

CANADA / JUDGMENT

R. v. Gallant

2024 BCSC 2327

COURT

Supreme Court of British Columbia

DECIDED

18 December 2024

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2024 BCSC 2327 R. v. Gallant

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Gallant,

2024 BCSC 2327

Date: 20241218

Docket: 87685-2, 89295-2

Registry: Nanaimo

Rex

v.

Michael William Gallant

Before: The Honourable Justice Marzari

Oral Reasons for Sentence

Counsel for the Crown:

J. Rutherford

Counsel for the Accused Michael William Gallant:

K. Waugh

M. Winkel

Place and Date of Hearing:

Nanaimo, B.C.

September 20, 2024

Place and Date of Judgment:

Nanaimo, B.C.

December 18, 2024

INTRODUCTION

[1] Michael William Gallant is before me for sentencing on two indictments:

- a) Count 1 of 87685-2 for possession of fentanyl and carfentanil for the purposes of trafficking on or about July 30, 2020, which I shall refer to as the "2020 Indictment"; and
- b) Counts 1 and 2 of 89295-2 for possession of fentanyl (Count 1) and methamphetamine (Count 2) for the purposes of trafficking on or about July 4, 2021, which I shall refer to as the "2021 Indictment".

[2] Mr. Gallant plead guilty to the above charges. The remaining counts on both Indictments were stayed by the Crown.

CIRCUMSTANCES OF THE OFFENCE

Facts at Sentencing

- [3] Because Mr. Gallant plead guilty, I have not made factual findings regarding the circumstances of the offences. A guilty plea carries with it only an admission of the essential elements of the offence admitted, and no more: *R. v. Gardiner*, [1982] 2 S.C.R. 368 at 414, 1982 CanLII 30.
- [4] Where there are facts in dispute, I must be satisfied on a balance of probabilities of the existence of a disputed fact before relying on it to determine the sentence, pursuant to s. 724(3)(d) of the Criminal Code, R.S.C., 1985 c. C-46 [Code]. This includes facts which are contained in a pre-sentence report; in that case, the party wishing to rely on the fact bears the burden of proof: s. 724(3)(b). Of course, the Crown must prove any aggravating facts beyond a reasonable doubt: s. 724(3)(e).
- [5] In this case, the essential facts relating to the circumstances of the offences for the purposes of sentencing have been agreed for the purposes of this sentencing. I will briefly summarize the most salient circumstances.

The 2020 Indictment

- [6] In late July 2020, Mr. Gallant, together with his co-accused, Ms. Edwards, were arrested in their home after a police investigation and surveillance operation into Mr. Gallant's involvement in trafficking drugs from their shared home in Nanaimo, BC.

- [7] In the search of the home at the time of the arrest, the police found:
- a) 23 grams of fentanyl, most of which contained some carfentanil, worth between \$2,300-\$4,600 depending on how it was sold;
 - b) 72 grams of methamphetamine worth approximately \$7,200 on the street; and
 - c) 9.5 grams of cocaine worth approximately \$900-\$950 on the street.
- [8] In addition, the police found:
- a) almost \$5,000 cash, mostly in coins and \$20 bills;
 - b) 2 cell phones that had been factory reset;
 - c) ammunition (but no firearms); and
 - d) score sheets, powder caffeine, digital scales with drug residue, mixing and packaging paraphernalia, and a "debt list".
- [9] I find that the amounts of the drugs and the paraphernalia are consistent with street level trafficking of these drugs. The amounts and associated paraphernalia, including mixing, cutting, and weighing equipment establish that Mr. Gallant was also involved in the processing of these drugs for sale at the street level. The Crown calls these "mid-level" elements of a street-level trafficking operation, and the defence objects to a "mid-level" characterization. Regardless of how they are characterized, I find beyond a reasonable doubt on the admitted evidence before me that Mr. Gallant was involved in the cutting and processing of these controlled substances, and that while Mr. Gallant was selling at the street level (as opposed to selling to dealers), his activities involved the over 20 grams of fentanyl, most of which was mixed with carfentanil, and almost \$5,000 in cash. These are aggravating circumstances that I will take into account in Mr. Gallant's sentence.
- [10] Both Mr. Gallant and Ms. Edwards were charged with possession of fentanyl and carfentanil for the purposes of trafficking on the 2020 Indictment and came before the Court over a year ago for voir dire and scheduling of a trial. After completing one of several voir dire scheduled before trial of this matter, Mr. Gallant indicated that he wished to plead guilty to the 2020 Indictment.

