture of ketamine and fentanyl, with the concentration of fentanyl measuring as 5.1%.

[3] I heard the submissions of counsel with respect to sentencing on September 24, 2021, and March 4, 2022. Mr. Downey is before the court today for sentencing.

Circumstances of the offence

- [4] In March of 2018, the Street Crimes Unit of the North Cowichan Duncan Detachment of the Royal Canadian Mounted Police initiated a project called EPHACOID to target drug trafficking throughout the Cowichan Valley, which involved employing an undercover officer (the "UCO") to purchase drugs.
- [5] During the course of the investigation, the UCO purchased drugs at a point level (i.e., 0.1 gram) from an A.J. The UCO asked A.J. about purchasing larger quantities, and A.J. suggested she speak to "Felix or Lewis" at a specific phone number.
- [6] On March 31, 2018, the UCO called the number and then met with a male calling himself Felix. That individual turned out to be Mr. Downey. She purchased from him seven grams of a substance for \$600. The substance was later analyzed to be a mixture of ketamine and fentanyl with a fentanyl concentration of 5.1%.
- [7] Over the next three months, the UCO called that same number and spoke with a person identified as "Lewis", whose real name was Mr. Butler. The UCO engaged in various transactions with Mr. Butler involving larger quantities of heroin and fentanyl.
- [8] On June 29, 2018, the UCO arranged with Mr. Butler to purchase two ounces of heroin/fentanyl for \$4,100. At the arranged meeting time, Mr. Downey was with Mr. Butler. Both were arrested and searched. Mr. Butler was in possession of some 55.6 grams of a substance that contained both heroin and fentanyl.
- [9] Mr. Downey when searched was in possession of a cellphone, a Canadian passport, and \$277 cash.
- [10] Later that day, police executed a search warrant at Mr. Downey's home. There they located a .22-calibre rifle with a magazine, body armour, and two digital scales with what appeared to be drug residue.

Impact of fentanyl

- [11] In this case, there is no specific victim in the conventional sense of an identified individual who is directly injured by the offender's conduct. However, the Crown introduced evidence at the sentencing hearing of the societal impact of the trafficking and distribution of drugs, and in particular fentanyl.
- [12] In April 2016, the Provincial Public Health Officer declared a public health emergency in relation to the significant rise in opioid-related overdose deaths. By March 2018, at the time of the offence in this case, the ongoing opioid crisis and the potentially lethal consequences of the distribution of illicit fentanyl were well known in society.

- [13] The evidence included two Coroner's Service reports dated August 31, 2021, reflecting data collected up to June 30, 2021. The first titled "Illicit Drug Toxicity Deaths in British Columbia" illustrates that since 2016, illicit drugs are the leading cause of unnatural death in British Columbia, eclipsing suicide and motor vehicle collisions. The second, titled "Illicit Drug Toxicity Deaths / Types of Drug Data" illustrates that in 2018 there was fentanyl detected in 86% of drug toxicity deaths.
- [14] The data in the report indicated that illicit drug toxicity deaths in the Island Health Region increased from 55 and 72 in 2014 and 2015 respectively, to 241 and 243 in 2017 and 2018 respectively.
- [15] The evidence confirms that Vancouver Island was hard hit by fentanyl. In addition to contributing to the plight of those in society who are addicted, trafficking in fentanyl inflicts substantial injury on the community as a whole. It impacts the lives of many British Columbians, including family and friends of those subject to addiction, and continues to take its toll on those involved in the healthcare system, including first responders.

Circumstances of the offender

- [16] The court had the benefit of a pre-sentence report which was filed on March 30, 2021.
- [17] Mr. Downey was 21 years of age at the time of the offence and is now 25. He was born in the United States, but his family relocated to the Cowichan Valley when he was approximately three years of age. The family dynamic was difficult with much conflict. His parents separated when he was approximately 14 years of age.
- [18] He attended a prestigious private school through Grade 10. The evidence indicated that while attending that school, he did very well academically. He was focused on preparing for college, was on the debate team and the rowing team, and participated in activities such as the Model United Nations.
- [19] After his parents' separation, Mr. Downey initially lived with his mother. His relationship with his father was difficult with many intense arguments, although their relationship has improved more recently. He moved away from his mother's home at age 15. Initially, he slept outside in "random places", including a tent in the woods. He then transitioned to long-term couch surfing with acquaintances.
- [20] For Grade 11, Mr. Downey attended a local public high school where his passion, work ethic and goals fell off dramatically. He completed his Grade 11 credits, but ultimately dropped out of school completely. At age 15, he began working in pubs doing various kitchen jobs and took on various casual jobs, including helping friends work on their vehicles. He eventually turned to delivering packages containing drugs in return for food and money. He described his involvement in the drug trade as his reaction to being in "survival mode".

