
CANADA / JUDGMENT

R. v. Kazakoff

2022 BCSC 2151

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 2151 R. v. Kazakoff

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Kazakoff,

2022 BCSC 2151

Date: 20221107

Docket: 22878

Registry: Rossland

Rex

v.

Peter Paul Kazakoff

Before: The Honourable Justice Kirchner

Oral Reasons for Sentence

Counsel for the Crown:

I. Ferbey

Counsel for the Accused:

B.F. Suffredine, K.C.

Place and Dates of Hearing:

Rossland, B.C.

September 23, 2022 and

November 7, 2022

Place and Date of Judgment:

Rossland, B.C.

November 7, 2022

- [1] THE COURT: On June 24, 2022, I found the accused, Peter Paul Kazakoff, guilty on three counts of possession for the purpose of trafficking of controlled substances contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19. The offences took place on March 13, 2021. Count 1 relates to fentanyl, Count 2 relates to fentanyl and carfentanil, and Count 3 relates to methamphetamine.
- [2] I also convicted Mr. Kazakoff on a second indictment with a sole count of possessing ammunition while prohibited from doing so contrary to s. 117.01(1) of the Criminal Code.
- [3] These are my reasons for sentencing. I expect that when a transcript is ordered, I will make some minor corrections and changes to grammar and syntax and add some headings, but the substance and conclusion and analysis will not change in the written form.

Facts for the Purpose of Sentencing

Circumstance of the Offence

- [4] On March 13, 2021 the RCMP in Grand Forks executed a search warrant authorizing it to search two units - Units 113 and 118 - at the Hotel 99 in Grand Forks, B.C., where Mr. Kazakoff was then working and living. Specifically, Mr. Kazakoff was living in Unit 118 at the time.
- [5] The search of Unit 118 yielded substances containing: fentanyl, totalling 111.76 grams; fentanyl and carfentanil totalling 21.22 grams; and methamphetamine totalling 111.04 grams. These were found in varying amounts in various containers and locations throughout the unit. Much of it had been weighed and packaged into one-quarter or one-half-ounce dime bags and labelled as such. The drugs containing fentanyl and/or carfentanil were dyed with various shades of blue, purple, and pink. The value of the substances containing fentanyl and carfentanil was estimated to be \$26,596 if sold at the street level and between \$13,123 and \$16,884 if sold at wholesale. The value of the methamphetamine was estimated to be between \$3,331 to \$5,550 if sold at street level and \$1,560 to \$2,340 if sold at wholesale.
- [6] At trial, Mr. Kazakoff admitted to being in possession of the seized drugs, but maintained they were for his personal use. He said they were, in fact, a relatively small amount of actual narcotics which he had heavily diluted with adulterants such as caffeine to suit how he manages his own drug addiction. I did not believe that evidence at trial and I found that the quantity of substances containing fentanyl, carfentanil, and methamphetamine were so substantial that it was inconsistent with possession for purposes of personal consumption.

- [7] The RCMP also seized \$5,000 in Canadian cash in five rolls of \$1,000 bills each found in a black jacket that belonged to Mr. Kazakoff. They also seized drug trafficking paraphernalia, including 35.7 grams of a purple powder containing caffeine often used as an adulterant for cutting fentanyl or carfentanil, several dozen Ziploc baggies, two digital scales with a powdery residue on them, a drug-mixing kit containing vials of dye and a spoon with residue, and needles both used and unused.
- [8] I accepted the evidence of Constable Bonner-Corriveau that fentanyl is readily available, including in Grand Forks, such that it would be unnecessary for a user to stock up on the large quantity of fentanyl or methamphetamine for personal use. Given the volume of substances seized, being just under 133 grams of substances containing fentanyl or carfentanil and 111 grams of methamphetamine, Mr. Kazakoff's admission that these substances were his, and Constable Bonner-Corriveau's evidence, I was satisfied beyond a reasonable doubt that Mr. Kazakoff was in possession of these narcotics for the purposes of trafficking. I found this conclusion was further supported by the drug paraphernalia seized from the unit, including the electronic scales, the Ziploc baggies, and the drug-mixing kit, and that the packaging of these substances into one-quarter and one-ounce marked dime bags all supported my conclusion, and persuaded me beyond a reasonable doubt that Mr. Kazakoff was in possession of these narcotics for the purposes of trafficking.
- [9] Also seized from Unit 118 were certain weapons, namely, a homemade spear, two swords, a knife, and a can of bear spray. A shovel was also seized and, while I accept this item could be used as a weapon, I am not persuaded Mr. Kazakoff possessed it as such.
- [10] Finally, a box of 48 live rounds of .22 calibre ammunition was found and seized. On the date the warrant was executed, Mr. Kazakoff was subject to a "Discretionary Prohibition Order - Firearms and Weapons" issued by Judge Brooks of the Provincial Court, pursuant to s. 110(1) of the Criminal Code, prohibiting Mr. Kazakoff from possessing, among other things, ammunition.
- [11] Mr. Kazakoff testified that the ammunition was old and belonged to his dad. He said he did not initially know he was prohibited from possessing ammunition, but learned of that existing prohibition from an incident in 2020 when he was charged with unlawfully possessing ammunition. He said that, when he realized he was under a prohibition, he put the ammunition in a safe. Despite the fact that he was in possession of and controlled access to the safe, he said he believed putting it away in this manner would be acceptable. Notably, the RCMP did not locate any firearm in Unit 118 or in any other location in the motel it searched, let alone a firearm that would be capable of firing this ammunition. Given the age of the box and the lack of a firearm, I accept Mr. Kazakoff's evidence that he possessed this ammunition as a collector's item for some sentimental value and, while that does not relieve him of the conviction for unlawful possession, it is a factor that I will consider in sentencing for this offence.

