
CANADA / JUDGMENT

R. v. Lockhart

2021 BCSC 1226

COURT

Supreme Court of British Columbia

DECIDED

3 June 2021

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2021 BCSC 1226 R. v. Lockhart

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Lockhart,

2021 BCSC 1226

Date: 20210603

Docket: 88658-2

Registry: Kelowna

Regina

v.

Jesse Dayton Lockhart

Before: The Honourable Mr. Justice G.P. Weatherill

Oral Reasons for Sentence

Counsel for the Crown

appearing by teleconference:

J. Le Dressay

Counsel for the Accused

appearing by videoconference:

J. Dosanjh

Place and Date of Trial/Hearing:

Kelowna, B.C.

May 14 and

June 3, 2021

Place and Date of Judgment:

Kelowna, B.C.

June 3, 2021

[1] THE COURT: These are my reasons for sentence following submissions on May 14, 2021.

Introduction

- [2] On June 24, 2020, following a three-day trial, I convicted Mr. Lockhart of two counts of trafficking illicit drugs--fentanyl, on February 23, 2018, and a mixture of heroin and fentanyl on February 24, 2018 (the "Drugs"), contrary to the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA].
- [3] In January 2021, Mr. Lockhart applied to have both convictions stayed on the basis of the common law doctrine of entrapment. On January 8, 2021, I dismissed that application and his convictions were registered. He is now to be sentenced.

Circumstances of the Offences

- [4] In February 2018, the Kelowna RCMP targeted street-level drug trafficking in a notorious area of downtown Kelowna known as the "Red Zone" which includes the 200 to 400 blocks of Leon Avenue. Sergeant Woodcox oversaw the operation, dubbed "Operation Passguard", from February 22-24, 2018.
- [5] Constable Wong, an undercover officer from outside the Kelowna area, was recruited and sent to the Red Zone to purchase heroin from street traffickers. He made two purchases from Mr. Lockhart.
- [6] Constable Wong dressed in a "costume" to look the part of a down-on-his-luck drug user who had suffered a leg injury. The costume included an air cast on his ankle and a cane to help him walk. He limped when he walked and appeared to be in pain. His intention was to blend in with others in the Red Zone and create a bond with drug traffickers.
- [7] On February 23, 2018, Constable Wong approached Mr. Lockhart who was walking on the 200 block of Leon Avenue. They had no prior dealings. Constable Wong initiated a conversation by asking Mr. Lockhart if he had a "point of down," by which he meant 0.1 g. of heroin. Mr. Lockhart pulled out a plastic baggie (known on the street as a "dime bag") of a substance and asked him if he had any tinfoil. Constable Wong produced some tinfoil and Mr. Lockhart free-poured a small amount of the substance--later determined to be fentanyl--into the foil. Constable Wong gave Mr. Lockhart \$20 in return. There had been no prior

discussion about price. Constable Wong testified that \$20 for a "point" of fentanyl or heroin or both was the going price on the street at the time. Constable Wong folded the tinfoil and placed it in his pocket. The two then engaged in a short general conversation, at the conclusion of which, Mr. Lockhart wrote his phone number on a receipt for "the future" which Constable Wong took to mean for future purchases of illicit drugs.

- [8] The following day, February 24, 2018, Constable Wong returned to the Red Zone with specific instructions to purchase more drugs from Mr. Lockhart. As Constable Wong approached Mr. Lockhart on the 400 block of Leon Avenue, Mr. Lockhart said something to the effect of, "Hey, what are you up to? What are you doing here again?" The two conversed briefly. Then Mr. Lockhart asked Constable Wong, "Are you looking?" Constable Wong took this to mean "looking for drugs," and replied, "Yes, a point of down."
- [9] Mr. Lockhart then asked Constable Wong to walk down the block and meet him in a parking lot. At the lot, Mr. Lockhart pulled out a dime bag and asked for Constable Wong's hand. As before, Constable Wong pulled out some tinfoil and Mr. Lockhart dispensed a small amount of what was later determined to be a mixture of fentanyl and heroin into the foil. Mr. Lockhart stated that the substance was "fent," which Constable Wong took to mean fentanyl, and suggested he take a "half hoot" (meaning he should only smoke one-half due to its strength). Mr. Lockhart told him to be careful because, "the high comes all at once." Mr. Lockhart asked if he intended on taking it by himself, to which Constable Wong replied "Yes". Constable Wong then handed Mr. Lockhart \$20.