The 2021 Indictment

- [11] On July 4, 2021, Mr. Gallant was pulled over while driving a vehicle that had been reported stolen. He was arrested for possession of stolen property and a search was made of the vehicle, resulting in the seizure of a backpack located in the back seat of that vehicle and a cell phone plugged into the central console.
- [12] The backpack contained the following controlled substances:

- a) Over 187 grams of methamphetamine worth between \$4,820 and \$18,721 depending on how it was sold;
 - b) Over 28 grams of fentanyl worth between \$2,500 and \$5,700 depending on how it was sold;
 - c) 2.7 grams of cocaine; and
 - d) 22 hydromorphone pills.
- [13] The backpack also contained paraphernalia associated with the trafficking of controlled substances, including two scales, empty dime bags, a pound of caffeine powder, and score sheets. The score sheets made reference to balances and payments in the hundreds of dollars for ounce, half ounce, 8-ball (or 3.5 grams) and gram amounts using vernacular terms for methamphetamine, cocaine and fentanyl.
- [14] The cellphone was also searched and determined to be registered in Mr. Gallant's name. Messages from March 2021 to the date of the phone's seizure included numerous requests for various controlled substances, using slang terms, including the substances with which Mr. Gallant was in possession of that date and which he has now plead guilty to possessing for the purposes of trafficking that day.
- [15] Mr. Gallant denied ownership of the backpack, but he concedes for the purposes of this guilty plea that he was in legal possession of its contents.
- [16] The Crown advises that Mr. Gallant was not on bail when he committed the 2021 offences, and no breach of bail conditions is alleged.
- [17] Mr. Gallant plead guilty to the 2021 Indictment before a different judge of this Court on what was to be the first day of trial, after advising the Court that the trial would not proceed because of his intention to do so.

CIRCUMSTANCES OF THE OFFENDER

Current Circumstances

- [18] Mr. Gallant was 39 years old at the time of the sentencing hearing in September 2024. He currently lives with his mother and stepfather, who have supervised him during his lengthy period of house-arrest.
- [19] Mr. Gallant has two sons who are in the care of his sister Crystal, who has been working with Mr. Gallant to re-establish their relationship with him.
- [20] Mr. Gallant has significant and impressive levels of family support, most particularly from his mother and sisters.

Criminal Record

- [21] The Crown describes Mr. Gallant's criminal record as minor and dated with a possession charge dating from 2017, and some breaches of probation. The Crown says that the main significance of his record is that he is not a first-time offender but does not rely on Mr. Gallant's record beyond that.
- [22] Mr. Gallant has not spent any significant time in custody to date. His 20 days in pre-trial custody after his arrest on July 4, 2021, is the most time he has served, and this detention was solely in relation to the 2020 Indictment. I note that he was arrested but not yet charged with the 2021 Indictment at the time.
- [23] It is agreed that he entitled to a 30-day credit on the 2020 Indictment in relation to this pre-trial custody.

Personal Background

- [24] I have been provided with both a pre-sentence report and a forensic report for Mr. Gallant with respect to this sentencing. Both are marked as exhibits.
- [25] What stands out from these reports is that Mr. Gallant was raised in a home marked by drug and alcohol abuse and significant family violence. When he was fourteen, Mr. Gallant removed his father from his house to protect his mother from his father. He also was the one to respond and to call emergency services when his mother harmed herself when he was sixteen. I find that Mr. Gallant was exposed to very traumatic events as a child and teen.
- [26] Mr. Gallant was also exposed to drugs and alcohol in his childhood home and began consuming alcohol "heavily" in his teens, as well as drugs such as cannabis and cocaine. He used various drugs through his twenties, and in his thirties, he became a heavy user of crystal methamphetamine. This is the period in which the offenses occurred.
- [27] Mr. Gallant reports that he has not consumed any controlled drugs or alcohol for three years, essentially since his time in custody after his arrest on the 2021 Indictment.
- [28] Mr. Gallant has a grade 10 education and no accredited vocational training. He does have experience in car mechanics and construction and would like to develop his skills in the area of mechanics.
- [29] Mr. Gallant has a long history of anxiety that continues to affect his life choices, together with "significant trauma pathology" or PTSD. He is described by the forensic expert as "a rather meek and timid person who would benefit from learning ways to be more assertive in his interpersonal relationships." He suffers memory issues and neurocognitive difficulties with verbal expression and reasoning.