Circumstance of the Offender

- [12] Mr. Kazakoff is 48 years old. He was born in Salmo, B.C., and has lived in Grand Forks for about 30 years. He has been a drug addict, addicted in particular to opiates, for some 27 years.
- [13] Much of the following is taken from the Pre-Sentence Report. The Crown did not take issue with the Court relying on these facts.
- [14] Mr. Kazakoff grew up with his mother and stepfather, as well as six or seven siblings. The household was a difficult one. His mother smoked and drank often. He says his stepfather was an alcoholic and violent when he was intoxicated, which was frequent. Mr. Kazakoff witnessed verbal and physical abuse and violence by his stepfather against his mother and sexual assaults against his siblings. He says these circumstances prevented him from having friends over to his house as a child.
- [15] Until he was about 13, Mr. Kazakoff was led to believe his stepfather was his biological father. Shortly after learning of his true biological father, Mr. Kazakoff had a physical altercation with the stepfather and moved in with his biological father in Grand Forks. However, Mr. Kazakoff's biological father tragically died when Mr. Kazakoff was in his mid-teens and, as a result, Mr. Kazakoff spent much of his teens with no fixed address living in homeless shelters and group homes.
- [16] Mr. Kazakoff reports that he struggled with school and he attributes this to his unstable life growing up. He states he has been assessed as reading at a grade six level and has poor writing and spelling skills.
- [17] Mr. Kazakoff's mother died around 10 years ago. He was close to her and visited her often before she died.
- [18] Mr. Kazakoff says that he has Indigenous ancestry on his father's side and his grandmother experienced the well-known horrors of residential school. He was not directly exposed to these impacts, but argues the intergenerational traumatic effects of residential school help explain the difficult youth he had. According to the Pre-Sentence report, Mr. Kazakoff states that he is Métis, although he has provided few details of this and there is no evidence he has been accepted as a member of a Métis organization. I am not persuaded that Mr. Kazakoff can be fairly characterized as an Indigenous person that would attract the full application of Gladue, but I accept his grandmother's experiences and the effects of intergenerational trauma could contribute to understanding his experience as a youth and as a teenager. That said, the circumstances described in the Pre-Sentence report and that I have just articulated about Mr. Kazakoff's youth and teenage years are certainly themselves trauma-inducing, quite apart from any Gladue principles or Indigenous heritage.

- [19] At the time of the offence and until recently, Mr. Kazakoff worked as a maintenance worker at the Motel 99 where he was living, paying \$900 per month in rent. He has also worked there for the last seven years, with the exception of a break about three years ago when he went to a rehabilitation facility in Abbotsford.
- [20] Mr. Kazakoff has a number of prior convictions, including a 2010 conviction for possession for the purposes of trafficking, for which he received a suspended sentence and 12 months' probation.

Impact on the Offences Community

- [21] It is widely known and accepted by the courts and the community that fentanyl and especially carfentanil, is extremely dangerous and is killing literally thousands of British Columbians every year. This has been documented in many government reports that have been accepted as evidence in sentencing hearings by this court and the Provincial Court for persons convicted of trafficking fentanyl and/or carfentanil or for possession for the purposes of trafficking. In *R. v. Smith*, 2017 BCCA 112 [Smith], Justice Newbury in dissent, although not on this point, states at para. 44:
- [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.
- [22] In *R. v. Parranto*, 2021 SCC 46 [Parranto], Justice Moldaver of the Supreme Court of Canada said at para. 93 that trafficking in fentanyl and its analogues has "altered the landscape of the substance abuse crisis in Canada, revealing itself as public enemy number one." He said this threat pales in comparison to even serious drugs such as heroin and cocaine.
- [23] The threat posed by carfentanil is even more serious. While fentanyl is estimated to be 80 to 100 times more potent than morphine and 25 to 50 times more potent than pharmaceutical-grade heroin, carfentanil is estimated to be 100 times more potent than fentanyl: Parranto, paras. 94 to 95. It is so toxic that it "has no safe or beneficial human use, even within the medical community in highly controlled environments": Parranto, para. 95 quoting from A. Savvadini and A. Boni, *Sentencing Drug Offenders* (loose-leaf), at s. 2:1600.10.
- [24] In *R. v. Gill*, 2022 BCCA 127, Justice Fisher of the Court of Appeal writing for the majority added at para. 23:
- [23] 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

