

CANADA / JUDGMENT

R. v. Gowlett

2023 BCSC 1842

COURT

Supreme Court of British Columbia

DECIDED

29 September 2023

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2023 BCSC 1842 R. v. Gowlett

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Gowlett,

2023 BCSC 1842

Date: 20230929

Docket: 177342-2

Registry: Victoria

Rex

v.

Kenneth Gowlett and Deborah McMillan

Before: The Honourable Mr. Justice Saunders

Oral Reasons for Sentence

(re: Kenneth Gowlett)

Counsel for the Crown:

T.J. Corsi

Counsel for the Defence:

N. Brooks

Place and Date of Hearing:

Victoria, B.C.

September 7, 2023

Place and Date of Judgment:

Victoria, B.C.

September 29, 2023

- [1] THE COURT: Kenneth Gowlett, who is now 62 years of age, is before me for sentencing. He was initially charged with five counts of possession of narcotics for the purposes of trafficking under the Controlled Drugs and Substances Act. Following a voir dire regarding an ITO, heard before Mr. Justice Macintosh in January of this year, the defence acknowledged the sufficiency of the evidence and invited the court to convict Mr. Gowlett on Counts 1 and 2. Findings of guilt on those counts, possession for the purpose of trafficking of, respectively, cocaine and fentanyl were entered on January 12, 2023.
- [2] Justice Macintosh has since retired from the Court, and on June 6, 2023, I was appointed by Associate Chief Justice Holmes in accordance with s. 669.2 of the Criminal Code to conduct the sentencing.
- [3] I heard submissions on September 7, 2023.
- [4] The Crown seeks a custodial sentence of four years. The defence submits that the objectives of sentencing can be appropriately addressed through a conditional sentence of two years less a day, which would allow for the additional imposition of three years of probation, amounting to, effectively, five years for Mr. Gowlett to be subject to supervision and for his recovery to be monitored. Alternatively, the defence submits that the four-year period of incarceration sought by the Crown is too high on the authorities, and suggests a range of 24 to 36 months.
- [5] Mr. Gowlett addressed the court briefly following counsel's submissions, sincerely apologizing and expressing deep regret for the poor decisions that have led to him being here.
- [6] The circumstances, briefly, are that in July 2019 Mr. Gowlett's activities had become known to the Victoria Police through a confidential informant. The police made observations of his activities, leading to execution of a search warrant. Mr. Gowlett was found to be in possession of \$53,000 in cash and a significant quantity of drugs, 292 grams of cocaine, 133 grams of fentanyl, 85 grams of a heroin/fentanyl mixture, 10 grams of heroin, 75 tablets of morphine, as well as paraphernalia consistent with drug trafficking.
- [7] Sentencing is a highly individualized process. It is a fundamental principle that a sentence be proportionate to the gravity of the offence and degree of responsibility of the offender. Sentences must recognize relevant aggravating and mitigating factors and be consistent with our legal system's treatment of similar offenders sentenced for similar offences in similar circumstances. They must also reflect the exercise of restraint. The Criminal Code provides

that the fundamental purpose of sentencing is to contribute to respect of the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that meet one or more of several stated objectives. These objectives include the denunciation of unlawful conduct, the specific deterrence of the offender, and the general deterrence of other persons from committing offences, the separation of offenders from society where necessary, the rehabilitation of offenders, the making of reparations to the victim and to society, and the promotion of a sense of responsibility and acknowledgement of the harm done to victims and to the community.