- [30] In May 2023, Mr. Gallant was attacked during a home invasion and was struck in the head by an axe. He required many stitches, and believes it was an attempt on his life. He relates this attack to his previous drug associations and debts, and I find that he has been avoiding all such associations at least since that date. It is not clear whether this attack contributed to Mr. Gallant's neurocognitive challenges, or if they are more longstanding.
- [31] Since May 2023, Mr. Gallant is understandably fearful for himself and his family. He is worried, in particular, about going to jail with persons who are aware of his drug debts and who may wish to harm him. He says that he left a drug rehabilitation facility in February 2024 because he did not believe he needed their services, but also because he felt unsafe with the number of drug users present. I accept this explanation, though I find that Mr. Gallant would benefit significantly from trauma counselling to address his ability to respond to stressors without the assistance of controlled substances that are very harmful to him and others. This remains an "elevated" risk for him.
- [32] I find that Mr. Gallant's trafficking in methamphetamine and fentanyl was connected to his own addiction to these drugs, though he was trafficking them at a scale well beyond his personal use.

IMPACT ON COMMUNITY

- [33] I turn now from Mr. Gallant's personal circumstances to the impact of his offences on the community. The harms of substance abuse in Canada have long been recognized, for example by the Supreme Court of Canada in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1999] 1 S.C.R. 982 at paras. 89-91, 1998 CanLII 778. As serious as these harms were at that time, they pale in comparison to the current costs in terms of hospitalizations and daily deaths that we are now experiencing due to the proliferation of fentanyl and carfentanil in our BC communities.
- [34] In *R. v. Mann*, 2018 BCCA 265 at paras. 69, 98-99, the Court of Appeal approved of the trial judge's comments relating to the well-known harms of fentanyl, as recognized in *R. v. Smith*, 2017 BCCA 112 [Smith BCCA], and to the even greater dangers of carfentanil that are now known. These significant concerns were more recently expressed by the Court of Appeal in *R. v. Gill*, 2022 BCCA 127, citing Mann and Smith BCCA, and also noting the comments of Justice Moldaver in *R. v. Parranto*, 2021 SCC 46, as follows:
- [22] There is no question that the moral culpability of offenders who traffic in fentanyl and its analogue, carfentanil, is very high. This Court has recognized that general deterrence and denunciation must feature prominently in such cases in light of the serious, unabated public health crisis caused by the street sale of drugs containing fentanyl: Mann BCCA at para. 98; *R. v. Smith*, 2017 BCCA 112 at paras. 4, 48-49. As Newbury J.A. (in dissent, but not on this point) observed in Smith:

- [44] British Columbia has one of the worst, if not the worst, problems of Fentanyl abuse in Canada. This public safety emergency has prompted various media campaigns, public alerts and outreach efforts by police and social workers who are involved in seeking to contain this scourge – yet Fentanyl abuse continues to claim lives every day in our communities. The danger posed by such a drug must surely inform the moral culpability of offenders who sell it on the street, and obviously increases the gravity of the offence beyond even the gravity of trafficking in drugs such as heroin and cocaine.
- [23] More recently, in *R. v. Parranto*, 2021 SCC 46, Moldaver J. expressed the view that the trafficking of fentanyl and its analogues "has altered the landscape of the substance abuse crisis in Canada, revealing itself as public enemy number one": at para. 93. It is well known that the problem in British Columbia has only grown more critical in the past several years. The addition of the analogue carfentanil to the street supply is clearly increasing the extremely serious risk of more deaths. This Court has recognized that the offence of trafficking in carfentanil is even more serious than the offence of trafficking in fentanyl: *Mann BCCA* at para. 73.