- [21] Mr. Downey began experimenting with marihuana at age 12 and used it regularly by age 14. When he left home at the age of 15, he was regularly using a variety of drugs, including Dilaudid, oxycodone, Percocet, methamphetamine, and ketamine. The substances he was using allowed him to deal with issues in his life that were not going well.
- [22] This was Mr. Downey's lifestyle leading up to the transaction on March 30, 2018, and his arrest on June 30, 2018.
- [23] Mr. Downey has been reporting to the Duncan Community Corrections office since his initial release on July 1, 2018, other than 80 days spent in custody in the spring of 2019. While on release, he has been subject to stringent bail terms which restrict his ability to leave the family home without the permission of his bail supervisor.
- [24] I was advised that he has reported to his bail supervisor without exception and that there are no breach reports on file.
- [25] Both the pre-sentence report and the letters of support reflect the impact on Mr. Downey's mental health of his lengthy house arrest. He is normally a social and outgoing person and has found the extended time with limited mobility to be difficult. He benefited from counselling during his time in custody in early 2019, and also had the benefit of private counselling paid for by his mother after his release for so long as she was able to afford it. He also arranged for workout equipment at his mother's home as he finds physical exercise helps with his mental health.
- [26] The evidence indicates that after his release, Mr. Downey enrolled in online programming to complete his Grade 12. I was not advised that the programming had been completed at the time of the sentencing hearing.
- [27] Since his release in May 2019, Mr. Downey has relied heavily on his parents financially. He has, on occasion, assisted friends with vehicle repairs, has worked on renovations to an apartment purchased by his mother, and has found occasional casual work but has not had steady employment. Both the pre-sentence report and the letters of support state that Mr. Downey has not used any illegal substances or non-prescribed pills since being released from custody.
- [28] I was provided with a number of letters of support from family members and friends. Those letters describe a very intelligent and capable young man with much potential academically. That is consistent with his performance at school, up to and including Grade 10.
- [29] Mr. Downey's mother, with whom he has been living while on release, describes how he has been "in a state of suspended animation, struggling to maintain a positive attitude and make plans for a better future", while uncertainty remains as to his sentence. The strain on Mr. Downey of compliance with the 24-hour curfew requirements was confirmed by a letter from Duncan Community Corrections.

[30] Mr. Downey addressed the court during the course of his sentencing hearing. He expressed his remorse for his actions. He expressed gratitude for the people in his life, including his mother and girlfriend, and his determination to show them that he can be a man that they can be proud of, and that all they had done for him over the past nearly four years was not in vain.

Crown and defence positions

Position of the Crown

[31] The Crown submits that a sentence of 36 months less time served is the appropriate disposition in this case.

[32] The Crown argues that the sentencing principles that should be accorded the most significant weight in this case are denunciation, general and specific deterrence, separation from society, and protection of the public.

[33] The Crown identifies the following aggravating factors:

- a) this is a dial-a-dope operation which is a particularly insidious variation of drug trafficking because of the ease through which such operators disseminate toxic drugs into the community;
- b) the substance that was trafficked in this case included a 5.7% concentration of fentanyl. Fentanyl is a Schedule I substance that lies at the root of the recent public health emergency in British Columbia and has potentially lethal consequences;
- c) Duncan is a small community which has struggled with the impact of drug use; and
- d) the presence of a weapon for which Mr. Downey did not have a permit, and body armour at Mr. Downey's home.

[34] The Crown further argues that Mr. Downey was engaged in a mid-level drug operation. That characterization is said to flow from Mr. Downey's association with Mr. Butler and from the fact that, when the UCO sought to purchase larger amounts of fentanyl, she was given a telephone number that Mr. Downey answered.

[35] The Crown acknowledges two mitigating factors:

- a) Mr. Downey does not have a prior criminal record; and
- b) Mr. Downey entered a guilty plea in advance of trial.

[36] The Crown argues that a conditional sentencing order ("CSO") is not appropriate in the circumstances of this case, given the fact of and the quantity of fentanyl involved. The Crown argues, as well, that Mr. Downey has not established the sort of exceptional circumstances that have given rise to CSOs in cases involving trafficking in fentanyl.