Summary of Positions on Sentence

- [10] The Crown suggests that given these circumstances, a fit and proper sentence for Mr. Lockhart is 24 to 30 months' imprisonment.
- [11] Defence counsel seeks a suspended sentence with three years' probation or, alternatively, a 24-month conditional sentence order to be served in the community followed by 12 months' probation.

Mr. Lockhart's Background

- [12] Mr. Lockhart is 39 years old and has a grade 10 education. He has resided in the Central Okanagan since about 2013. He currently resides with his supportive mother in Peachland. He is neither permanently employed nor on social assistance. He supports himself by performing odd jobs and buying, fixing, and then reselling miscellaneous items. Prior to the COVID-19 pandemic, he worked as a landscaper for an unnamed company.
- [13] Mr. Lockhart was born into a First Nations community near Regina, Saskatchewan. His grandparents were part of the residential school system. His parents were not. As a child, he was introduced to and participated in traditional Indigenous gatherings, dances, and other cultural events. His upbringing was not chaotic. His family was not dysfunctional. His childhood was relatively normal.

- [14] While Mr. Lockhart's mother did not allow alcohol or drugs in the home and alcoholism is not a consistent theme throughout his family tree, he began drinking at the age of 17. By the age of 21, alcohol became problematic for him and he quickly progressed into using marihuana and cocaine. By the age of 32, he had an opioid addiction. As a drug user, he was not welcome at his mother's home and, therefore, lived on the street earning money any way he could including panhandling and selling drugs.
- [15] He was a self-proclaimed heroin addict when the offences occurred in February 2018. Thereafter, Mr. Lockhart said he decided to beat his addiction. He was given opioid replacements to help with withdrawal symptoms, returned to live with his mother and, save for two--what Mr. Dosanjh referred to as--"slipups" in the past three years, has achieved sobriety. With his mother's help, he has now been clean and sober for 11 months. He says he has distanced himself from the downtown Kelowna drug culture and lifestyle. He says he has turned his life around in a positive direction.

Mr. Lockhart's Criminal History

- [16] Mr. Lockhart has a relevant criminal record. On October 16, 1998, he was convicted of trafficking drugs as a young offender and received one year of probation and community service. At the same time, he was convicted of six separate breaches of recognizance and received concurrent sentences of one-year probation.
- [17] Since then, Mr. Lockhart has amassed an additional 14 convictions for breach of recognizance, breach of court orders, and failure to appear; three convictions for simple possession (two in 2004 and one in 2009); one conviction for possession for the purpose of trafficking; convictions in 2012 for assault causing bodily harm and obstructing a peace officer; and a conviction in February 2013 for driving while prohibited.
- [18] He has not been before the criminal justice since May 22, 2013, when he was last convicted of a breach of recognizance.

Mr. Lockhart's Position on Sentence

- [19] As earlier mentioned, Mr. Dosanjh argues for a suspended sentence with three years' probation. He does so on the basis that exceptional circumstances, as that phrase is defined in *R. v. Voong*, 2015 BCCA 285, exist in this case, namely, that:
- (a) prior to these charges in 2018, he had not been before the criminal justice system since May 2013, a period of about five years;
 - (b) he has the support of his mother and a close friend who is a residential care worker in Kelowna, and he has been clean and sober for the past 11 months;
 - (c) there is no indication that he breached his bail conditions since his arrest which is evidence of his path towards rehabilitating himself; and