CROWN AND DEFENCE POSITIONS ON SENTENCE

- [35] The Crown seeks a four-year sentence on the 2020 Indictment involving fentanyl and carfentanil, and a consecutive 30-month sentence on Count 1 of the 2021 Indictment, with an 18-month sentence on Count 2 of that indictment to run concurrently with Count 1.
- [36] This would result in a six-and-a-half-year sentence on the two indictments; however, the Crown agrees that there should be some reduction in that sentence on the grounds of totality, as well as to take into account Mr. Gallant's time in pre-sentence custody (20 days with a total of 30 day credit) and his 19 months of house arrest. A total sentence of five to six years is suggested.
- [37] The Crown also seeks a mandatory weapons ban for life on the second indictment, and a DNA sample. The Crown does not seek the victim's surcharge in light of Mr. Gallant's financial situation and his incarceration.
- [38] The defence suggests that a sentence of 30-36 months is appropriate for the 2020 Indictment involving fentanyl and carfentanil but says that this amount should be reduced by 6-12 months in light of his 19-month house arrest already providing a measure of this punitive and deterrent effect of a custodial sentence. The defence suggests a total sentence on the 2020 Indictment of two years.
- [39] The defence agrees with the sentence of 30 months also proposed by the Crown with respect to Count 1 of the 2021 Indictment and the concurrent 18 months on Count 2 of that Indictment.
- [40] This would amount to a four-and-a-half-year sentence on the two indictments, which the defence says should be reduced to four years under the principle of totality.

- [41] The defence and Crown positions are therefore one to two years apart on total custodial sentence. There is agreement on the appropriate sentence on the 2021 Indictment, but not on the 2020 Indictment or the appropriate reductions. The primary differences between the positions on the 2020 Indictment rest on the significance of the carfentanil and its harm to the community, the extent of the mitigating factor attributable to pre-sentence house-arrest, and differences between the Crown and defence on Mr. Gallant's rehabilitative prospects and the extent to which they are mitigating.

LEGAL FRAMEWORK

- [42] I turn now to the general principles of sentencing as set out in s. 718 of the Code and s. 10 of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA].
- [43] The Code and the CDSA set out a number of factors that the court must consider in pronouncing sentence. Section 718 of the Code provides that the fundamental purpose of a sentence is to protect society and to contribute, along with crime prevention measures, to respect for the law and the maintenance of a just, peaceful, and safe society. That broad purpose is achieved where the sentence contains just sanctions that reflect the sentencing objectives further set out in the section, namely denunciation, general and specific deterrence, separation of offenders from society where necessary, rehabilitation, reparation, promotion of a sense of responsibility in the offender, and an acknowledgment of the harm caused to the victims or, in this case, to the community.
- [44] Section 718.1 sharpens the focus of s. 718 with this requirement: that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender. Ultimately, the sentence must respect this fundamental principle of proportionality.
- [45] Section 718.2 sets out a number of specific sentencing principles, including the principles of parity and totality. The principle of parity calls for similar sentences for similar offences committed by similar offenders, and the principle of totality prescribes that where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh. Section 718.2 further instructs a sentencing judge to consider all available sanctions other than imprisonment that are reasonable in the circumstances, with particular attention to the circumstances of Aboriginal offenders.
- [46] Additional principles of sentencing in relation to drug offences are set out in s. 10 of the CDSA, including the importance of encouraging rehabilitation and treatment in appropriate circumstances.
- [47] Denunciation and deterrence are particularly weighty considerations in this offence. The presence of fentanyl and carfentanil in this case is particularly relevant to the requirement of denunciation and deterrence. Indeed, trafficking in any hard drug, even without considering the exceptional impact of fentanyl and carfentanil, has devastating consequences on the community.