- [25] Fentanyl is cut with cheap or innocuous substances like caffeine for street-level distribution. In *R. v. Mann*, 2018 BCCA 265, at para. 21 [Mann], the Court of Appeal noted that the risk of overdose death is heightened with fentanyl because of its potency and because traffickers typically use imprecise methods that can result in uneven distribution of the drug in a mix. This can leave concentrations of fentanyl or so-called "hot spots" which increase the risk of overdose: *Mann*, para. 22. That risk is much more serious when dealing with carfentanil given its extreme potency. In this case, Mr. Kazakoff was doing his own mixing. There is no evidence he was using a mortar and pestle which was noted in *Mann* to be particularly dangerous in that it is highly unreliable in creating a consistent mix. But nor is there evidence in this case of Mr. Kazakoff having a method or an approach to mix fentanyl or, worse, carfentanil, with diluents with any precision.
- [26] In *Mann*, the Court of Appeal noted that there is no way to effectively and safely mix carfentanil for any sort of street-level distribution.
- [27] Since April 2016, British Columbia has been in a state of public health emergency declared by the Province's Chief Medical Health Officer because of the opioid pandemic and the surge in overdose-related deaths due, in particular, to fentanyl: *R. v. Niederhumer*, 2022 BCCA 88 also *R. v. Kim*, 2022 BCSC 518 at para. 29 [Kim].
- [28] The offences in this case took place in March 2021. There is no question about the notoriety of the dangers of fentanyl at that time or the disturbingly high death rates of persons who have overdosed on fentanyl.
- [29] The Crown has tendered as evidence in this hearing a September 15, 2022, report of the B.C. Coroners Service on Illicit Drug Toxicity Deaths in B.C. between January 1, 2012, and July 31, 2022. Earlier versions of this report have been widely accepted and relied on by the courts in sentencing for trafficking offences relating to fentanyl.
- [30] The report shows that:
- In 2021, 2,268 persons died in British Columbia as a result of illicit drug toxicity (p. 4).
 - 376 of these deaths occurred in the Interior Health Region (p. 12) including 29 deaths in the Kootenay Boundary health services delivery area (which includes Grand Forks) in 2021 which is the year of the offences in this case (p. 15),
 - Between 2019 and 2022, illicit fentanyl and its analogues accounted for 85.6% of illicit drug toxicity deaths in British Columbia. Methamphetamine and amphetamines came in third at 41.9%. It may be inferred from these numbers that a substantial number of the 29 deaths in the Kootenay Boundary area in 2021, are likely fentanyl connected.
- [31] Sadly, while these numbers continue to shock, they are no longer surprising, as the drug toxicity crisis in British Columbia, and the many lives it takes every day, are now notorious and infamous.

- [32] It is largely for this reason that denunciation and deterrence have become the primary principles for consideration in imposing a sentence for possession of fentanyl for the purposes of trafficking: Smith, paras. 45-49; R. v. Toth, 2017 BCSC 501, at para. 81 [Toth].

Principles of Sentencing

- [33] Section 718 through 718.2 of the Criminal Code set out the statutory principles for sentencing. They are supplemented by s. 10 of the Controlled Drugs and Substances Act ["CDSA"].
- [34] Pursuant to s. 10 of the CDSA, the fundamental purpose of sentencing is to contribute to respect for the law and the maintenance of a just, peaceful, and safe society while encouraging rehabilitation, the treatment of offenders in appropriate circumstances, and acknowledging the harm done to victims and to the community. The objective is achieved through the imposition of just sanctions with the objective of denouncing unlawful conduct and harm to victims of society, deterring the offender and others from committing offences, separating the offender from society where necessary, assisting in the offender's rehabilitation, providing reparations for harm done to a victim or the community, and to promote a sense of responsibility in offenders and acknowledgment of harm done: Criminal Code, s. 718.
- [35] A sentence must be proportionate to the gravity of the offence and the offender's own moral culpability. It must also be consistent with sentences imposed on similar offenders for similar offences in similar circumstances, although each case must ultimately be considered on its own facts and circumstances. The court must also take into account aggravating and mitigating factors, some of which are prescribed under the Code. A term of imprisonment should only be imposed where the circumstances make it necessary.
- [36] Fentanyl, carfentanil, and methamphetamine are Schedule I substances. The maximum sentence for possession of these substances for the purposes of trafficking is imprisonment for life: CDSA; subss. 5(2) and 5(3).

