

CANADA / JUDGMENT

R. v. Makortoff

2024 BCSC 1399

COURT

Supreme Court of British Columbia

DECIDED

21 June 2024

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2024 BCSC 1399 R. v. Makortoff

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Makortoff,

2024 BCSC 1399

Date: 20240621

Docket: 22870-2

Registry: Rossland

Rex

v.

Jessie Adam Makortoff

Before: The Honourable Justice Matthews

Oral Reasons for Sentence

Counsel for the Crown:

I. Ferbey

Counsel for the Accused:

D.J. White

Place and Date of Trial/Hearing:

Rossland, B.C.

April 2, 17, 2024

May 9, 2024

June 20, 21, 2024

Place and Date of Judgment:

Rossland, B.C.

June 21, 2024

Overview

- [1] Jessie Makortoff is before the Court for sentencing on a conviction of unlawful possession of cocaine for the purpose of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19. I convicted Mr. Makortoff on this count on December 8, 2023. On March 14, 2024, I dismissed Mr. Makortoff's application for a judicial stay of proceedings due to delay based on s. 11(b) of the Canadian Charter of Rights and Freedoms.
- [2] The Crown seeks a custodial sentence of 22 months, a s. 109 order banning possession of firearms, weapon, and devices, and a DNA sample for the police DNA bank. The defence asserts that a custodial sentence can and should be accomplished through a conditional sentencing order, that Mr. Makortoff serve his sentence under strict house arrest for two years less a day with the weekly ability to leave his house for the purpose of personal errands, and subject to conditions to abstain from the possession and consumption of non-prescription substances and undertake community service.
- [3] Determining a fit sentence in this case involves consideration of the appropriate ranges for the offence in conjunction with the facts and circumstances of Mr. Makortoff and this offence, including the aggravating and mitigating factors; and determining the appropriate balance of deterrence, denunciation, and rehabilitation. A particular focus of sentencing in this case is whether a jail custodial sentence as opposed to a conditional sentence of house arrest is appropriate to accomplish the objectives of sentencing.
- [4] I delivered these reasons for sentence orally. I have edited this transcript without changing the substance.

The Facts

Circumstances of the Offence

- [5] On October 8, 2020, Constable Tabert of the Grand Forks RCMP and Constable Innes, a sniffer dog handler with the Nelson RCMP, found cocaine inside a hockey skate which was one of two pairs of skates inside a Bauer skate box in the trunk of the car that Mr. Makortoff was driving. The officers searched the car after Constable Tabert pulled Mr. Makortoff over for a traffic stop, detained him on suspicion of transporting controlled substances, and then arrested him after a sniffer dog deployed by Constable Innes signalled that there was one or more controlled substances in the vehicle. The vehicle was registered to Mr. Makortoff's

mother.

- [6] The cocaine weighed 137.5 grams. It was in a chunky form and, on testing, was a mix of cocaine and benzocaine, a substance used to "step on" or expand the quantity of pure cocaine to increase its value by increasing its volume.
- [7] Constable Minkley of the RCMP was qualified to give opinion evidence on packaging, concealment, distribution, sale, consumption, and prices of cocaine and drug jargon and slang. Constable Minkley testified that the chunk form of cocaine was consistent with it not yet having reached the street-sale level because cocaine sold on the street is typically in powder form. Constable Minkley testified that this chunk form cocaine combined with benzocaine would sell for about \$2,000 per ounce, resulting in a purchase cost of \$9,720 and a street-sale value of about \$11,000 at the fairly stable street price of \$80 per gram.
- [8] Constable Minkley testified that 137.5 grams of cocaine would supply a heavy user for about 46 days. He also testified that the quantity and form of cocaine in chunky form had likely been broken off a brick.
- [9] In addition to the cocaine, the RCMP officers also found a hammer in the driver's side footwell of the vehicle that Mr. Makortoff was driving. Constable Minkley testified that it is typical for persons who traffic drugs to transport them in a vehicle registered in the name of someone other than themselves and to have a weapon handy to them during transport.
- [10] At trial, Mr. Makortoff submitted that the evidence was consistent with possession for personal use. I rejected the argument that the evidence raised a reasonable doubt about possession for the purpose of trafficking. I found that the circumstances as a whole, including the form the cocaine was in, the quantity of the cocaine in relation to personal use, its value, and the presence of a hammer in the vehicle, proved possession for the purpose of trafficking beyond a reasonable doubt.
- [11] On sentencing, the Crown submits that the evidence adduced at trial is consistent with wholesale cocaine and consistent with Mr. Makortoff having access to wholesale dealers. The Crown submits this is consistent with Mr. Makortoff dealing drugs at the mid level of a drug operation.
- [12] Mr. Makortoff, through his counsel, advised that, at the time of the offence, Mr. Makortoff and his partner used drugs heavily. He advised that he and his partner would use about one-half of the drugs he acquired and sell the other half. He sold in quantities of at most 3.5 grams, mainly to people he knew. In other words, according to what his counsel told me, although he was acquiring drugs, at a mid level dealer level, he sold them at the street level.
- [13] In *R. v. Deol*, 2019 BCSC 1879 at para. 65, Justice Riley addressed sentencing of one of two offenders who sold cocaine in gram quantities and also in several-ounce quantities up to 20 ounces. In that case, the police found quantities of cocaine and other paraphernalia consistent with street-level trafficking in the home of one of the offenders. Justice Riley described their operation as straddling mid level and street level distribution. In this case,