RANGE, AGGRAVATING AND MITIGATING FACTORS

- [48] The Crown and Defence agree that 30 months is an appropriate sentence for Count 1 on the 2021 Indictment relating to trafficking fentanyl, with a concurrent 18-month sentence for the possession of methamphetamine for the purpose of trafficking charged at Count 2 of that indictment. In support of this sentence, the Crown and defence cite *R. v. Emery*, 2019 BCSC 1789. In that case, Justice Ker imposed a 36-month sentence for an offender operating both as a direct-dealer and as a mid-level dealer to other dealers of fentanyl, who also had a lengthier record who had taken no meaningful steps towards rehabilitation. It is suggested a lesser sentence than 36 months is appropriate for Mr. Gallant. I agree.
- [49] Given the general agreement around the 2021 Indictment, the focus of the submissions before me, and these reasons, are on the 2020 Indictment for the possession of fentanyl and carfentanil for the purposes of trafficking.
- [50] The Crown relies on several cases, with the following cases relied upon to support a four-year sentence on the 2020 Indictment:
- a) *Gill*, in which the majority of the Court of Appeal reduced a five-year sentence to a four-year sentence for a youthful first-time offender who trafficked in fentanyl and carfentanil and who had a profit motive, but who plead guilty and had strong rehabilitative prospects. The Crown argues that Mr. Gallant has more aggravating factors but also some additional mitigating factors, making the appropriate sentence comparable. The defence argues that *Gill* is a more aggravated case because Mr. *Gill* also trafficked to dealers, not at the street level.
 - b) *R. v. Davies*, 2019 BCCA 359, in which the Court of Appeal upheld a sentence of 32 months for trafficking in fentanyl, directing a mid-level dial-a-dope operation. The amounts of drugs seized in that case were 30 grams of cocaine and 9.53 grams of fentanyl, which is less fentanyl than Mr. Gallant was found in possession of, but at a comparable scale of operation. In mitigation, Mr. *Davies* was young and plead guilty. He no longer associated with his negative peers, had a stable and pro-social family life, had performed valuable community service, and had expressed genuine remorse, while remaining clean and sober. But for these mitigating factors, the trial judge would have imposed 36 months.
 - c) *Mann*, in which the Court of Appeal upheld a five-year sentence for one of the accused who was dealing in carfentanil in addition to fentanyl at the street level, including cutting, processing and packaging it. This case establishes the very serious harms and moral blameworthiness of carfentanil even above trafficking in fentanyl. The Crown concedes that there were also significant additional aggravating factors contributing to that five-year sentence, including firearms present and much higher concentrations of carfentanil. The defence says that it was also aggravating that the offenders were motivated by profit and arrogant about it.

- d) R. v. Byrne, 2020 BCSC 811, in which this Court imposed a four-year sentence in a case that the Crown says has many similarities to that of Mr. Gallant's 2020 Indictment, including that:
 - i. Similar amounts of drugs were involved, including fentanyl and carfentanil (as well as heroin), and similar processing and distribution paraphernalia were seized;
 - ii. Justice Thomson found Mr. Byrne was close to, but not at, the mid-level of the trafficking operation;
 - iii. Mr. Byrne was a similar age to Mr. Gallant, with a lack of support at home and early addictions arising from medical treatment with opioids, and was supporting a heavy addiction;
 - iv. Mr. Byrne was working towards rehabilitation and had had four months of addiction treatment; and
 - v. Mr. Byrne plead guilty plea after an adverse voir dire ruling.

The Crown argues that this case is the most consistent with Mr. Gallant's and relies on Thomson J.'s suggestion at para. 23 that "the appropriate range of sentence in the case at bar is four to five years." The Crown also concedes that there were aggravating factors in that case not present here, including Mr. Byrne's possession of brass knuckles and more extensive criminal record. To this, the defence would add that Mr. Byrne had no psychological assessment and there was little discussion of his rehabilitate prospects.

