

CANADA / JUDGMENT

## R. v. Dubensky

2023 BCSC 489

COURT

Supreme Court of British Columbia

DECIDED

9 February 2023

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2023 BCSC 489 R. v. Dubensky

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Dubensky,

2023 BCSC 489

Date: 20230209

Docket: 87669-2, 89281-2

Registry: Nanaimo

Rex

v.

Michael John Dubensky

Before: The Honourable Madam Justice Young

Oral Reasons for Sentence

Counsel for the Crown:

J. Rutherford

Counsel for the Accused:

J.D.A. Watt

Place and Date of Trial/Hearing:

Nanaimo, B.C.

February 9, 2023

Place and Date of Judgment:

Nanaimo, B.C.

**February 9, 2023**

- [1] THE COURT: Michael Dubensky pleaded guilty yesterday after seven days of pretrial Charter applications to the following in the indictment in Court File No. 87669-2, Nanaimo Registry, Count 2, possession of Fentanyl and Carfentanil for the purpose of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C 1996, c. 19 (the CDSA). This event occurred on the 26th day of June, 2020, in Nanaimo, B.C.
- [2] In addition, Mr. Dubensky pleaded guilty to an offence in a new indictment in Court File 89281-2, Nanaimo Registry, Count 2, and it is also possession of Carfentanil and Fentanyl for the purpose of trafficking contrary to s. 5(2) of the CDSA. This event occurred on the 19th day of March, 2022, in Nanaimo, B.C.
- [3] An agreed statement of facts has been filed and I have been presented with joint submissions on sentence. The Crown and defence have proposed a four-year sentence for each count to be served consecutively with a two-year reduction based on the totality principle. For clarity, the joint submission is that Mr. Dubensky is to spend six years incarcerated for these two offences.
- [4] I am mindful of the decision in the Supreme Court of Canada in Anthony-Cook, 2016 SCC 43, para. 34 which establishes that a sentencing judge should not reject a joint submission unless the proposed sentence would be viewed by reasonable and informed persons as a breakdown in the proper functioning of the justice system.
- [5] Having heard the submissions and reviewing the authorities jointly submitted, I am satisfied that the joint submission proposed is an appropriate sentence. These reasons for sentence should be read with reference to the agreed statement of facts filed as an exhibit on the sentencing hearing which comprehensively accounts for the circumstances.
- [6] I will briefly set out the facts in this ruling in summary form.

### **The Offences**

- [7] An investigation into Mr. Dubensky commenced after the police had been called regarding a suspected Carfentanil overdose of an individual known as Herbert Mountain. Mr. Dubensky's telephone number was taken from the phone belonging to Mr. Mountain. Police began their investigation and surveillance and surveillance took place over four days starting June 23 and ending June 26, 2020, with Mr. Dubensky's arrest. Upon arrest, Mr. Dubensky had cash of \$325 rolled up in his pocket. He had just delivered drugs to Mr. Mickey including Fentanyl that was packaged in a baggie carrying a tattoo piercer logo.

- [8] At approximately 2:00 a.m. on June 27, 2020, the RCMP received a search warrant granting authority to search Mr. Dubensky's residence using a key that had been seized from Mr. Dubensky. The police seized a total of 31.82 grams of Fentanyl/Carfentanil with a concentration from 0.6 percent to 0.9 percent which I am advised by the Crown is a low concentration. The police also seized cash in the residence in the amount of \$3,311. There were other paraphernalia associated with drug trafficking including scales, a Magic Bullet blender, both with drug residue confirmed to be Fentanyl/Carfentanil, two cellphones, a notebook with scoresheets, and baggies including one with a tattoo piercer logo the same as what was found in Mr. Mickey's pocket on arrest.
- [9] The facts relevant to the second offence in File 89281 are as follows. On January 19, 2022, RCMP from Nanaimo responded to the scene of an overdose. A small orange compact car was seen leaving the scene. Police knew Mr. Dubensky drove a small orange compact car and commenced an investigation. Surveillance was conducted on Mr. Dubensky at his known residence at 17-31 Prideaux Street between March 2 and March 18. The police observed several meets with individuals over the course of several days that were consistent with drug trafficking.
- [10] On March 19, the police arrested Mr. Dubensky and a person in the passenger seat of his vehicle. On arrest, the police seized a cellphone, two baggies totalling 1.4 grams of Fentanyl, and \$525 in cash from Mr. Dubensky. The police seized 1.8 grams of Fentanyl from the male passenger. The police obtained a search warrant to search Mr. Dubensky's residence at 17-31 Prideaux Street and located \$250 in cash and approximately 18 grams of Fentanyl/Carfentanil in various packages together with paraphernalia associated with drug dealing including digital scales, a 50-gram weight, a cellphone, scoresheets, a taser, an extendable baton, and brass knuckles.
- [11] The Crown submits that Mr. Dubensky was a low-level street dealer who was dealing drugs to addicts. His principal motivation for dealing drugs was to fund his own severe addiction.