- [8] Mr. Gowlett, unfortunately like so many others who come before our courts, became involved in drug trafficking through his own drug abuse, which in turn had been brought about from his use of prescription medication. He had a serious construction accident in or around 2006 which aggravated a serious injury he had sustained as a teenager. Prior to that construction accident, he had had some modest involvement with the criminal justice system, two convictions for impaired driving, three convictions for theft under \$5,000, and other convictions for assault, uttering threats and breach. The 2006 injury seems from his record to have been a turning point. He was prescribed oxycontin, struggled with withdrawal, and then succumbed to addiction, first buying pills on the street and then using heroin. In July 2008, he was convicted of possession for the purpose of trafficking and production of a controlled substance and received a conditional sentence of 12 months. In April 2013, he pleaded guilty to three counts of possession for the purpose of trafficking and was given a conditional sentence of 15 months.
- [9] I am told, and I accept, that Mr. Gowlett was at that time able to turn his life around with the support of his family. However, in July 2019 he again had to have surgery at the site of his original injury. He was not prescribed opiates, but his previous experience with narcotics led him back to the streets to obtain pain relief. Heroin now is more difficult to find, it has largely been transplanted by fentanyl, and Mr. Gowlett was actively using fentanyl at the time of the subject offences.
- [10] Mr. Gowlett has not used opiates since his arrest.
- [11] A history of addiction and a user's participation in drug trafficking to support their habit can be treated in sentencing as reasons for finding reduced moral responsibility or culpability that go to mitigation. By way of other mitigating factors in this case, the defence tenders letters of support from Mr. Gowlett's co-accused, from a friend, and from an employer attesting to his good character, his caring nature and his loyalty to his friends. The defence submits that this evidence presents a compelling picture of someone who with his struggle with addiction now again under control can be a contributing member to society and whose rehabilitation should be encouraged and facilitated.

- [12] The offences for which Mr. Gowlett has been found guilty and for which I am sentencing him are, as I have said, possession for the purpose of trafficking of cocaine and fentanyl. The weight of those drugs and their inherently dangerous nature are aggravating factors in sentencing. Even though Mr. Gowlett has not been convicted on the counts related to the other drugs, the heroin and morphine and heroin/fentanyl mixture, his possession of those drugs is also an aggravating factor.
- [13] The quantity and variety of these drugs and the amount of cash found in Mr. Gowlett's possession support his activity being characterized as mid-level trafficking. This is not a case of street level trafficking by a marginalized individual. This was evidently an operation of some sophistication and some considerable level of profitability. Mr. Gowlett was trafficking for profit in highly addictive, highly dangerous substances. He was profiting off the misery of others less fortunate than himself. This is by its very nature a predatory activity. The level of moral culpability is high.
- [14] I take judicial notice that for the month of August 2023 alone, the B.C. Coroners Service has reported that there were 174 deaths due to the illicit, unregulated drug supply in our communities. The death toll for the first eight months of this year stood at more than 1,600 persons. Our society has an interest in trafficking in these dangerous substances being denounced through the imposition of just and proportionate but significant sentences of incarceration. That sentencing objective of denunciation and the objectives of deterrence of Mr. Gowlett and others have greater weight than the object of rehabilitation.
- [15] Mr. Gowlett, as I have described, as two prior convictions for possession for the purpose of trafficking. Those offences are dated. Nevertheless it appears that the conditional sentences he served for those offences were not sufficient to deter him from taking up this activity again. His record is an aggravating factor. These aggravating factors, Mr. Gowlett's moral culpability and the need to reflect the sentencing objectives I have identified, outweigh the mitigating factors of his personal circumstances and his remorse.
- [16] I turn to consider cases of similar offences.
- [17] *R. v. Shah*, 2018 BCSC 2238, dealt with a significant quantity of drugs, 762 fentanyl pills, more than 500 grams of cocaine, more than 250 grams of methamphetamine, and more than 40 grams of heroin found in a safe in the offender's home. He was a first-time offender. The trial judge, Justice Warren, in sentencing Mr. Shah surveyed a number of authorities from B.C. and other provinces. Justice Warren made particular reference to *R. v. Toth*, 2017 BCSC 501, in which Justice Ker found that the sentencing range for a serious sustained and relatively sophisticated mid-level trafficking operation involving fentanyl was between 28 months and seven years. Recognizing the seriousness of Mr. Shah's conduct but also, at para. 77, "the absence of any prior record and a long history of law-abiding adult life where he appears to have been a productive member of society," Justice Warren sentenced him to three years.