Positions of Crown and Defence

Crown's Position

- [37] The Crown argues that Mr. Kazakoff was operating at the level of a high-level retailer or a low-level distributor. The Crown points to the presence of drugs in ounces, the mixing kit, and the cash as evidence of this. The Crown argues the quantity of drugs of which Mr. Kazakoff was in possession also indicates that he was not a mere street-level dealer.
- [38] The Crown argues the large quantities of drugs in this case, the fact that the drugs included carfentanil, and the fact that Mr. Kazakoff knew he was in possession of carfentanil for the purposes of trafficking are significant aggravating factors that require a significant sentence. The Crown argues rehabilitation prospects for Mr. Kazakoff are dim given his age and the

fact that the offences were committed while he was awaiting trial on a substantially similar charge, albeit for smaller amounts that did not include carfentanil. Nevertheless, the Crown suggests this indicates specific deterrence is a significant factor here. The Crown argues for a global sentence of six years and says that this should be served consecutively to an 18-month sentence imposed recently by Justice Edelmann in another matter.

Mr. Kazakoff's position

- [39] Mr. Kazakoff argues for a sentence of two years less a day plus three years' probation to be served concurrently to the sentence imposed by Justice Edelmann.
- [40] He argues he was largely in possession of these drugs for his own use and supporting his own habit. He reiterated the argument that I rejected at trial that he had diluted the drugs so substantially to support his own need, preference, and addiction.
- [41] He argues this is a case of sentencing an addict and a person who needs help, not a person with the culpability of a drug dealer. He says imposing a significant term of incarceration like that sought by the Crown will take him to the end of his working life and thus equates with "locking him up and throwing away the key."

Mitigating and Aggravating Factors

Aggravating

- [42] In my view, the aggravating factors in this case including the following. The quantity of fentanyl and carfentanil in Mr. Kazakoff's possession are clearly substantial, especially when viewed in light of the case authorities I will turn to in a moment. The fact that Mr. Kazakoff was in possession of carfentanil for the purposes of trafficking is a significant aggravating factor given the serious risk of overdose that is presented by carfentanil in any quantity. This point is further aggravated by the fact that Mr. Kazakoff knew he was in possession of carfentanil, again, creating a serious risk of death for those who ultimately might have bought or taken this carfentanil regardless of the extent of its dilution.
- [43] Also aggravating, in my view, is the fact there is no evidence of Mr. Kazakoff having a method to consistently mix and dilute the fentanyl and particularly the carfentanil, creating a further risk to the public. Many courts have compared this to a game of Russian roulette, that is, where the mixture is inconsistent such that a "hot spot," as I have described earlier, can arise and be fatal to the person consuming the fentanyl or carfentanil.
- [44] The Crown argues that Mr. Kazakoff was either a high-level street dealer or a low-level retail dealer. Given the volume of drugs in his possession, I agree that Mr. Kazakoff cannot be characterized as an ordinary street-level dealer. I am not persuaded, though, he was a mid-level dealer of any sophistication. I would place him at the lower end of the retail dealer spectrum: *R. v. Emery*, 2019 BCSC 1789, at paras. 45 and 66 [Emery]. Considering the quantities, though, he is not at the lowest end of that scale.

- [45] Pursuant to s. 10(2)(b) of the CDSA, I must consider as an aggravating factor that Mr. Kazakoff has previously been convicted of a "designated offence", namely, possession for the purposes of trafficking in 2010. I do take note, though, that the offence is now some 12 years old and the disposition was a non-custodial term. I also consider Mr. Kazakoff's criminal record. He has 14 previous convictions, one in 2000 for sexual interference. He has five convictions for possession including one, as I have just noted, for the purposes of trafficking. He has a conviction for obstructing a peace officer, assault of a public officer while threatening to use a weapon, among other offences.
- [46] I do not take into account Mr. Kazakoff's recent convictions by Edelmann J. since those convictions came after the offence dates in this case. However, I do consider it to be an aggravating factor that these offences were committed while Mr. Kazakoff was on bail awaiting trial on the charges before Edelmann J. As I have said, the charges were similar to the present ones and this demonstrates that Mr. Kazakoff was undeterred by the investigation, the arrest, and the proceedings that would later come before Edelmann J. I agree with the Crown that this suggests a lack of deterrence.
- [47] Finally, with respect to aggravating factors, I place little significance on the weapons found during the search. The weapons were not used during the commission of the offence. The Crown acknowledges this, but argues that I should still consider the likelihood that they relate to the offence in that they served to protect Mr. Kazakoff and the supply of drugs. I am not convinced that is the case for the full series of weapons, but I do accept that is the case for the bear spray. Regardless, I do not find this to be a particularly compelling aggravating factor in the present case.

Mitigating Factors

- [48] I accept that Mr. Kazakoff is himself a drug addict and supports that habit through trafficking, although I find he earns money on top of this, as well.
- [49] I have earlier described his experiences and difficulties growing up. I am not going to repeat those, but suffice it to say that I accept that those are all mitigating factors and substantial ones at that.