### Circumstances of the Offender

- [12] I will now review the circumstances of Mr. Dubensky which I have taken into consideration. Mr. Dubensky is 44 years of age. He spent most of his younger years in the Vancouver area and suffered from an unfortunate upbringing. He was the victim of mental and physical abuse at the hands of his father and ran away from home at an early age. He spent his adolescence and teen years in group homes and facilities. He did not go to high school, but to his credit, earned his Dogwood diploma while in jail in his 20s. He has worked a variety of labour jobs including construction, working for a moving company, and as a delivery driver. He is currently on disability pension because of his anxiety and depression.

- [13] Mr. Dubensky has a lengthy criminal record. Most of his offences are related to theft and possession of stolen property which is consistent with an individual struggling with a drug addiction or being under the influence of drugs. He does have one prior conviction for the purpose of trafficking in 2014 which he received a sentence of six months and 12 months' probation.
- [14] Mr. Dubensky started using marihuana and alcohol at age 10 and proceeded to using crack cocaine as a teenager. He managed to stop using crack cocaine, but was unable to withdraw completely from other drug use. He became addicted to crystal meth and heroin. He has spent 30 years in a vicious cycle of addiction leading to involvement in the criminal justice system and time in jail. Mr. Dubensky has no children and is not in a relationship at the present time. He is estranged from his father.
- [15] Over the past six months, Mr. Dubensky has been working with a psychologist to address some of his early childhood trauma and anxiety and depression and he is trying to connect with his father to make amends.
- [16] Mr. Dubensky sees this sentence as an opportunity for him to get clean and sober. He recognizes that he needs help and that he has been unable to manage it on his own. He seeks out heroin, but instead he gets Fentanyl and Carfentanil and is compelled to use them and has become addicted to them. He has witnessed friends die and has had the traumatic memory of trying to resuscitate an overdosing friend unsuccessfully. He told the court that he hates these drugs and what they cause. Because of the nature of his addiction, he has been on a repetitive cycle of trying to stop and then relapsing. He is sick of this way of life and he spoke to the court very sincerely saying that he sees this sentence as a real opportunity to change things. He has taken that first step by admitting his guilt.

## Principles of Sentencing

- [17] The purpose of and principles of sentencing are set out in s. 718 of the Code and also s. 10 of the CDSA. The court has recognized that general deterrence and denunciation must feature prominently in cases of trafficking in Fentanyl and Carfentanil in light of the serious unabated public health crisis caused by the street sale of drugs containing Fentanyl : R. v. Gill, 2022 BCCA 127 at para. 22; R. v. Mann, 2018 BCCA 265 at para. 98; and R. v. Smith, 2017 BCCA 112 at paras. 4, 48-49. Fentanyl and Carfentanil are killing its users at a frightening rate. The investigation of these two offences themselves commence with an overdose death of two individuals.
- [18] I recognize how serious this health crisis is, but as a sentencing judge, I still cannot forget the importance of rehabilitation of the offender. This is important especially in a case like this where the offender has struggled for over 30 years with addiction and where the offences are directly related to his need to fund his own addiction.

- [19] Section 718.1 articulates the most basic principle, namely, the sentence imposed should be "proportionate to the gravity of the offence and the degree of responsibility of the offender." Point 2 sets out a number of specific principles. The ones I find particularly relevant are at sub (a), a sentence should be increased or reduced to take account of aggravating or mitigating circumstances; (b) a sentence should be similar to sentences imposed on similar offenders for similar offences in similar circumstances; and (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh.