the only facts about trafficking pertain to street level trafficking, but the evidence about the quantity of the cocaine suggests mid level procurement. Accordingly, I conclude that Mr. Makortoff was involved in the drug trade in ways that involved both mid level procurement and street level trafficking.

Circumstances of the Offender

- [14] Some of the facts that I relate pertaining to Mr. Makortoff are based on the evidence at trial. The others are based on submissions of his counsel at a sentencing hearing, letters of reference, a record of his criminal convictions, medical records, and Mr. Makortoff's statement to the Court at sentencing.
- [15] Mr. Makortoff was born in December 1981 and so he was 38 years old at the time of the offence. He is now 42 years old. He has two siblings. Mr. Makortoff has an eleven-year-old daughter. He separated from her mother when she was very young. He has supervised, by his parents, parenting time with his daughter. At the time of the offence, he was in a relationship with a person who has a son age eight to whom he plays a role of stepfather and still does despite the end of that relationship. He is currently in a relationship with Carina Gutierrez. She has two daughters ages twelve and seven. He plays a role in their lives.
- [16] According to reference letters written by his parents, Mr. Makortoff had a happy childhood until he experienced bullying in school. Despite the bullying, according to his parents, he retained a positive outlook and a big kind heart. His parents attribute his kind heart and good nature and the bullying, to the fact that he fell into the wrong crowd and started using drugs as a young man. He has abused drugs most of his adult life.
- [17] In terms of employment, Mr. Makortoff has a history of working in the construction industry on metal and concrete structures, including on the Olympic Village in the Lower Mainland in 2009. During 2009, Mr. Makortoff was injured in a workplace accident while working on a concrete structure and falling off a ladder.
- [18] In 2018, Mr. Makortoff worked on the construction of the Women's Transition Centre in Grand Forks. According to his counsel, he had the opportunity to work on a similar project in Kelowna, but did not take it because he wanted to stay close to his daughter. He has also worked on a construction project for his father.
- [19] In addition to construction, he has worked for Teck Cominco, at the water treatment plant in Elkford.
- [20] More recently, Mr. Makortoff worked for the Morrissey Creek Building Centre until the summer of 2022 when it was sold to Home Hardware. Subsequent to that, he has worked on acquiring old vehicles in a state of disrepair, restoring them, and selling for a profit.
- [21] Mr. Makortoff's paid employment has been interrupted by his participation in the drug trade, including incarceration, which I will describe in due course.

- [22] Mr. Makortoff owns property in Grand Forks. He has moved out of it, and now lives on a property owned by his parents also in Grand Forks.
- [23] As I have said, Mr. Makortoff has struggled with drug abuse most of his adult life and his counsel described him as an addict. According to his counsel, at the time of the offence, he was selling drugs in part to pay for his drug habit and that of his partner.
- [24] Mr. Makortoff has health issues other than his addiction. He had a stroke in July 2023. As a result of the investigations post stroke, he has been diagnosed with antiphospholipid antibody syndrome, referred to as APS for short. People with APS are susceptible to developing blood clots in arteries and veins which can lead to heart attacks and strokes. He also has high blood pressure.
- [25] The treatment for Mr. Makortoff's APS includes prescription medication options. One option is anticoagulant prescription medication. Another is Warfarin, a blood thinner. His doctor has advised that it is "extremely important" that Mr. Makortoff avoid use of alcohol and recreational drugs. The same doctor advised him that the consideration of which medication to use is not an easy choice and he should not be using drugs and alcohol when that choice is made.
- [26] Just prior to the first day of sentencing submissions, Mr. Makortoff developed a bad infection that required hospitalization. He was out of hospital at the time of that sentencing hearing on April 2, 2024, but I acceded to his request that we not conclude sentencing, but rather adjourn after defence counsel had made the submissions he was able to make at that juncture. The adjournment was so that defence counsel could obtain medical evidence pertaining to Mr. Makortoff's medical situation which at that time seemed to be taking a turn for the worse.
- [27] Mr. Makortoff has two previous convictions of possession of drugs for the purpose of trafficking. The first was in 2005 and related to marijuana. Mr. Makortoff was sentenced to a one-year conditional sentence. He was also convicted of failing to attend court on those charges. In July 2017, he was convicted of possession of cocaine for the purpose of trafficking and was sentenced to a one-year term of incarceration and a mandatory weapons prohibition pursuant to s. 109 of the Criminal Code, R.S.C. 1985, c. C-46.
- [28] According to letters written by Mr. Makortoff's parents, a friend, his current girlfriend, and a co-worker, Mr. Makortoff is generous, community-minded, hard working, and devoted to his family, especially his daughter and step son. One of the letter writers is a co-worker who had fallen on hard times due to partner abuse and addiction. Mr. Makortoff invited him to stay at his home and got him back on his feet. This person wrote that he has witnessed Mr. Makortoff help other people. Another friend who faces challenges wrote about Mr. Makortoff's generous nature, his skills as a parent, and about his involvement in community sports to the benefit of the community of Grand Forks.