Position of the defence

- [37] The defence argues that the only offence before the court is one count of trafficking of seven grams of product, which included fentanyl, for \$600, and that it is that conduct for which Mr. Downey should be sentenced. The defence argues that one sale of that amount does not constitute a mid-level drug dealer. The defence notes that Mr. Downey's home was searched, that no drugs and only a small amount of cash were found, and that the scales that were found are consistent with a street-level trafficker.
- [38] The defence submits that this case falls at the lower end of the Smith range for which an appropriate sentence is 18 to 24 months, and in the circumstances this is an appropriate case for a CSO. The defence notes that the conduct for which Mr. Downey is to be sentenced involved a single incident, that he has no criminal record, that he became involved in the drug trade in connection with an addiction, that he has been drug-free for a lengthy period of time now, and that he has strong support from family and friends.
- [39] The defence notes that Mr. Downey has been under very strict bail terms since his arrest, which amount, in effect, to house arrest. He has observed those requirements with no breach reports on file. The defence argues that the compliance by Mr. Downey with restrictions amounting to house arrest for over 40 months should be a factor considered by the court in determining a fit sentence.

Legal framework

- [40] Mr. Downey has pleaded guilty to trafficking in what is a Schedule I substance under the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA]. Section 5(3) of the CDSA provides that the maximum sentence to which an offender will be liable for trafficking in a Schedule I substance is life imprisonment.
- [41] Section 10(1) of the CDSA provides that:
- 10 (1) the fundamental purpose of any sentence for an offence under this Part is to contribute to the respect for the law and the maintenance of a just, peaceful and safe society while encouraging rehabilitation, and treatment in appropriate circumstances, of offenders and acknowledging the harm done to victims and to the community.
- [42] Section 718 of the Criminal Code, R.S.C. 1985, c. C-46, provides that:
- 718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
 - (b) to deter the offender and other persons from committing offences;

- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[43] Sections 718.1 and 718.2 provide that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. It must be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and it should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[44] As noted above, in this matter the defence seeks a conditional sentencing order. Section 742 of the Criminal Code deals with the conditions and circumstances in which such orders can be made. Section 742.1(c) and (e) makes a CSO unavailable for an offence that can result in a maximum term of imprisonment for life or for an offence involving trafficking in drugs. However, in *R. v. Chen*, 2021 BCSC 697, this court declared those subsections to be unconstitutional and of no force and effect. Mr. Downey has filed an application seeking to have this court follow and apply the ruling in *Chen*. Counsel for Crown notes that the decision in *Chen* has been appealed, but concedes that there is no basis for me to depart from that ruling.

[45] Counsel have put before me a number of judgments that provide guidance on an appropriate sentence in this case.

[46] In *R. v. Voong*, 2015 BCCA 285, the Court of Appeal considered Crown appeals of sentences imposed on four respondents who had pleaded guilty to dial-a-dope drug trafficking offences and were given suspended sentences. Justice Bennett began her reasons for judgment by commenting at para. 1 that:

[1] Those who embark in drug trafficking engage in serious criminal conduct. Absent exceptional circumstances, in British Columbia, they should expect to be sent to prison.

[47] Dealing with the appropriate sentence in such cases, Justice Bennett commented at para. 59 that:

[59] In summary, absent exceptional circumstances, the sentence for a first offence or with a minimal criminal record, dial-a-dope drug seller will be in the range of six to eighteen months imprisonment, depending on the aggravating circumstances. Exceptional circumstances may include a combination of no criminal record, significant and objectively identifiable steps towards rehabilitation for the drug addict, gainful employment, remorse and acknowledgement of the harm done to society as a result of the offences, as opposed to harm done to the offender as a result of being caught. This is a non-exhaustive list, but at the end of the day, there must be circumstances that are above and beyond the norm to justify a

non-custodial sentence. There must be something that would lead a sentencing judge to conclude that the offender had truly turned his or her life around, and that the protection of the public was subsequently better served by a non-custodial sentence. However, Parliament, while not removing a non-custodial sentence for this type of offence, has concluded that CSO sentences are not available. Thus, it will be the rare case where the standard of exceptional circumstances is met.