- (d) he is motivated to remain sober and drug-free.
- [20] Defence counsel says that Mr. Lockhart's mother is a positive influence on him and he is on the path to becoming a law-abiding and contributing member of society. Counsel asserts that Mr. Lockhart is a marginalized offender caught in what this Court recently described as the "missing middle" between penalties of incarcerations on the one hand and suspended sentences on the other: *R. v. Chen*, 2021 BCSC 697, at para. 165. I note that the term "missing middle" was drawn from *R. v. Sharma*, 2020 ONCA 478, a fairly controversial s. 7 Charter case where the Supreme Court of Canada has granted leave to appeal, but the appeal has not yet been heard.
- [21] Defence counsel asserts that given the Drugs were only a "point" each and the trafficking was low-level and unsophisticated, Mr. Lockhart's sentence should attract, at most, a provincial jail sentence of under two years. He notes that Mr. Lockhart has complied with his bail conditions for three years, which shows that he would not endanger the safety of the community. He contends that rehabilitation is a strong factor in Mr. Lockhart's sentencing and that denunciation and deterrence could be served with the imposition of a suspended sentence.
- [22] Defence counsel referred me to a number of authorities where denunciation and deterrence yielded to the importance of an offender's rehabilitation resulting in a suspended sentence: *R. v. Cain*, [1993] 28 B.C.A.C. 105; *R. v. Preston* (1990), 47 B.C.L.R. (2d) 273 (C.A.) ["Preston"]; *R. v. Boone*, 2013 BCSC 1306; *R. v. Joon*, 2017 BCPC 301 ["Joon"]; and *R. v. Faraj*, 2019 BCSC 612.
- [23] I have reviewed all of these cases.
- [24] Of note, Preston involved a Crown appeal of a two-year suspended sentence for a 41-year-old heroin addict with no skills or education and with 23 prior convictions, but who had shown objectively identifiable steps towards rehabilitation. The appeal was dismissed.
- [25] Joon involved a 19-year-old offender in a dial-a-dope operation who was motivated by greed. He had no prior record, pled guilty to trafficking in fentanyl and heroin, and received a three-year suspended sentence because of the objectively positive rehabilitation efforts he had undertaken.
- [26] In further support of Mr. Lockhart's position that he should be given a suspended sentence, his mother and friend attended at the sentencing hearing and prepared character reference letters which I have read. They obviously both support him and I hope they will continue to do so.

The Crown Submissions on Sentence

- [27] Crown proposes a 24 to 30-month penitentiary sentence. It points to Mr. Lockhart's previous convictions, as well as an April 29, 2021, BC Coroners Service Report ("Coroner's Report") which provides some sobering up-to-date statistics about fentanyl-related deaths in our

community and in the province as a whole. Some 87 percent of drug-related deaths in the province involved fentanyl. According to these statistics, 73 fentanyl-related deaths occurred in Kelowna in 2017, the year prior to Mr. Lockhart's arrest. A large proportion of these occurred during the third week of the month coinciding with income assistance payment week. These statistics are disturbing. The Crown analogizes that if there were a plane crash at the Kelowna Airport killing 73 passengers and crew, such carnage would attract international attention.