- [29] As I will relate, when Mr. Makortoff addressed the Court, he spoke about his genuine wish to return to these community-minded activities. Mr. Makortoff's parents and his girlfriend who, as I have said, has two daughters, know of his addiction and this conviction and support him. They very much want him to have the opportunity to serve his sentence in the community so that he is not separated from his children and from them.
- [30] Mr. Makortoff addressed the Court on sentencing. He stated that he knew he had made bad decisions and mistakes and that he needed to address the wrongs he had done to his community. As I have said, he is eager to return to the activities he has undertaken to the benefit of his community. He advised the Court that he wants a chance to prove that he is capable of sobriety.
- [31] Mr. Makortoff advised the Court that, at the time of the offence, he was in a relationship with a woman who was using drugs and he acquired cocaine in order to avoid her using heroin which he thought was ruining her health. He advised that he had overcome dependency on heroin and had not used heroin for seven years at the time of sentencing.
- [32] Mr. Makortoff also advised that the relationship ended while these proceedings were ongoing. In the summer of 2023, he met his current partner, Ms. Gutierrez, and he told the Court he now has a new lease on life and on love. He advised that he is very committed to her and her two children. He described that they lived together on his parents' property and they have commenced the process of obtaining a business licence for his vehicle restoration business which he intends to run from his parents' property and which he seeks to have as a legacy for his family.
- [33] Mr. Makortoff also advised that since his 2017 incarceration, he has been limited in his parenting time with his daughter to supervised parenting and his goal is to get back to equal parenting time with his daughter.
- [34] Mr. Makortoff confirmed that he continues to use cocaine and alcohol. He advised the Court that these proceedings have been a heavy weight of stress since he was arrested and his continued drug use has been a crutch to deal with that stress. He told the Court that, if he receives a conditional sentence, he will take the steps to stop using drugs for good. He committed to the Court that the Court will never see him back in the same situation.

Impact on the Victim and/or Community

- [35] As has been stated in many cases, trafficking drugs is not truly a victim-less offence despite that there is no complainant before the court. The community, including the community of addicted drug users, are victims of those who seek to maintain their addiction by supplying drugs to them and profiting from that.

- [36] Despite Mr. Makortoff's assertion that he imported drugs himself to ensure that they were not contaminated with fentanyl and supplied them mostly to people he knows, he is not a benevolent dealer. He profited from selling drugs. The community to which he sold drugs suffered by his procurement and sale of drugs.

Positions of the Crown and the Defence

- [37] The Crown seeks a sentence of 22 months incarceration.
- [38] The Crown also seeks ancillary orders. The first is for a s. 109 firearm and weapons prohibition. Initially, Crown sought a lifetime prohibition on all firearms, specified weapons, and devices pursuant to s. 109(3) of the Criminal Code. The Crown has revised its position to a 10-year prohibition on non-restricted and non-prohibited firearms, weapons, and devices and a lifetime ban on restricted and prohibited firearms, weapons, and devices pursuant to s. 109(2) of the Criminal Code.
- [39] The second is a provision of a DNA sample pursuant to s. 487.051(3)(b) of the Criminal Code.
- [40] The third is an order for forfeiture of some items seized during the search of the vehicle Mr. Makortoff was driving at the time of his arrest and the return of other items seized during that search.
- [41] Mr. Makortoff submits that the appropriate sentence is a conditional sentence of house arrest for two years less a day, subject to opportunities to leave his home to attend to personal matters, with conditions of community service and a prohibition against use of alcohol and non-prescribed drugs.