- [48] In *R. v. Smith*, 2017 BCCA 112, the Court of Appeal concluded that the sentencing range for cases involving fentanyl should be higher than that for trafficking in other drugs, that denunciation and deterrence must generally be given primacy in such cases, and that the normal sentencing range should begin at 18 months' imprisonment.
- [49] While denunciation and deterrence are of primary importance, rehabilitation cannot be overlooked. However, the importance of rehabilitation will vary from case to case, depending on the degree of willingness of the offender to turn things around, and the degree of confidence that the court has in the durability of the offender's recovery: *R. v. Emery*, 2019 BCSC 1789, at para. 62.
- [50] In *Emery*, the court considered the appropriate sentence for an offender who was above a street-level dealer. After reviewing a number of cases, Justice Ker concluded at para. 45 that:
- [45] where an offender is situated above the level of a street-level trafficker, the range in *Smith* is not applicable and that something higher than 18 to 36 months is necessary for the mid-level trafficker. Larger quantities of fentanyl, evidence of mixing and packaging, knowledge that the substance is fentanyl, engaging in the drug trade for profit, and repeated sales all elevate the moral culpability of the offender and elevate the sentence. While Mr. Emery is not simply a street-level trafficker, he certainly is not at the higher end of the mid-level trafficking group, either. The circumstances of his case are not nearly as sophisticated as those in *Mann and Bransford*. What I take from the authorities is that someone in Mr. Emery's position in the drug trafficking hierarchy does not fall at the lower end of the *Smith* range. However, he does not fall within the higher end of the mid-level trafficking range as demonstrated in *Mann and Bransford*, either.
- [51] Justice Ker inferred from the authorities she had reviewed that the range for an offender who was more than a street-level trafficker would be somewhere between 36 and 72 months: *Emery* at para. 70.
- [52] In *R. v. Davies*, 2019 BCCA 359, the trial judge had identified a range of 30 to 48 months for a first offender who was a mid-level trafficker in fentanyl, and imposed a 32-month sentence. In the Court of Appeal, Justice Butler discussed that finding at paras. 35-36 and, while not specifically adopting the range set out by the trial judge, found no error in the trial judge's approach. The appeal was dismissed.

- [53] Mr. Downey's counsel drew my attention to two recent judgments in which conditional sentence orders were imposed in cases involving possession for the purpose of trafficking of Schedule I substances: *R. v. Flintroy*, 2021 BCSC 1187, a case involving cocaine and methamphetamine, and *R. v. Howard*, 2021 BCPC 167, a case involving fentanyl, cocaine, and heroin, with an estimated street value of \$14,320. The Crown, in return, argued that each of these cases reflected significant accomplishments by the offenders in turning their lives around.
- [54] I was provided with oral reasons for sentence with respect to four other individuals, each of whom was charged in connection with the same RCMP operation in the Duncan area.
- [55] In *R. v. McMillan*, 2020 BCSC 2269, the offender pled guilty to two counts of possession for the purpose of trafficking, one of which involved fentanyl. Upon execution of a search warrant, Mr. McMillan was found to be in possession of three grams of cocaine with fentanyl and six grams of methamphetamine. Mr. McMillan, who was recognized to be in the throes of an addiction upon his arrest, had entered into a recovery program and received a glowing report from the facility. Justice Crabtree accepted a joint submission for a suspended sentence and a period of probation for three years, concluding that Mr. McMillan had demonstrated exceptional circumstances in accordance with Voong.
- [56] In *R. v. Essler*, 2021 BCSC 583, the offender pled guilty to a charge of trafficking a mixture of heroin and fentanyl, selling four grams on one occasion and 1.3 grams on another. The offender was in the grips of an addiction, had significant mental health issues, and had taken no significant steps in turning her life around. Justice Thompson concluded that a sentence at the bottom end of the Smith range was appropriate and sentenced her to 18 months' imprisonment plus a six-month term of probation.
- [57] In *R. v. Butler*, 2021 BCSC 1016, the offender pled guilty to four charges, including trafficking in heroin and fentanyl on multiple occasions, as well as possession of heroin and fentanyl for the purposes of trafficking. Mr. Butler made three sales to the UCO, but involving more substantial quantities of heroin and fentanyl than were sold by Mr. Downey. Then on June 29, 2018, Mr. Butler spoke with the same UCO and agreed to a price of \$4,100 for two ounces of the substances. When he was arrested on June 30, 2018, he had the two ounces on his person. His house was subsequently searched and the RCMP seized 935.6 grams of methamphetamine, 411.8 grams of fentanyl/cafeine, 266.8 grams of heroin/fentanyl/cafeine, 55 grams of heroin/ketamine/fentanyl/cafeine, and 23.3 grams of cocaine. The drugs found at his house had street values totalling nearly \$70,000.
- [58] Justice Baird concluded that Mr. Butler was a mid-level dealer. He noted comments made by Mr. Butler to the UCO indicating awareness that his product was causing extreme health problems in the community, and that Mr. Butler was not himself an addict. He imposed an overall sentence of 36 months' imprisonment.