[51] In addition, the defence urges me to consider the following cases:

- a) Emery, discussed above.
- b) R. v. Butler, 2021 BCSC 1016, in which Justice Baird imposed a three-year sentence for trafficking in very significant amounts of methamphetamine, fentanyl, cocaine and ketamine at a wholesale level to other distributors with amounts and values well above Mr. Gallant's operation. Firearms and cutting agents were also seized, and the Court found that Mr. Butler was engaged in a profit-oriented operation, alive to the danger and deaths his product was causing. Mitigating factors were found to be Mr. Butler's youth, lack of criminal record, and sincere remorse. Justice Baird reviewed Emery and suggested that, absent exceptional circumstances, a dealer of fentanyl at this level should expect a three to six-year sentence, and that a four year sentence would ordinarily be appropriate in this case but for three years of community oversight while on bail.
- c) R. v. Campbell, 2021 BCSC 853, wherein Justice Ker reviewed much of the jurisprudence on sentencing for possession for the purposes of trafficking involving fentanyl and carfentanil. In that case, Mr. Campbell entered a guilty plea on the date set for trial. He was found to be supplying both dealers and street-level clients. Over 625 grams of fentanyl were seized, together with over 800 grams of cocaine, and almost 400 grams of methamphetamine. The value of the fentanyl alone was opined to be close to \$100,000, with the other drugs and cash found totalling to a similar amount. This was a "mid-level" operation considerably more serious and blameworthy than that of Mr. Gallant. Mitigating factors included Mr.

Campbell's youth, that he had been clean for nine months, and his positive bail performance. Gladue factors were also significant in that case, resulting in a sentence of two years for each count, to be served concurrently, and three years probation for a total of five years including probation.

- d) *R. v. Smith*, 2023 BCSC 2326 (unreported), in which Justice Baker sentenced an Indigenous offender engaged in street level trafficking with quantifies of substances and values higher than those in the 2020 Indictment of Mr. Gallant. Similar drug paraphernalia, such as scales and other drugs were seized, including fentanyl, but no carfentanil. Mr. Smith also entered a guilty plea after the search warrant was upheld on voir dire. Mr. Smith was also an addict, and while not yet sober, was reducing his daily consumption. He had a dated but related record that was found not material. The Court imposed a sentence of two years less a day, together with a three-year term of probation, to be served in the community, or a total five year sentence non-custodial sentence.
- e) The defence also relies on the case of *R. v. Saker*, 2022 BCPC 322, to argue that a conditional sentence order ("CSO") may also be available in carfentanil case.

[52] Sentencing is, of course, an individualized process focused on the particular circumstances of the offender and the offences in each case. Analogous cases assist the court in promoting parity, but I must still consider the Supreme Court of Canada's caution in *Parranto* that ranges are tools and not straightjackets, and parity serves proportionality, not the other way around: paras. 37-38. As stated by the Court therein at para. 12, "[t]he question is always whether the sentence reflects the gravity of the offence, the offender's degree of responsibility and the unique circumstances of each case".

[53] With the above in mind, the Court of Appeal has provided some guidance to trial courts with respect to a generally applicable range of sentence for fentanyl trafficking offences, starting at 18 months: *Smith BCCA* at paras. 45, 48; *Mann* at paras. 86-87. Furthermore, in *Mann* at para. 81, the Court of Appeal indicates that trafficking in carfentanil, whether knowingly or not, is a "more serious offence" for which a more significant sentence is appropriate. As noted above, a five-year sentence was upheld in relation to the carfentanil charge, whereas a four-year concurrent sentence was imposed in relation to the fentanyl related charge in that case.

[54] I do not take this to mean that a sentence for possession for the purposes of trafficking in carfentanil must exceed the upper range discussed in *Smith BCCA*. Indeed, as established in *Saker*, a properly crafted CSO may be appropriate in some cases.

[55] Nevertheless, in my view, the moral blameworthiness of the Mr. Gallant's dealing in carfentanil in 2020 requires a higher sentencing range than his dealing in fentanyl in 2021, even though that offence was an earlier one.