Case Law

- [50] I have earlier touched on the leading cases of Smith and Parranto. Smith dealt with a first-time offender who was trafficking in fentanyl at the street level at a time before a drug toxicity crisis had been declared a public emergency. The quantities were much smaller than here, 2.6 grams of fentanyl and 3.2 grams of cocaine. The Court of Appeal noted that sentences in British Columbia for trafficking in fentanyl were out of line with other jurisdictions and the gravity of the offence having regard to the scourge of drug toxicity crisis. It established a starting point of 18 months' imprisonment for a first-time offender trafficking in fentanyl at the street level.

- [51] In *Toth* the execution of a search warrant on Mr. Toth's residence and vehicle yielded 1,098 pills containing fentanyl and heroin in a safe located in the residence. These pills were valued at between \$5,490 to \$10,980 at the wholesale level and \$32,940 and \$65,880 at the street level. The searches also yielded 70.2 grams of crack cocaine and three-eighths of an ounce of cocaine, the combined value of which was between \$5,700 and \$7,800. Police also seized cash totalling \$48,535. The offender in that case had an unrelated criminal record. He was an Indigenous person with a good employment history and a strong family support. He had made significant efforts at rehabilitation.
- [52] Justice Ker noted in that case that the scope of sophistication of an enterprise is critical in considering the appropriate sentence. She observed at para. 82, there is a broad spectrum of trafficking activities ranging from the less sophisticated and isolated to "persistent, sophisticated and serious." She said that where a particular offence is situated on that spectrum will substantially impact how the court will decide on an appropriate sentence.
- [53] On her review of the authorities, she observed that for "serious, sustained, and relatively sophisticated midlevel operations, i.e., a supplier to street-level dealers", sentences range from 28 months to seven years. She imposed a custodial sentence of three years in that case. While I find Mr. Kazakoff was not a street-level dealer, his operation was, in my view, less sophisticated than the one in *Toth*.
- [54] In *Emery* a search of the accused's home located 6.38 grams of methamphetamine, 5.97 grams of fentanyl, heroin and caffeine mixture in 22 small packages, and 5.62 grams of crack and powder cocaine in nine small packages. The accused was found to be in possession of these substances for the purposes of trafficking and he was considered to be a street-level trafficker who also supplied some other street-level traffickers that he knew. Justice Ker found that the *Smith* range was not applicable to offenders operating above the street level. She said at para. 45:

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.

- [55] Justice Ker found the offender in that case was not simply a street-level trafficker, but also "certainly not at the higher end of the mid-level trafficking group." She said the sentencing range for an offender who is more than a street-level trafficker must start at the upper end of the range for *Smith* and suggested a range between 36 and 72 months. For this, she relied on *R. v. Bransford*, 2018 BCSC 1995, *Smith* and *Mann*. Justice Ker imposed a sentence of three years less credit for time served. The offender in that case was 32 years old and the volume of seized narcotics was much smaller than the present case.
- [56] In *R. v. Gill*, 2022 BCCA 127, the Court of Appeal reduced a five-year sentence for trafficking in fentanyl and carfentanil to four years. The offender in that case was 19 years old and had no criminal record. At the request of an undercover officer who got the accused's name and number from a related matter, the accused sold the officer 6.53 grams of drugs that were

later analyzed to contain a mixture of cocaine and carfentanil. A second sale took place about a month later, at which time, the accused was arrested and his car was searched yielding seven bags of fentanyl weighing a total of 2.14 grams and three bags of powder containing a combination of carfentanil, fentanyl, and caffeine weighing a total of 8.12 grams. On appeal, the majority took into account the young age of the offender, his very brief involvement in drug dealing, and the risk that his good prospects for rehabilitation would be harmed by a long period of incarceration.

- [57] Returning to Mann, the Court of Appeal there considered whether the trial judge erred in imposing a longer sentence for a conviction involving carfentanil when the Crown failed to prove the accused knew the substance contained carfentanil. At issue was a five-year concurrent sentence for possession of a substance containing carfentanil for the purposes of trafficking. The offence occurred in a "small and unsophisticated" dial-a-dope operation by which two accused sold substances they knew to contain fentanyl to undercover officers. Upon their arrest, the appellant was found to be in possession of 3.98 grams of a substance containing carfentanil, fentanyl, and caffeine. A subsequent search of the residence located a bowl containing 20.89 grams of a substance containing fentanyl, carfentanil, and caffeine as well as a mortar and pestle used for mixing drugs. A handgun was also seized from the home.
- [58] The Court of Appeal upheld the five-year sentence imposed by the trial judge, noting that carfentanil is a far more serious drug than fentanyl with much more significant risks. Thus, trafficking in carfentanil is considered more serious than trafficking fentanyl and will attract a harsher penalty: Mann, para. 73. The Court found that ignorance that the mixture contains carfentanil will not detract from the seriousness of the offence if it actually does contain carfentanil:
- [79] where an offender knowingly traffics a controlled substance that is subsequently discovered to contain an additional, more harmful substance, the offender cannot maintain that his or her moral culpability is reduced simply because he or she was unaware of the additional substance.
- [59] Here, Mr. Kazakoff knew one of the packages that he possessed contained carfentanil.
- [60] The Court also found that it significant that the accused persons in Mann were mixing their drugs with a mortar and pestle and this created a significant risk of "hot spots" that can lead to overdose. The Crown relies on this in the present case, although I note there is no evidence Mr. Kazakoff was using a mortar and pestle to mix his drugs, but nor is there evidence to explain exactly how he was mixing them or to show that he was mixing them in a safe manner.