- [28] The Crown refers to *R. v. Smith*, 2017 BCCA 112 at paras. 36, 37 and 45, where the Court of Appeal endorsed a sentence range of 18 to 36-plus months for a conviction of fentanyl-related drug trafficking:
- [36] It is also indisputable that from time to time, sentencing ranges must be adjusted or re-aligned when they fail to reflect, in a general sense, changes in societal factors that are relevant to proportionality, whether in a particular region or in society generally.
- [37] On this occasion, the change we must consider is the proliferation of Fentanyl and the fatal consequences of its illegal sale and distribution. These consequences inform the "circumstances of the offence" and the culpability of the offender. The Crown submits that the sentence imposed in this case was clearly unfit given these circumstances. It also argues that a substantial discrepancy exists between sentences and sentencing ranges in cases involving the sale or distribution of Fentanyl by courts in this province, and those pronounced elsewhere in Canada.
- [45] I agree with the many judges who have stated that denunciation and deterrence must generally be given primacy in sentencing in cases involving Fentanyl. To this end, I would suggest a normal range beginning at 18 months' imprisonment, as the Crown suggests. I do not believe it is necessary for us to specify the top of the range, although I would suggest it might well exceed 36 months, especially where the offender has a substantial record involving the sale of Fentanyl or otherwise demonstrates an indifference to the human lives he or she is putting at risk. This is a matter that can be worked out in future cases. Obviously, the 'range' may also increase beyond 36 months, or a different range will apply, where the offender is higher up the chain of sale or distribution.
- [29] The Crown argues there is nothing to suggest that Mr. Lockhart's sentence should be below the range of 18 months and little evidence to suggest that Mr. Lockhart was selling drugs to feed an addiction. Rather, he was trafficking to victims to make a profit and his sentence should be one of incarceration within the Smith range.

Aggravating Factors

- [30] There is one aggravating factor. Mr. Lockhart was trafficking what he knew was fentanyl.

Mitigating Factors

- [31] The Crown argues that there are no mitigating factors in this case. The Crown does not comment on whether or not Gladue factors ought to be considered as a mitigating factor.
- [32] Defence counsel points out that Mr. Lockhart has behaved over the past three years while under the terms of his bail release. There is no suggestion that he has breached any of his bail conditions. Counsel also notes that Mr. Lockhart had not been before the criminal justice system from May 2013 (at the age of 31) to February 2018 (at the age of 36), when he was arrested on these charges. He argues the relatively small, low-level drug quantities involved in these convictions--two "points" sold for \$20 each--should be considered a mitigating factor.

The Purposes and Principles of Sentencing

- [33] The principles of sentencing are set out in s. 718 of the Criminal Code as follows.

The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
 - (b) to deter the offender and other persons from committing offences;
 - (c) to separate offenders from society, where necessary;
 - (d) to assist in rehabilitating offenders;
 - (e) to provide reparations for harm done to victims or to the community; and
 - (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.
- [34] Section 10(1) of the CDSA provides that, without restricting the generality of the Criminal Code provisions on sentencing, the fundamental purpose of any sentence under the CDSA is to contribute to the respect for the law and the maintenance of a just, peaceful, and safe society. At the same time, sentencing judges are encouraged to consider rehabilitation and treatment in appropriate circumstances and acknowledge the harm done to victims and to the community.
- [35] The proportionality principle requires a court to craft sentences reflecting both the gravity of the offence committed and the moral blameworthiness of the offender.

Decision

- [36] Now, Mr. Lockhart, I heard for the first time during Mr. Dosanjh's submissions that you have a First Nations background. No pre-sentence report, Gladue report, or pre-sentence report with a Gladue component was either requested or prepared. When asked, Mr. Dosanjh stated, essentially, that he interviewed you and your mother and has done the work of the Gladue report writer or the probation officer. He stated that his submissions on your behalf would not have changed in any event of a pre-sentence report or a Gladue report.
- [37] I, therefore, do not have the benefit of a pre-sentence report or anything related to your Indigenous background that would assist me. I infer from the lack of this information and from Mr. Dosanjh's submissions, that the fact that your grandparents attended a residential school did not have a direct effect on your upbringing and would not help explain the situation in which you now find yourself.
- [38] According to Mr. Dosanjh's submissions, there is no direct link between your Indigenous heritage and these offences, but of course, there is no obligation on you to show a direct link. The interconnections between your Indigenous background and these offences are simply too complex: *R. v. Ipeelee* at para. 83. Nevertheless, s. 718.2(e) of the Code still requires me to give attention to the unique background and systemic factors which may have played a part in bringing you before the Court.
- [39] According to Mr. Dosanjh, you appear to have had a relatively normal life growing up. You had a supportive mother who continues to support you. You did not grow up in an environment of substance abuse or violence that led to your own involvement in drugs, your subsequent addiction to them, or your criminal behaviour. Systemic and background factors do not operate as an excuse or a justification for your criminal conduct, but rather provide the necessary context to enable me to determine an appropriate sentence for your offences. Your particular background circumstances as related to me do not appear to bear on your culpability for these offences or to influence what your sentence should be. Recent comments from our Court of Appeal in *R. v. Hiscock*, 2020 BCCA 355, are helpful. At para. 10 of that case, the Court says this:
- [10] The content of the principle embedded in s. 718.2(e) is expressed in the two leading cases on that provision, *Gladue* and *R. v. Ipeelee*, 2012 SCC 13. In *R. v. J.L.M.*, 2017 BCCA 258, Madam Justice Bennett applied *Ipeelee*, and said this concerning the analysis required in crafting a sentence for an Aboriginal offender:
- [33] In *Ipeelee*, the Court was clear that s. 718(2)(e) of the Code "calls upon judges to use a different method of analysis in determining a fit sentence for Aboriginal offenders" (at para. 59). The Court said, at para. 60:

- [60] To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders.
- [35] The Court in Ipeelee repeatedly emphasized that a proportional sentence is the essence of a just sanction, and it found that proportionality is a principle of fundamental justice under s. 7 of the Charter (at paras. 36-37). As in Nur, [2015 SCC 150] the Court in Ipeelee stated that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender (at para. 36; Code, s. 718.1). The degree of responsibility is based on the offender's moral blameworthiness, a principle that dates back to Henry II
- [36] The Court in Ipeelee affirmed that in sentencing an Aboriginal offender, the Court must consider "the unique systemic and background factors which may have played a part in bringing the particular Aboriginal offender before the courts", as these factors "may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness" (at paras. 72-73).
- [40] The Gladue factors, as summarized in para. 93 of Gladue, require, in considering what a fit and proper sentence should be for you, Mr. Lockhart, that I:
- (a) undertake your sentencing individually, but also differently because the circumstances for Aboriginal offenders or people are unique;
 - (b) consider the unique systemic and/or background factors which may have played a part in bringing you before the courts;
 - (c) consider other types of sentencing procedures and sanctions which may be appropriate in the circumstances because of your particular Indigenous heritage or connection;
 - (d) may accept information from your counsel and may take judicial notice of the broad systemic and background factors affecting Indigenous people and of the priority given in Indigenous cultures to a restorative approach to sentencing;
 - (e) consider whether there are reasonable alternatives to incarceration and, if not, carefully consider the length of the term of incarceration; having said that, s. 718.2(e) is not to be taken as a means of automatically reducing the prison sentence of Indigenous offenders;
 - (f) consider that, generally, the more serious and violent the crime, the more likely it will be that the terms of imprisonment are to be the same for similar offences and offenders whether the offender is Aboriginal or not Aboriginal.