- [56] Having reviewed the above cases, I consider the cases of Gill, Byrne, and Butler to be most helpful. I do not find the cases with significant Gladue factors to be particularly helpful in my sentencing of Mr. Gallant. I also consider that the inclusion of carfentanil in the fentanyl in Mr. Gallant's case alters the circumstances and increases the seriousness of the offence, making cases where there is no carfentanil present of less assistance, with the exception of Butler because the other aggravating factors in that case are so significant.
- [57] I consider that the four-year sentences in Gill and Byrne, and the presumptive four-year sentence in Butler (before a reduction for Mr. Butler's strict bail conditions), are a useful benchmark for a sentence that reflects the important principles of denunciation and deterrence in cases involving trafficking in fentanyl and carfentanil and where there is also a guilty plea, remorse, and some prospect of rehabilitation.
- [58] I find that the Crown's sentencing submission of four years is an appropriate starting place to consider the gravity and moral blameworthiness of Mr. Gallant's dealing in fentanyl mixed with carfentanil, including the cutting and processing elements and the larger quantities of drugs putting the circumstances of this offence at the more serious end of street-level operations that have been established to the requisite standard.
- [59] I have found that the aggravating factors in this case include that Mr. Gallant was involved in the cutting and processing of these controlled substances, and that while Mr. Gallant was selling at the street level (as opposed to selling to dealers), his activities involved over 20 grams of fentanyl, most of which was mixed with carfentanil, and almost \$5,000 in cash. However, I found that Mr. Gallant was not selling directly to dealers, and I find that this is an important limitation in the weight of these aggravating factors, which places Mr. Gallant's moral blameworthiness below that of Mr. Gill, Byrne or Butler.
- [60] I also find that Mr. Gallant's circumstances engage significant mitigating circumstances that make a four-year sentence on this Count disproportionate to his moral blameworthiness, including in relation to the restrictions on his freedoms that he has already experienced in pre-trial house arrest.
- [61] I turn then to the mitigating circumstances in this case.
- [62] First, I find that Mr. Gallant has indicated, through his letter to the Court, a sincere remorse for the harms caused by his actions, most particularly to his family and children. Although he has not expressed a full understanding of the community harms of his actions, I find that his remorse is real, and his commitment to remain drug-free and be a support for his children is earnest.
- [63] That remorse is also evidenced by his guilty plea. Though not at the earliest opportunity, I am of the view that he made this plea not because he believed himself out of other legal options, which he was not, but because he believed doing so was an important step in taking responsibility for his actions.

- [64] I also believe Mr. Gallant that he has been sober and in remission from his addictions for over a year with the support of his family (and perhaps out of a need to avoid the dangerous people who harmed him, as well). This is an impressive accomplishment for someone with such a lifelong history of substance addiction and trauma.
- [65] It is of some concern that Mr. Gallant has not committed to some counselling services offered. While Mr. Gallant may believe that he can remain clean without that assistance and that being in some programs with persons still using drugs or trying to use drugs is not helpful to him, the evidence of the reports before me, as well as his family supports, indicates that Mr. Gallant is still at a significant risk of addiction recidivism in high-stress situations if he is unable to address his underlying traumas and anxiety.
- [66] Nevertheless, I find that even with limited resources, he has accomplished a great deal towards his rehabilitation and turning his life around.
- [67] His family support, particularly from his mother and sisters, is significant to his ongoing prospects of continuing his path to rehabilitation and avoiding the addictions that I find were a significant cause of his criminal behaviour. This is also mitigating.
- [68] In addition, Mr. Gallant served 19 months of pre-trial house arrest, which is more restrictive than just obeying a curfew, and which has also served a number of the purposes of a custodial sentence, including specific deterrence (which has been entirely successful), rehabilitation, as well as a punitive restriction on his freedoms.
- [69] While house arrest is not considered pre-sentence custody and is not credited under the Code towards sentence, and certainly not at a higher rate, house arrest may nevertheless be a mitigating factor in imposing sentence: see *R. v. Tse*, 2010 BCSC 1273 at paras. 14-22; *R. v. Harrower*, 2021 BCSC 1796 at paras. 63-71.
- [70] In terms of how this mitigating factor might affect the overall sentence, Justice Davies in *Tse* explained as follows, quoting the words of Justice Groberman in *R. v. Nghiem*, 2009 BCCA 170:
- [19] Justice Groberman then went on to say at paras. 15 and 16 in *Nghiem*:
- [15] In *R. v. Cuthbert*, 2007 BCCA 585, this Court considered the approach that should be taken to time that an accused spends on strict bail conditions prior to sentencing. It found that a flexible approach should be adopted, with time on bail conditions considered as a mitigating factor in sentencing.
- [16] In my view, time spent under strict bail conditions is not to be considered by way of application of some mathematical formula to reduce the length of sentence. Instead, a court should concern itself with the degree to which objectives of sentencing may have already been accomplished through the imposition of strict bail conditions. While such conditions are not intended to be penal, they can nonetheless incidentally serve to further the goals of rehabilitation, deterrence and denunciation.