Discussion

Principles of Sentencing

- [42] Section 718 of the Criminal Code provides that the fundamental purpose of sentencing is to protect society and to contribute to respect of the law and maintenance of a just, peaceful, and safe. Subsections (a) through (f) of s. 718 set out objectives to achieve the fundamental purpose, namely: denouncing unlawful conduct and its resultant harms; deterrence both general and specific; separating offenders from society where necessary to protect the public; assisting in rehabilitation; providing for reparation for harms done, and promoting responsibility in offenders and acknowledging the impact of their conduct. As explained in *R. v. Nasogaluak*, 2010 SCC 6, at para. 43, none of these factors are inherently more important than the other. Rather, the sentencing judge must determine which are important and persuasive given the circumstances of the case
- [43] Section 718.1 and s. 718.2 of the Criminal Code provide a non-exhaustive list of sentencing principles. Section 718.1 mandates that a sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender. Section 718.2 provides for the consideration of aggravating and mitigating circumstances, the principles of parity and

totality, and the instruction to consider all available sanctions other than imprisonment that are reasonable in the circumstances. The most fundamental of these principles is proportionality: *R. v. Ipeelee*, 2012 SCC 13 at para.37.

- [44] Proportionality is the primary animating principle; parity and individualization inform it. While the gravity of the offence may be the same regardless of who commits it, the individual offender varies. A fit sentence is one which reflects the gravity of the offence, the degree of responsibility of the offender, and the unique circumstances of each case: *R. v. Parranto*, 2021 SCC 46 at paras. 9-12, 205.
- [45] Cocaine is a Schedule I substance in the Controlled Drugs and Substances Act, S.C. 1996, c. 19. Pursuant to s. 5(3)(a) of the Controlled Drugs and Substances Act, a conviction of possession of cocaine for the purpose of trafficking gives rise to a maximum sentence of life in prison. The purpose of sentencing for convictions under the Controlled Drugs and Substances Act is set out in s. 10(1) as contributing to respect for the law and the maintenance of a just, peaceful, and safe society while encouraging rehabilitation and treatment of offenders in appropriate circumstances and acknowledging the harm done to the community.
- [46] Drug offences and possession for purposes of trafficking significantly engage the objectives of principles of denunciation and deterrence: *R. v. Voong*, 2015 BCCA 285 at paras. 1, 18. In *Voong*, the Court of Appeal for British Columbia also observed that those who commit such offences should expect a custodial sentence. I note that *Voong* was decided at a time when conditional sentences were not available for this offence. So that comment must be viewed within the legislative context which prevailed. However, I also note that several appellate authorities have indicated that for such offences there must be evidence that the offender has turned his or her life around or has taken definitive and effective steps towards rehabilitation in order to depart from a prison custodial sentence. I will have more to say about this below.
- [47] More generally, the Court of Appeal for British Columbia has provided guidance on how to take into account addiction and rehabilitation: *R. v. Kukelka*, 2010 BCCA 180; *R. v. Hansen*, 2012 BCCA 142; and *R. v. Datt*, 2014 BCCA 484. Those cases stand for the proposition that where there is evidence of a reasonable chance of rehabilitation, the principle of deterrence should yield to that prospect, especially in cases where incarceration will detract from the prospects of rehabilitation such that public safety is better served by rehabilitation.
- [48] Section 742.1 provides for conditional sentences where four criteria are met:
- (1) the offender must be convicted of an offence that is not punishable by a minimum term of imprisonment;
 - (2) the court must impose a term of imprisonment of less than two years;