- [61] In Mann, the court found at para. 53 that the mixing there was "outrageously negligent" with concentrations of fentanyl high as 14% when anything above 2% is likely to cause an overdose. Again, we do not have that evidence of this nature in the present case, although this does illustrate the risks of self-mixing.
- [62] In R. v. Chau, 2021 BCPC 180 [Chau], Judge Tam sentenced the accused to five years in jail for several counts of possession for the purposes of trafficking. The drugs were stored in a stash house to which the accused had access. Police discovered 282.89 grams of cocaine, 145.61 grams of drugs containing fentanyl, and 53.1 grams of methamphetamine. The street value was estimated at \$43,000. Police also seized \$7,355 in cash, trafficking paraphernalia and a calendar specifying work shifts for drug runners. The amounts of drugs seized in that case were similar to the present case, although the operation appeared much more sophisticated than Mr. Kazakoff's. On the other hand, the accused in that case was just 24 years old with no criminal record.
- [63] In R. v. Naidu, 2019 BCPC 188, Judge Sudeyko considered a sentence for an offender found guilty of trafficking drugs including fentanyl-laced heroin to undercover officers. The quantities of drugs involved in the exchanges increased over time. Ultimately, drugs were exchanged for money on 20 occasions during the investigation. The value of the drugs was \$119,000. When Mr. Naidu was arrested, he was found in possession of \$45,000 worth of heroin. Judge Sudeyko found that the escalation to larger transactions were fairly characterized as mid-level transactions, but all of those were the result of opportunity presented by the police and there is no evidence of mid-level transactions to anyone else. A search of the accused's home did not yield any evidence of him being a mid-level drug dealer. As I read Judge Sudeyko's analysis, he treats the mid-level trafficking transactions as being akin to entrapment and does not appear to have allowed those transactions to influence the sentence he imposed. He did find, though, that the accused was more than a street-level dealer. He imposed a sentence of five years less credit for time served.
- [64] In R. v. Virus, 2022 BCPC 11, Judge Harvey considered the sentence for four counts of possession of drugs containing fentanyl for the purposes of trafficking. The case involved a warrantless arrest of the accused. The search of the accused found on his person 5.87 grams of crystal methamphetamine, 261.7 grams of substances containing fentanyl or carfentanil, 13.49 grams of cocaine, over \$20,000 in cash, and the value of the drugs containing fentanyl and carfentanil was estimated to be between \$21,600 and \$51,784 depending on the level at which it was sold. The accused testified that, prior to his arrest, he was asked by a friend whom he would not name to hold the friend's belongings which included these drugs and cash. The accused did not believe he would be holding them for longer than five or 10 minutes, but he knew that he would be paid with some drugs for doing so. He said he intended to sell some of those drugs to others. The court seemed to reluctantly accept the accused's evidence, but found the moral culpability was still significant. The accused pleaded guilty in that case, but he had an extensive criminal record including for drug trafficking, breaking and entering, and robbery. He was sentenced to six years less credit for

time served.

- [65] Lastly, I will mention Kim, where Justice Devlin sentenced the accused for a number of drug trafficking and weapons offences. The offences arose from the execution of a search warrant in a residential apartment in Richmond. The apartment was "used as a stash site to assemble and package a variety of drugs for street-level distribution." A total of 170.06 grams of opioids and opioid mixtures were seized including substances containing carfentanil. Also seized were 81.49 grams of methamphetamine, 216.43 grams of cocaine, 76.78 grams of Oxycodone and acetaminophen, 109.97 grams of Alprazolam, 1,228.08 grams of cutting agents including caffeine, \$28,863 in cash, and much drug paraphernalia and weapons.
- [66] Justice Devlin noted that there was abundant evidence that the people had been weighing and packaging drugs and she described the operation as "a sophisticated and high-volume drug trafficking operation." She sentenced the accused to a global term of 10 years in prison, including 10 years for possession of the opiates to be served concurrently with other terms of imprisonment, which included six years for the possession of methamphetamine, cocaine, and heroin.
- [67] I refer to this case not because it has any particular parallels to the present one. In fact, I find it to be quite different. However, it does illustrate the circumstances where a higher end of a range of four to 10 years has been imposed as a sentence. The operation in Kim and the extent of the drugs and the organization and the weapons were much more substantial than the present case.