- [20] I am satisfied that when read in conjunction with Cuthbert, the Court of Appeal's conclusion in Nghiem that "time spent on bail is not to be considered by application of some mathematical formula to reduce the length of sentence" does not preclude the granting of some credit for time spent on bail in determining the remainder of an otherwise appropriate sentence that must be served after granting such credit.
- [71] In Butler at para. 56, Baird J. reduced what would have been a four-year sentence to three years on the basis of sincere remorse and three years of bail and curfew terms, something I consider much less restrictive than the house arrest Mr. Gallant has observed for more than a year and half.
- [72] In my view, Mr. Gallant's house arrest term has indeed served many of the important objectives of sentencing applicable to his situation. He served those in relation to the 2020 Indictment, and I find it is that sentence that is appropriately reduced accordingly.
- [73] Taking this time into account, as well as considering the role that trauma and addiction has played in Mr. Gallant's criminal activity, his minor and dated record, his very significant strides towards rehabilitation over the past two years, and his sincere remorse, I find that a 30-month sentence is appropriate for Count 1 of the 2021 Indictment.

TOTALITY

- [74] The sentences for the 2020 Indictment and 2021 Indictment will run consecutively, arising as they do from entirely distinct events a year apart. This is not contested.
- [75] That would lead to a total 60-month sentence for these two indictments. I consider that some further reduction is appropriate under the totality principle pursuant to s. 718.2(c) to ensure the aggregate or cumulative sentence rendered does not exceed the offender's overall culpability: *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 at para. 42, 1996 CanLII 230; see also *R. v. Radjenovic*, 2013 BCCA 522, leave to appeal to SCC ref'd 35789 (June 5, 2014).
- [76] Pursuant to this principle, I would reduce the 60-month sentence by six months, and I would deduct that time from the sentence on the 2021 Indictment. This results in a total sentence, before pre-sentence custody, of 54 months, or four-and-a-half years.
- [77] In addition, I find that Mr. Gallant is entitled to one-month pre-sentence credit on the 2020 Indictment for his 20 days of pre-trial custody in July 2021: see *R. v. Summers*, 2014 SCC 26.

SENTENCE

- [78] Mr. Gallant, would you stand, please.
- [79] Mr. Gallant, I sentence you to the following custodial terms:
- a) 30 months on Count 1 of the 2020 Indictment #87685-2, less one month credit for pre-sentence custody, for a total of 29 months; and

- b) 24 months on Count 1, and 18 months on Count 2 of the 2021 Indictment #89295-2, to be served concurrently with each other.
- c) The sentence on the 2021 Indictment #89295-2 is to be served consecutively after the sentence on the 2020 Indictment #87685-2, for a total sentence of 53 months.

[80] I also make the following ancillary orders:

[81] I am required to impose an order that prohibits you from having possession of any weapons or ammunition for life. That order is made under s. 109(3) of the Code.

[82] With respect to a DNA sample, this is a secondary designated offence and, pursuant to s. 487.051(3) of the Code, making such an order is discretionary.

[83] In *R. v. Awasis*, 2009 BCCA 134, the Court of Appeal set out the principles to be considered in the exercise of this discretion. The purposes of taking a DNA sample are multifaceted, and an offender post-conviction has a lesser expectation of privacy: paras. 40-43, 52. In view of the circumstances of this case, including the seriousness of the offences, the extremely dangerous nature of the drugs involved, and Mr. Gallant's lack of opposition to the order, I conclude that it is appropriate to order the provision of a DNA sample. You will submit to the taking of these samples.

[84] I am waiving the victim fine surcharge in this case. Given Mr. Gallant's financial circumstances and required incarceration, I find that it would be an undue hardship to him to impose this fine.

[85] I believe I have already made the forfeiture orders sought by the Crown and consented to by the defence at the sentencing hearing.

[86] Thank you, counsel, for your thoughtful and helpful submissions. Mr. Gallant, I wish you the best in these circumstances.

"Marzari J."

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