- (3) the safety of the community would not be endangered by the offender serving the sentence in the community; and
 - (4) a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2 of the Criminal Code.
- [49] In *R. v. Proulx*, 2000 SCC 5, the Supreme Court of Canada comprehensively addressed the appropriate approach to conditional sentences under what was then relatively new amendments to the Criminal Code.
- [50] At paras. 58-60, Chief Justice Lamer explained that the requirement that the judge impose a sentence of imprisonment of less than two years does not require the judge to first impose a sentence of imprisonment of a fixed duration before considering whether that sentence can be served in the community and, in particular, it does not require the sentencing court to consider the principles of sentencing twice, once in deciding whether the sentence will be less than two years of imprisonment and again in determining whether a conditional sentence is appropriate. Rather, the sentencing court shall make a preliminary determination about whether the appropriate range of sentence is a term of imprisonment of less than two years and, if it is, then determine whether it is appropriate for the offender to serve his or her sentence in the community, taking into account the principles of sentencing.
- [51] A determination that having the offender serve the sentence in the community will not endanger the safety of the community is a prerequisite to imposing a conditional sentence: Criminal Code s. 742.1(a); and *Proulx* at paras. 63, 65. At paras. 68-76, Lamer C.J.C. described the requirement that the sentencing court be satisfied that the safety of the community would not be endangered by a conditional sentence as a condition precedent to the imposition of conditional sentence. In making this determination, the judge should consider the risk posed by the specific offender through considering two factors:
- (1) the risk of the offender re-offending; and
 - (2) the gravity of the damage that could ensue in the event of re-offence.
- [52] A consideration of the risk posed by the offender should include the risk of any criminal activity, and not be limited solely to the risk of physical or psychological harm to individuals.
- [53] If the prerequisites of s. 742.1 are satisfied, the sentencing judge should give serious consideration to the possibility of a conditional sentence in all cases by examining whether a conditional sentence is consistent with the fundamental purpose and principles of sentencing that I have described and that are set out in ss. 718 to 718.2: *Proulx* at para. 90.

- [54] At paras. 22, 41, 67, and 108 of Proulx, Lamer C.J.C. explained that a conditional sentence can provide denunciation and deterrence; however, there may be some circumstances where the need for denunciation or deterrence is so pressing that incarceration will be the only suitable way in which to express society's condemnation of the offender's conduct or to deter similar conduct in the future.
- [55] Section 742.1 also lists specific circumstances that preclude a conditional sentence. There is no dispute that they do not preclude the availability of a conditional sentence in this case. So, if I make a preliminary determination that a fit sentence is one of less than two years and that community safety is not endangered, I will go on to determine whether a conditional sentence is a fit sentence.

Preliminary Determination of the Appropriate Range

- [56] The Crown submits a sentence of 22 months of incarceration and the defence submits a sentence of two years less a day of imprisonment through house arrest.
- [57] Accordingly, this case falls into the category described by Lamer C.J.C. in Proulx at para. 59, as one where counsel agree that the sentence should be imprisonment of two years or less reducing the necessity for a lengthy preliminary assessment of this requirement.
- [58] Crown and defence have referred me to: R. v. Kozma, 2000 BCCA 440; R. v. McKibbin, 2020 BCCA 337; R. v. Tucker, 2019 BCSC 961; Deol; R. v. Fernquist, 2021 BCSC 344; R. v. Schuler, 2021 BCPC 192; and R. v. McEwen, 2019 BCPC 265. Based on those cases and cases cited in those cases, I am satisfied that the range for this offence is 15 months to 36 months' imprisonment.
- [59] As I will discuss below, there are both mitigating and aggravating factors. I consider the offence grave and Mr. Makortoff's moral culpability would be high due to the quantities of drugs he had in his possession, but given his addiction and the role it played in his offending overall, he bears medium moral culpability. I make a preliminary determination that a sentence of slightly less than two years of imprisonment of some form is appropriate.

Safety of the Community

- [60] Mr. Makortoff, through his counsel, asserts that he is addicted to drugs. His parents' letter of support indicate that he had been abusing drugs most of his adult life. Mr. Makortoff asserts that he traffics drugs in order to secure a safe supply for himself (and, at the time of this offence, his spouse) and to pay for his drug supply. Because of this dynamic, it is necessary to consider whether his addiction raises the risk of reoffending and, if so, whether the risk of reoffending poses a danger to his community.
- [61] Mr. Makortoff has two prior convictions for possession of drugs for the purpose of trafficking. As I have said, on the first, he was sentenced to a conditional sentence and, on the second, he was sentenced to incarceration.