- [59] Finally, in *R. v. Milne*, 2021 BCSC 1859, the offender pled guilty to two counts of trafficking in fentanyl. On each of two occasions, he sold small amounts of drugs for \$40 each time. Mr. Milne was described as well behaved until Grade 12, when he began to travel with a bad crowd, ultimately ended up in a state of drug dependency, and sold drugs to support his addiction. He had embarked on a rehabilitation program and had been drug-free for 18 months at the time of sentencing.
- [60] Mr. Milne sought a conditional sentencing order. Justice Williams cited para. 59 of *Voong*, which I quoted above, and commented at para. 43 that:
- [43] To my mind, the approach directed by the court to consider whether exceptional circumstances are present is also relevant in the determination of whether a court should deviate from a conventional custodial sentence within the stipulated range.
- [61] Having considered a number of mitigating and aggravating factors in the case before him, Justice Williams went on to discuss the appropriateness of a CSO at paras. 49-51:
- [49] The general context in which the sentence must be determined is a clear and compelling line of authority holding that denunciation and deterrence are primary considerations in the fashioning of a sentence for a dial-a-dope operation.
- [50] Taking all of these considerations into account, I have concluded that notwithstanding the steps that Mr. Milne has taken to rehabilitate himself, and I do not demean or minimize those in any way, given the considerable gravity of the offence and the high degree of responsibility that Mr. Milne must be attributed, in conjunction with the real and pressing need to denounce and deter this conduct in this community, a term of imprisonment to be served in a custodial institution must be imposed.
- [51] I reach that conclusion recognizing that the Supreme Court of Canada stated in *R. v. Proulx*, 2000 SCC 5, that conditional sentence orders can be tailored to provide elements of denunciation and deterrence. Nevertheless, I am convinced that in this case the imposition of a conditional sentence order would not be sufficiently consistent with those aspects of the fundamental purpose and principles of sentencing.
- [62] He concluded that a fit sentence in the circumstances of that case was 18 months' incarceration.

Discussion

- [63] I begin with the key difference between the submissions made by the Crown and the defence: that is, whether Mr. Downey is appropriately characterized as a mid-level drug dealer. In my view, the answer is no. Mr. Downey was charged with and pled guilty to one trafficking transaction at a value of \$600. While the value of that transaction was higher than some of the other Duncan cases described above, it does not establish that Mr. Downey is a mid-level dealer.

- [64] The Crown relies as well on the fact that the initial request by the UCO for access to a larger quantity of drugs led to A.J. giving her a number that led to Mr. Downey. Having the ability to sell a larger quantity than the point-level quantity sold by A.J. does not establish Mr. Downey as a mid-level dealer.
- [65] Other than those two factors, the balance of the Crown's arguments appear to be based on associating Mr. Downey with Mr. Butler. While it does appear that they shared access to a phone and Mr. Downey was present on June 30, 2018, with Mr. Butler, the transactions that Mr. Butler engaged in otherwise had no indication of involvement by Mr. Downey, nor did the search of Mr. Downey's person or home give rise to any indicators of involvement at the same level as Mr. Butler.
- [66] The Crown referred me to a reference in the Butler sentencing decision, attributing to Mr. Butler the assertion that Mr. Downey was involved at the same level as Mr. Butler. I would view any such assertion with much suspicion. Mr. Downey's counsel advised that this allegation was not accepted by the defence and the Crown took no steps to prove it.
- [67] Ultimately, Mr. Downey was charged with and pled guilty to a single transaction. He should be sentenced for that transaction, not for an association with another individual who engaged in other transactions.
- [68] As a result, the sentence in this case should be imposed within the Smith range; i.e., 18 to 36 months.
- [69] I turn to consider the aggravating factors in this case. I accept the aggravating factors advanced by the Crown, namely:
- a) Mr. Downey was involved in a dial-a-dope operation which is a particularly insidious variation of drug trafficking because of the ease through which such operators disseminate toxic drugs into the community;
 - b) the substance that was trafficked in this case included a 5.7% concentration of fentanyl. That sort of concentration is potentially lethal and the presence of fentanyl in any concentration is of serious concern;
 - c) Duncan is a small community which has struggled with the impact of drug use; and
 - d) Mr. Downey had a weapon with no permit, and body armour at his home.
- [70] The mitigating factors in this case include:
- a) the lack of any prior criminal record;
 - b) the entry of a guilty plea before trial; and
 - c) Mr. Downey's addiction and drug use.