### Crown and Defence Position

- [20] The Crown and defence have jointly submitted the following sentencing authorities in support of their submission that two consecutive sentences of four years reduced to six years by operation of the totality principle is the appropriate sentence.
- [21] In *R. v. Gill*, 2022 BCCA 127, the Court of Appeal overturned a five-year sentence and set a four-year sentence for a 19-year-old offender who was a mid-level Fentanyl/Carfentanil dealer and had no previous criminal record. He had no addiction issues and was selling drugs to enable him to buy luxury brand items.
- [22] In *R. v. Byrne*, 2020 BCSC 811, Mr. Byrne was found to be a higher-up-the-chain than a street-level dealer and was found with large quantities of Fentanyl and Carfentanil. He had relevant previous convictions and the court found his principal motivation for these offences was to feed his own expensive drug habit. Mr. Byrne was sentenced to four years' imprisonment.
- [23] In *R. v. Tomczyk*, 2019 BCSC 1313, Mr. Tomczyk was convicted of possession for the purpose of trafficking in methamphetamine and Carfentanil. He was nearly 42 years of age and had an extensive criminal record with multiple relevant convictions for possession and trafficking. There was no evidence that Mr. Tomczyk suffered from any addiction at the time of the offence. He received a four-year sentence.
- [24] The sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Mr. Dubensky was well aware that he was selling drugs that had a potential to kill its users. These offences clearly call for jail time. Mr. Dubensky has an extensive criminal record. However, I do note there is only one prior possession-for-the-purpose-of-trafficking offence and I agree that his previous offences appear to be directly related to his long struggle with addiction.
- [25] I recognize that Mr. Dubensky was not motivated by greed, but was selling drugs in order to fund his own addiction. This is a mitigating factor and reduces the degree of moral blameworthiness. Mr. Dubensky has sought out counselling with a psychologist over the last six months. He has expressed remorse and strong motivation to turn his life around and so I do consider rehabilitation and hope that he is able to accomplish this.

- [26] Mr. Dubensky pleaded guilty to both offences which is a mitigating factor. Admittedly, he pleaded guilty to the first offence after two Charter rulings that were unfavourable to him, but he did save the court time by not having to conduct a trial. With respect to the second offence, it has not yet gone to the preliminary hearing stage and so this is a stronger mitigating factor.
- [27] Having reviewed the authorities, I am satisfied that four years is the appropriate sentence for each offence. As they were committed in two different times two years apart, they should be served consecutively. Applying s. 718.2(c), which I repeat says, "Where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh," this prevents the court from imposing a total cumulative sentence that exceeds the principle of proportionality. I find a combined sentence of eight years to be unduly long and harsh and I apply the totality principle and reduce the sentence to six years.
- [28] Mr. Dubensky, I will ask you to stand now. Thank you.
- [29] So, Mr. Dubensky, I sentence you to four years for the first count, four years for the second count, and these sentences are to be served consecutively, but I reduce them by two years so that you will be incarcerated for six years.
- [30] I make the following ancillary orders.
- [31] There will be a DNA order pursuant to s. 487.051(1) of the Criminal Code on Count 2 on Indictment File 87669-2 and Count 2 on 89281-2. These are secondary designated offences. After considering the factors set out in s. 487.051(3) of the Criminal Code, I am satisfied that it is in the best interests of the administration of justice to make an order in Form 5.04 authorizing the taking of samples of bodily substance from you for the purpose of registration with the DNA national databank.
- [32] I will impose a lifetime prohibition for the possession of firearms, restricted weapons, prohibited weapons, prohibited devices, and prohibited ammunition under s. 109(2) of the Criminal Code, and this is in recognition of the fact that you previously did have a 10-year prohibition.
- [33] I have signed a s. 16 CDSA forfeiture order for each offence yesterday as part of the sentence that I make today.
- [34] With respect to the victim surcharge, pursuant to s. 737(2.1) of the Criminal Code, I am satisfied because of your precarious financial circumstances as a result of unemployment and disability the surcharge would cause undue hardship to you and so I am not going to make an order for a victim surcharge.
- [35] Mr. Dubensky, I wish you well and I hope that you are able to get the strength and follow-through with what you committed to do yesterday and that is to address your addiction and improve your life and so I do wish you the best. Thank you.

[36] THE ACCUSED: Thank you, Justice.

[37] THE COURT: You may sit down now. Thank you.

[38] CNSL J. RUTHERFORD: And, Justice, the Crown enters a stay of proceeding on the remaining counts on both files. I think that is Count 1 on each of them.

[39] THE COURT: Good, thank you. The remaining counts on both files are stayed.

[40] That concludes the sentencing. Thank you, counsel.

"B. M. Young, J."

The Honourable Madam Justice Young

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