- [62] The offence of possession for the purpose of parenting time of a Schedule I drug such as cocaine was eligible for a conditional sentence in 2000 when the Supreme Court of Canada decided Proulx (see para. 80). In 2005, when Mr. Makortoff was convicted of possession for the purpose of trafficking of marijuana, a conditional sentence order was available for that offence and he was sentenced to a one-year conditional sentence.
- [63] However, this offence, possession for the purpose of trafficking a Schedule I drug, was excluded from conditional sentences at some time between then and now and, in particular, was not available at any time between 2014 when Mr. Makortoff committed the same offence and July 2017 when he was sentenced to a one-year incarceration for that offence. For that reason, it is not possible to know whether, had a conditional sentence been available at that time, Mr. Makortoff would have reoffended as he did in October 2020 when he committed this offence. On the other hand, the significant deterrent effect of one year in prison did not address Mr. Makortoff's problem with drug abuse or prevent him from reoffending, which he did within a year and a half after that sentence expired.
- [64] It is apparent that neither form of imprisonment has proven to address the specific deterrent objective or the rehabilitation objective for Mr. Makortoff.
- [65] Mr. Makortoff relies on Kozma, decided shortly after Proulx, in which the Court of Appeal for British Columbia allowed an appeal and substituted a conditional sentence for a sentence of incarceration for Mr. Kozma who had been convicted on several counts of possession of cocaine for the purpose of trafficking. In that case, the pre-sentence report indicated that the offender's cocaine abuse had ended with his arrest on the charges for which he was convicted and included a recommendation that he was appropriate for community supervision. At the time of the appeal, the offender was living in a stable family situation and was involved in deterring the use of drugs by youth in the community.
- [66] In *R. v. Charlie*, 2008 BCCA 44, the Court of Appeal for British Columbia upheld a conditional sentence order for possession of cocaine for the purpose of trafficking because the offender had taken exceptional steps towards his rehabilitation which were described and supported in a presentence report. See also *R. v. Amhaz*, 2013 BCCA 348.
- [67] Consistent with these cases where rehabilitation is a tangible prospect, in *R. v. Ahmed*, 2001 BCCA 504, the Court of Appeal for British Columbia overturned a conditional sentence order of 18 months given to a 29-year-old man who sold drugs at a street level, including one dial-a-dope sale. At para. 8, the Court of Appeal held that where a case involves trafficking in hard drugs, a conditional sentence order must be supported by some significant factor or factors including reasons for the offending or presentence efforts at rehabilitation. The Court of Appeal substituted eight months' incarceration for the conditional sentence. See also Voong at para. 59 on the issue of the circumstances in which a conditional sentence will be appropriate for the offence of possession for the purpose of trafficking.

- [68] Mr. Makortoff's counsel advises that, at the time of this offence, Mr. Makortoff trafficked drugs in order to secure a safe supply for himself and in order to sell some of it to fund his drug addiction. While this is not evidence, it is a submission made by Mr. Makortoff's counsel that links Mr. Makortoff's drug use to trafficking.
- [69] Ms. Gutierrez and Tom Makortoff both refer to Mr. Makortoff working on his addiction in the letters they have submitted to the Court on this sentencing. However, the medical records put into evidence include references to the fact that, as of May 2024, Mr. Makortoff told his doctor that he was drinking three to four drinks of alcohol daily and using cocaine daily. While addressing the Court on sentencing, Mr. Makortoff acknowledged his continued use of cocaine and alcohol, but also assured the Court that, if he is given what he calls a second chance through a conditional sentence, he will take the step to cease use of drugs for all time.
- [70] Counsel for Mr. Makortoff advised that Mr. Makortoff has seen a counsellor since the time of this offence but for issues other than his drug use and abuse. Mr. Makortoff has not sought treatment for his addiction or developed a plan to do so in conjunction with his request for a conditional sentence order. Mr. Makortoff has indicated, through his counsel, that he will comply with any direction his sentence supervisor makes about treatment for addiction.
- [71] In Proulx at para. 72, Lamer C.J.C. addressed the risk of reoffending and remarked that a sentencing court could impose a treatment order on an offender as part of a conditional sentence " notwithstanding that the offender has a lengthy criminal record linked to this addiction, provided the judge is confident that there is a good chance of rehabilitation and that the level of supervision will be sufficient to ensure that the offender complies with the sentence".
- [72] In this case, unfortunately, I do not have the confidence referred to by Lamer C.J.C. because, while Mr. Makortoff has advised that he will stop using drugs if he is given a conditional sentence, he has not supported this stated intention with any concrete steps to rehabilitate in the three-and-a-half years since his arrest. He has not developed a plan to address rehabilitation in a way that makes rehabilitation a tangible prospect.
- [73] While I believe Mr. Makortoff means what he says, that he would try to take steps to become abstinent, the fact that he has not taken steps to do so when that would clearly improve his chances to avoid incarceration demonstrates the power of addiction. In addition, he had a serious stroke in July 2023 and, although he asserts that he stopped using for a while that did not last. After that stroke, about a month ago, his neurologist told him that it is extremely important for the management of his blood clotting problem that he cease using alcohol and recreational drugs. He continues to consume both daily. This speaks to how challenging the health issue of addiction is and how highly entrenched Mr. Makortoff's serious health problem with addiction is. I do not believe that Mr. Makortoff can fulfill the commitment he makes without a formal plan that addresses this serious health problem and is supported by those with experience dealing with longstanding entrenched addiction. He has not provided

such a plan.