- [71] In my view, Mr. Downey's conduct is more serious than that involved in the Essler and Milne cases, but substantially less serious than that involved in the Butler case.
- [72] Mr. Downey is young. He appears to have taken significant steps to deal with his addiction and to prepare for further education. He has complied with strict bail conditions over an extended period of time. He has great potential.
- [73] The fact that Mr. Downey has endured over 40 months of virtual house arrest is a factor to be considered. It is, of course, different from the 80 days he spent in custody for which an established formula is to be applied.
- [74] In the absence of the lengthy period of time Mr. Downey was subject to those strict bail conditions, I would likely have considered it appropriate to impose a sentence that was a few months greater than that imposed on Mr. Milne. In light, however, of the conditions under which Mr. Downey has lived for most of the past 44 months, it is my view that a fit sentence is 18 months.
- [75] The Crown has advised that Mr. Downey is entitled to credit of 122 days for the time he spent in custody in 2018 and 2019.
- [76] I turn now to the question of whether a CSO is appropriate in the circumstances. As I read the cases, a CSO in a case involving trafficking in fentanyl is appropriate only where the steps taken by the offender to turn their life around are exceptional. I do not want to diminish the effort of Mr. Downey. His apparent success in dealing with his addiction is notable. However, while he has talked about finishing high school and had occasional employment, I do not see the sort of concrete results of those efforts that would lead me to conclude that Mr. Downey has, in fact, turned his life around to the extent that a CSO would be appropriate.
- [77] I certainly believe that Mr. Downey is more than capable of doing so. I am hopeful that having the certainty that today's decision will provide, even if the result is not entirely what was hoped for, will help him to move forward. I do hope that he has an opportunity to re-engage with the counselling that he found so valuable.
- [78] However, giving due consideration to the gravity of the offence, the high degree of responsibility that Mr. Downey must be attributed, and the real and pressing need to denounce and deter this conduct in the community, I conclude that a term of imprisonment to be served in a custodial institution must be imposed.

Disposition

- [79] Mr. Downey, will you please stand.
- [80] For the single count of trafficking in respect of which you have pleaded guilty, I sentence you to a period of incarceration of 18 months, less 122 days' credit for pre-sentence time in custody. You may be seated.

Ancillary Orders

- [81] In addition to the jail sentence, there will be an order under s. 109 of the Criminal Code. Mr. Downey is subject to a lifetime prohibition for prohibited and restricted firearms, and a 10-year prohibition for non-restricted firearms and weapons.
- [82] The Crown seeks a secondary DNA order pursuant to s. 487.051(3) of the Criminal Code. Mr. Downey's counsel argued that such an order is not strictly necessary; however, no specific privacy interest was identified. I am satisfied that such an order is in the best interests of the administration of justice, given the nature of the offence and the minimal impact on Mr. Downey's privacy and security of the person: *R. v. Awasis*, 2009 BCCA 134.
- [83] Finally, I would make an order pursuant to s. 16 of the CDSA for forfeiture of the following items seized and circled on the major exhibit flowchart: Items 4 and 5 on 186831D, and Items 1 to 5, 8 to 9, and 12 on the handwritten flowchart at Tab 1 in the Crown's book of documents, which is Exhibit 1. I exclude from this order an Asus tablet and Acer laptop from the list, as no evidence was presented relating those items to the commission of the offence.
- [84] Mr. Downey, you have taken significant steps over the past 44 months to become the sort of person you want to be. I recognize that today's decision will be a setback to you, but I do believe, from the material that I have read, that you have great potential to move forward positively and I wish you success in that endeavour.
- [85] Is there anything else that we should be dealing with?
- [DISCUSSION OF ORDER PURSUANT TO S. 16 OF CDSA]
- [86] CNSL D. MCKAY: Yes, Justice. Given the fact that he'll be incarcerated, I'd ask that you consider waiving the victim fine surcharge.
- [87] THE COURT: Mr. Gibson?
- [88] CNSL C. GIBSON: No submission.
- [89] THE COURT: I will waive the victim fine surcharge.

"Veenstra J."

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