Reasons

- [68] I agree with the Crown that the evidence here supports that Mr. Kazakoff was not operating as a street-level drug dealer. The amount of drugs found in his unit were substantial. The pre-packaging of much of the fentanyl mix into ¼ and ½ ounce labelled bags indicates a certain level of organization and planning, if not sophistication. I am satisfied that Mr. Kazakoff's involvement in dealing fentanyl and methamphetamine was prolonged and, to the extent necessary to characterize it, I would characterize it as the lower end of mid-level trafficking, above street-level trafficking.
- [69] Mr. Kazakoff is himself an addict and this is a mitigating factor I take into account. However, he is not, in my view, an "impoverished, street-entrenched addict possessing and selling small amounts of drugs to support a personal addiction," which is how Justice Dhillon described "low-level dealers" in *R. v. Fletcher*, 2018 BCSC 290.

- [70] Given the volumes of narcotics and the cash Mr. Kazakoff had on hand, I accept he intended to profit from this activity, but he was also supporting his own drug addiction. I do not consider Mr. Kazakoff's profit motive to be on par with cases such as Kim, Toth, or Chau, but nor was he simply sustaining his own habit. I do not accept Mr. Kazakoff's argument that he was diluting drugs for his own use. As I said, I rejected this evidence at trial and I do not accept his effort to revive it in sentencing.
- [71] I do not take into account Mr. Kazakoff's recent conviction, as I have said, for substantially the same offence in smaller amounts given that Mr. Kazakoff had not been convicted at the time of these offences. However, I accept the Crown's argument that these indicate both that the present offences are not one-off acts for Mr. Kazakoff and suggest that specific deterrence is a factor that I have got to apply.
- [72] Again, without repeating the mitigating factors, I take into serious consideration Mr. Kazakoff's history, the difficult childhood he has had, the very difficult teenage years he has had, and the very difficult family relations he has had. These are all substantial factors, in my view, to be taken into account in arriving at the appropriate sentence.
- [73] Taking all these factors into account, but putting aside for the moment the totality principle which I will address in a moment, I generally agree with the Crown that a total sentence of six years incarceration is appropriate for this offence. The Crown argues that this sentence, which I will break them down in a moment, should be served consecutively with the 18-month sentence of incarceration imposed by Justice Edelmann because the offences here represent distinct transactions separated in time by more than a year.
- [74] Given the Crown's position, I must consider the totality principle. The Crown has referred me to *R. v. Learning*, 2019 BCCA 332. There, the Court of Appeal considered the application of the totality principle when an accused had been sentenced in a different jurisdiction and whether a court sentencing that accused in this jurisdiction was to consider the totality principle in respect to those other offences. The court said at para. 29:

The principle of totality arises most commonly when the same judge is sentencing an offender for multiple offences, the circumstances of which are well known to the sentencing judge. When a sentencing judge is asked to reduce a sentence based on a consideration of the sentence received by the offender for some other offence in another jurisdiction, the judge must make an assessment of overall culpability of the offender based on the information available.

- [75] I agree with the Crown that the situation here, although not dealing with another jurisdiction, is analogous and the Court of Appeal would have intended the totality principle to be considered in this case. The total sentence recommended by the Crown is six years to be served consecutively with Justice Edelmann's sentence which would bring a total of seven-and-a-half years. In my view, looking at the sentences in their totality, this pushes the sentences to a higher range than I consider to be consistent with Mr. Kazakoff's overall culpability and the mitigating factors I have discussed. I understand the Crown's submission with respect to the separation of time between these two offences being over a year. At the

same time, though, the Crown pointed out that they seem to be a bit of a continuum of activity.

[76] For those reasons and, again, having regard to the mitigating factors I have discussed, in my view, a term of incarceration of seven-and-a-half years in totality for the two sets of offences is out of proportion to Mr. Kazakoff's overall culpability. I would, therefore, find a total sentence for the present offences to be five years served consecutively to the sentence imposed by Justice Edelmann. In my view, that is appropriate having regard to the moral blameworthiness and the mitigating factors. Thus, when this sentence is served consecutively to Justice Edelmann's sentence, the two combined will total six-and-a-half years. I would therefore, sentence Mr. Kazakoff to five years for the present offences, broken down as follows:

- four years for Count 1;
- five years for Count 2; and
- two years for Count 3,

all to be served concurrently.

[77] On Court File Number 22879-2, I am satisfied that Mr. Kazakoff was in possession of the ammunition as a collector's item. While this does not excuse the offence, it does not mitigate his culpability. On the other hand, he knew he was under a prohibition from possessing ammunition and acted recklessly in keeping the ammunition in his possession, albeit in a safe. In the circumstances, I find a sentence of 30 days to be served concurrently with Count 1 is appropriate.

[78] Mr. Kazakoff, could you please stand?