- [74] Given the nature of Mr. Makortoff's addiction, the Court cannot assume that Mr. Makortoff will be able to comply with the condition that he abstain from the use of drugs that are not prescribed. This gives rise to the concern that the Court ought not impose a condition that an offender is likely to be able to comply with, and that such a condition is not adequate to prevent Mr. Makortoff from continuing to use cocaine and to re-offend due to the connection between his trafficking of cocaine and use of cocaine.
- [75] Counsel for Mr. Makortoff explains that he understands that the stress of these proceedings is currently driving Mr. Makortoff's current daily use of cocaine and alcohol. Mr. Makortoff confirmed that when he addressed the Court. A significant factor in the stress is the prospect of incarceration. Mr. Makortoff told the Court that the stress of these criminal proceedings, especially the prospect that they will further interfere with his parenting time with his daughter, have been crushing and have caused him to continue to use drugs and alcohol as a crutch. Mr. Makortoff submits, through his counsel, that if he receives a conditional sentence, the stress relief will be such that he will be able to achieve abstinence.
- [76] Regretfully, I also do not accept this submission. It is a bare submission undermined by Mr. Makortoff's history, present circumstances, and the nature of addiction. As I have said, I believe that the prospect of incarceration and everything that would affect, especially his role in the lives of his daughter and step children, motivates Mr. Makortoff to commit to overcome his addiction, but logically since his last incarceration and since his arrest on this offence, he has recognized that his use of drugs is jeopardizing his relationship with his daughter and his stepchild, but he has been unable to stop using drugs. Stress is not an adequate explanation or at least one that leads the Court to conclude that Mr. Makortoff will be able to become abstinent if he is not incarcerated. He will not be free from the threat of incarceration because if he breaches any of the conditions, he will be very likely to be incarcerated.
- [77] In the circumstances of ongoing addiction and no treatment plan to address the ongoing addiction, an assertion that a conditional sentence order premised on abstinence is unrealistic. The Court cannot proceed on the basis that conditions it imposes and a sentencing supervisor can be effective when Mr. Makortoff has not taken any steps to pursue rehabilitation.
- [78] With regard to the gravity of the damage that could ensue in the event of re-offence, the community is at risk that Mr. Makortoff will traffic drugs in order to secure a safe supply of drugs and to make enough money to afford them. With regard to whether the drug supply that he provides is safe in the sense of not being cut with fentanyl and fentanyl derivatives, I observe that there is no actual evidence that Mr. Makortoff benefits the drug users in the community by providing a supply of drugs that is safe. Cocaine that is not laced with fentanyl is, nevertheless, illegal, addictive, and has negative consequences for the health of those who use it: Deol at para. 21. Trafficking cocaine is included in the judicial description

of drug trafficking that is a scourge in modern society.

- [79] I conclude that permitting a situation where Mr. Makortoff will resort to his previous method of paying for the drugs to which he is addicted through acquiring and selling cocaine poses a grave danger for the community. For that reason, I conclude that a conditional sentence is not available in this case.

Mr. Makortoff's Request That I Wait Before Imposing Sentence

- [80] Submissions on sentencing commenced April 2, 2024. As I have already related, I adjourned that hearing to permit Mr. Makortoff to adduce more medical evidence which might impact his request for a conditional sentence. He has provided further information at this stage of sentencing. He does not submit that his medical situation is such that his life would be endangered by incarceration as opposed to a sentence served in the community. This makes this case different from McKibbin where the Court concluded there was a risk that the particular offender could suffer a life-threatening illness in prison that could not be effectively treated there. Mr. Makortoff submitted that a conditional sentence will allow him to seek treatment of his condition with his family doctor, which is his preference.
- [81] At this stage of the sentencing hearing, Mr. Makortoff also requested that if the Court is going to sentence him to imprisonment, that the Court delay the sentencing for a few weeks so that Mr. Makortoff has time to prepare for that. The Crown's position is that this sentencing has already been adjourned once at Mr. Makortoff's request. Mr. Makortoff is aware that an imprisonment sentence is sought by the Crown and may ensue and he does not need more time to prepare for that eventuality. The Crown also points out that Mr. Makortoff's request does not include information about any specific arrangements he needs to make.
- [82] I agree with the Crown's position. I acknowledge that Mr. Makortoff has demonstrated that learning of my decision to impose a sentence of imprisonment will be difficult for him. However, he has not explained how more time to prepare for it will serve any specific interest that I can weigh against the interest of the administration of justice in moving this matter to its conclusion.
- [83] I do not consider further delay to be in the interests of the proper administration of justice. Mr. Makortoff was convicted of this serious offence in December 2023. Sentencing did not proceed promptly due to Mr. Makortoff's s. 11(b) application for a judicial stay. Despite the efforts of the Court and counsel to schedule sentencing as promptly as possible after that application, I adjourned it after it commenced for the reasons I have already explained and with the defence waiver of any and all delay due to that adjournment. Although Mr. Makortoff will waive any delay due to the further delay he now requests, I have concluded that the administration of justice would be badly served by further delay.
- [84] In short, the time has come to sentence Mr. Makortoff and for him to begin his sentence.