- [18] R. v. D'Allesandro, 2019 BCSC 1810, concerned an offender in possession of heroin and fentanyl, cocaine and methamphetamine, in amounts more modest than involved in the case of Mr. Gowlett. The offender had a lengthy criminal record including three previous but dated convictions for possession for the purpose of trafficking. The court described the mitigating factors as including entrenched drug addiction, poverty and homelessness. He was sentenced to four years.
- [19] R. v. Harper, 2021 BCSC 1515, involved a 35-year-old offender with a long history of drug addiction, though not addiction to fentanyl, convicted of possession for the purpose of trafficking of over an ounce of fentanyl and approximately eight grams of methamphetamine. He had previously been convicted twice for possession of controlled substances since 2017, and earlier in 2021 had been convicted of three counts of possession for the purpose of trafficking of methamphetamine, fentanyl and GHB, and had been sentenced. He had been on bail on those possession for the purpose of trafficking charges at the time the index offences were committed. Justice Baird, sentencing the offender to 42 months, stated that he was taking into consideration the fact that any remission of sentence the offender may have been benefitted from had been negated by the prison term he was currently serving.
- [20] Finally, in R. v. Davies, 2019 BCPC 107, affirmed 2019 BCCA 359, the offender pleaded guilty to two counts of possession for the purpose of trafficking. He had been found in possession of more than 30 grams of cocaine, 9.5 grams of fentanyl, and just under \$2,800 in cash. The offender was 23 years old at the time of the offence. He had a positive presentence report. He had some history of drug and alcohol abuse but it was not debilitating and the court found he had been able to work and pursue his education while actively participating in what was described as a mid-level dial-a-dope scheme. He had no criminal record. The sentencing judge reviewed the cases and found they supported a range of sentencing for a first-time offender engaged in mid-level trafficking of fentanyl at 30 to 48 months. She pronounced a sentence of 32 months. While declining to specify a range for mid-level trafficking in fentanyl, the Court of Appeal upheld that sentence.
- [21] I find that treatment by our courts of offenders similarly situated to Mr. Gowlett amply supports the Crown's position in this case.
- [22] Mr. Gowlett, sir, would you please stand.
- [23] Kenneth Gowlett, on each of Counts 1 and 2 on the indictment I sentence you to a term of imprisonment of four years, to be served concurrently.
- [24] You are also under s. 109 of the Criminal Code prohibited from possessing any firearm, crossbow, restricted weapon, ammunition and explosive for life, and you are prohibited from possessing any other prohibited weapon or prohibited device for a period of 10 years.
- [25] You may be seated, sir.

- [26] Counsel, are there any other matters? Mr. Corsi, I think Crown had indicated that the \$53,000 cash had already been subject to a civil forfeiture order, or is there an order to be --
- [27] CNSL T. CORSI: That cash --
- [28] THE COURT: -- made in this case?
- [29] CNSL T. CORSI: Yes, thank you, Justice. I believe that cash has already been subject of a civil forfeiture order.
- [30] THE COURT: Okay.
- [31] CNSL T. CORSI: I did file a draft forfeiture order in relation to some other more minor things, two cellphones, a scale and a stun gun.
- [32] THE COURT: Yes, the other -- the other paraphernalia, they will be subject to a forfeiture order, as well, then. Mr. Brooks?
- [33] CNSL N. BROOKS: Justice, he is going to be busy for the next little bit. I will ask that you find that the victim surcharge be undue hardship in these circumstances.
- [34] THE COURT: Very good. Any position on that, Mr. Corsi?
- [35] CNSL T. CORSI: No, thank you.
- [36] THE COURT: Good, thank you. The victim surcharge is waived then. And, yes, as I said, do you have a form of order for the other paraphernalia, Mr. Corsi, or...?
- [37] CNSL T. CORSI: I do here, yes.
- [38] THE COURT: Thank you. Good thank you.
- [39] All right, that concludes matters. Mr. Gowlett, thank you for your expression of remorse, which I have recognized, and thank you, too, for the responsible fashion in which you dealt with this matter through not contesting matters beyond the voir dire stage, and I wish you luck, sir, as you proceed.

"A. Saunders J."

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