[79] For the reasons I have just given, I sentence you on Court File Number 22878-2, Count 1, which is possession of fentanyl for the purposes of trafficking, to four years in prison; and Count 2, which is possession of fentanyl and carfentanil for the purposes of trafficking, to five years to be served concurrently with Count 1; and Count 3, which is possession of methamphetamine for the purposes of trafficking, I sentence you to two years in jail concurrent -- to be served concurrently with Count 1; and on Court File Number 22879-2, Count 1, possession of ammunition contrary to an order, I sentence you to 30 days to be served concurrently with Count 1 on the other -- on Court File Number 22878-2.

[80] All of that is to be served consecutively to the sentence imposed by Justice Edelmann.

[81] I am also sentencing you to a lifetime firearm prohibition pursuant to s. 109 of the Criminal Code.

[82] THE COURT: I have not received detailed submissions on the DNA sample. I have to say I am not fully -- I understand it is a discretionary order. You did not speak to it. I have to say I am not -- without some further submission on it, I am not convinced that it is necessary here.

- [83] MR. FERBEY: May I have a look at Exhibit -- whatever exhibit the earlier record was because I think that Mr. Justice Edelmann may have imposed it and, if that is the case, I will not pursue it further, Mr. Justice. I think this was Exhibit 7.
- [84] THE COURT: Mr. Kazakoff, you may be seated now.
- [85] MR. FERBEY: Well, I can say I did not come equipped with the case that addresses it, Mr. Justice, and I will just not pursue that application any further at this point.
- [86] THE COURT: Okay. So the Crown is not pursuing an order for a DNA sample. So I make no order to that effect.
- [87] MR. FERBEY: May I ask -- oh, the court is not --
- [88] THE COURT: That concludes my reasons. Thank you.
- [89] MR. FERBEY: Thank you, Justice. Now, I would ask because -- now, this is -- I have seen it done by other counsel when I was defence counsel in the Lower Mainland where the court would make some directions that its reasons for sentence or any reports filed at the sentencing be provided to the Correctional Service of Canada for purposes of administering the sentence pursuant to s. 743.2 of the Criminal Code --
- [90] THE COURT: Yes, right, that is paragraph 5 of your submission.
- [91] MR. FERBEY: Yes.
- [92] THE COURT: I will make that -- I do not know if it needs to be an order or direction, but I will make it an order that my reasons for sentence be transcribed and a copy provided along with any reports filed at the sentencing -- well, let us be clear about this. The reports that are being filed are the pre-sentence report. Anything else?
- [93] MR. FERBEY: I would say the pre-sentence report and perhaps the CPIC record, as well, Exhibit 7.
- [94] THE COURT: Okay, so my reasons for judgment and Exhibit 7 and Exhibit 6 --
- [95] MR. FERBEY: Yes.
- [96] THE COURT: -- filed on this sentencing hearing will be provided to the Correctional Services for the purposes of administering the sentence, and I make that order pursuant to s. 743.2 of the Code.
- [SUBMISSIONS RE FORFEITURE OF \$5,000 CASH]
- [97] THE COURT: Thank you. So on an application -- I treat this as an application under s. 16(1) of the Controlled Drugs and Substances Act by the Attorney General seeking forfeiture of \$5,000 in cash that was seized from Mr. Kazakoff's jacket during the search warrant that was executed in March of 2021 in this proceeding. At trial, Mr. Kazakoff said the \$5,000 was pay from his employer and money he had been saving up. I rejected that evidence, and I found

that the existence of the \$5,000 in the circumstances in which it was found contributed to my conclusion beyond a reasonable doubt that Mr. Kazakoff was in possession of narcotics for the purposes of trafficking.

- [98] Having regard to all the circumstances as discussed in my original reasons for judgment in convicting Mr. Kazakoff, I am satisfied on a balance of probabilities that the \$5,000 cash is offence-related property within the meaning of s. 16(1). There is, in my view, sufficient circumstantial evidence relating to where it was found and the circumstances in which it was found that persuades me on a balance of probabilities that it is offence-related property and, for that reason, I will order forfeiture of that under s. 16(1)(b), as I am required to do once I have determined on a balance of probabilities that it is offence-related property.

[SUBMISSIONS RE VICTIM FINE SURCHARGE]

- [99] THE COURT: So Mr. Kazakoff applies under s. 737(2.1) of the Code to be relieved of the requirement to pay a victim surcharge or to pay a reduced amount on the basis that it would cause undue hardship to Mr. Kazakoff. Mr. Kazakoff is currently serving a term of incarceration and therefore has no source of income at the moment. His income from the Motel 99 when he was working was, as I recall from the evidence, quite small and much of that went to his rent. Anyway, given the circumstances that he is currently incarcerated with no ability to earn an income, I am satisfied that imposing the victim surcharge would cause undue hardship. So, I am going to order that he be relieved from making that payment.

"Kirchner J."

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