- [41] I am satisfied, Mr. Lockhart, that you were a relatively low-level drug dealer, but one who had the ability to acquire fentanyl and heroin and disseminate them throughout the community.
- [42] In *Smith*, the Court of Appeal held that barring exceptional circumstances, the presumptive sentence for trafficking in fentanyl is incarceration. Voong held that "exceptional circumstances" must engage principles of sentencing to a degree, sufficient to overcome the application of the main principles of denunciation and deterrence by way of a prison sentence. To depart from this presumption, there must be something about the case that makes a jail sentence inappropriate.
- [43] The only information I have regarding "exceptional circumstances" comes from your counsel's submissions as earlier summarized. Voong suggests that there must be objective evidence or independent verification of rehabilitation (see paras. 78, 86, 89, 96, and 101. For example, in setting aside the suspended sentence imposed on one of the offenders in *Voong*, the Court stated:
- [101] Much of the evidence supporting his progress came from his mother, who no doubt wishes to see the best for her son. There is, however, little independent evidence of progress, and he was clearly using drugs approximately ten months after the offence date in this case, which was August 2013.
- [102] Mr. Taylor has not demonstrated the degree of "exceptional circumstances" in terms of rehabilitation that would justify a non-custodial sentence. In my view, the sentencing judge erred in overemphasizing rehabilitation over denunciation and deterrence, and that error led her to impose a sentence that was unfit.
- [44] I would similarly distinguish this case from *Preston* or *Joon* where there was objective evidence of rehabilitation.
- [45] In the end, Mr. Lockhart, the circumstances of this case, including your apparent sobriety and change in direction of your life, do not persuade me that exceptional circumstances exist to take this case out of the normal range of sentences for trafficking in fentanyl.
- [46] I consider that trafficking in fentanyl, no matter the quantity, is a serious offence and should attract a harsh penalty. Constable Wong's evidence, which I accepted, was that you knew you were selling fentanyl and knew how harmful it could be. You even cautioned Constable Wong against taking it all at once.
- [47] Mr. Lockhart, you were caught on two occasions trafficking fentanyl in the downtown drug-infested area of Leon Avenue in Kelowna, where homeless persons and others on the lower fringes of society frequent. You took advantage of their situation.
- [48] I must consider the impact that illicit drugs have on the community of Kelowna and on society in general. I accept the statistics provided by the Crown by way of the Coroners Report, which Mr. Dosanjh also accepted on your behalf. I am satisfied that by February

2018, it was widely known that fentanyl was a very serious drug that was causing countless deaths in our community. Our society cannot stand by and allow this to continue with impunity. There must be consequences for those who continue to traffic or distribute fentanyl. The Court must send a message that trafficking in death, which is what fentanyl has been called, will not be tolerated and it will be punished. The public expects and is entitled to no less. It looks to the justice system to do its part in controlling or eliminating this scourge as the Court of Appeal has described it.

- [49] My role as a judge is to take these factors, as well as many others, into account in determining what constitutes a fit and proper sentence for the individual offender in the particular circumstances of the individual case.
- [50] I recognize that sentencing is an individual process. In your case, I consider that any rehabilitation you may have undergone with your mother's support must take a second seat to denunciation and deterrence which must be considered front and centre in this case.
- [51] Mr. Lockhart, I have taken into account the principles of sentencing including proportionality; the aggravating and mitigating factors; the submissions made by Crown and Mr. Dosanjh; your background and circumstances as described to me; the two letters of reference in evidence; and the principle of parity. I have also paid heed to s. 718.2(e) that all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders.
- [52] Mr. Lockhart, if you would be good enough to stand, please.
- [53] Despite able submissions from Mr. Dosanjh, who frankly has said everything that could be said on your behalf, the fact remains that you were engaged in trafficking fentanyl at the street level, targeting the disenfranchised. All things considered, Mr. Lockhart, I find a fit and proper sentence for you on both Counts 1 and 2 is 26 months' incarceration in a federal prison to be served concurrently. You may now be seated.

Ancillary Orders

- [54] I am going to discuss some ancillary orders now. Mr. Le Dressay, I did not note whether Crown applied for a DNA order. I do not believe you did. Mr. Dosanjh -- correction, Mr. Le Dressay? I beg your pardon. Mr. Le Dressay?
- [55] CNSL J. LE DRESSAY: Yes.
- [56] THE COURT: During the sentencing submissions, I did not note whether the Crown applied for a DNA order.
- [57] CNSL J. LE DRESSAY: I think that it is not going to be necessary, My Lord.
- [58] THE COURT: Very good.

[59] I will, however, order that there be a firearms prohibition pursuant to s. 109 of the Code. The offences under s. 5(1) of the Controlled Drugs and Substances Act are listed in s. 109(1)(c) of the Criminal Code and, therefore, pursuant to s. 109(2)(a), I must impose a minimum 10-year firearms prohibition.

"G.P. Weatherill J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/21/12/2021BCSC1226.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-lockhart-2021>

Prepared on 27 October 2026 · Esheria