Custodial Sentence

- [85] I turn to consider the appropriate length of a sentence of imprisonment.
- [86] As I noted above, the range is 15 to 36 months and I have made a preliminary determination that a sentence of slightly less than two years is fit.
- [87] Sentencing ranges are a tool to determine a fit sentence. They assist the court to determine a sentence that has been applied to similar offenders convicted of similar crimes: *R. v. Smith*, 2017 BCCA 112, at para. 35, citing *R. v. M.C.A.*, [1996] 1 S.C.R. 500, at para. 92. However, they are only tools and must not overtake the unique circumstances of the offender before the court and the principle of proportionality: *Parranto* at paras. 3-4, 16-28, 36-37, 41, 205; and *Smith* at para. 35.
- [88] In *Voong*, the Court of Appeal for British Columbia reviewed several cases and held that the range for a first-time offender in a dial-a-dope operation, which is usually considered very serious street-level dealing, is between six and 18 months incarceration: at paras. 44-59; and *McKibbin* at para. 5.
- [89] In *Deol*, Riley J. thoroughly reviewed the authorities and concluded that the range for persons who are involved at the "ounce level" to be higher than the *Voong* range for first-time dial-a-dope offenders and considered an appropriate range to be 15 months to 36 months, relying heavily on *R. v. Mackay*, 2019 BCSC 1112. Justice Riley sentenced Mr. Deol, who had prior convictions that were serious but dated and unrelated to drug trafficking and whose offending straddled midlevel and street-level distribution drug operations, to 21 months. Mr. Deol pleaded guilty and had taken a number of positive steps since his arrest.
- [90] In *Kozma*, the Court of Appeal for British Columbia held that a prison sentence of two years was within the range for convictions of possession of cocaine for the purpose of trafficking in amounts that ranged from half a gram to three-quarters of a pound.
- [91] In *Fernquist*, the offender pleaded guilty to possession of cocaine for the purpose of trafficking. He was involved in a drug operation that had aspects of midlevel and aspects of low-level operations. A very large quantity of cocaine, a brick with a street value of \$105,000, was found in his home. He had no previous convictions. Justice Mayer accepted a joint submission of two years incarceration.
- [92] In *Schuler*, the offender engaged in several drug deals ranging from grams of cocaine to ounces of cocaine characterized as exceeding a purely street-level drug trafficking operation. He has prior convictions for possession for the purpose of trafficking. He had taken positive steps towards rehabilitation since his arrest. He was sentenced to 20 months incarceration.
- [93] The aggravating circumstances in this case are:

1. Mr. Makortoff has two previous convictions of possession for the purpose of trafficking, one of which involved cocaine; and
 2. Mr. Makortoff was acquiring the cocaine in quantities and a form that indicated he had access to supply at the wholesale level.
- [94] In this case, the defence asserts that Mr. Makortoff's substance abuse caused or contributed to the commission of the offence for the reasons I have already described. While I accept what defence counsel advised about this as a basic proposition, and I have factored it into my consideration of his risk to re-offend, it does not rise to the level of a mitigating factor because it is not supported by evidence. Evidence is necessary to support this type of mitigating factor: *R. v. Merkel*, 2021 BCCA 445, at paras. 47-54; and s. 724.3 of the Criminal Code.
- [95] Mr. Makortoff's acknowledgment that his offending has harmed his community and that he needs to make amends for that is mitigating.
- [96] Mr. Makortoff's contributions to his community as a person who lends a hand up and who supports those who have fallen on hard times is mitigating.
- [97] As I have discussed above, Mr. Makortoff's offending includes aspects of midlevel drug trafficking as well as aspects of street-level drug dealing. The offending is more grave than his moral culpability, given that this is not a clear case of mid level trafficking purely for profit.
- [98] The need for specific deterrence is, however, high given his prior offending. The need for denunciation is high given the dangers of cocaine and given Mr. Makortoff's prior offending. As many other courts have expressed, the importance of denunciation cannot be understated in cases of such dangerous drugs.
- [99] With regard to rehabilitation, as I have described, it is a pressing need for Mr. Makortoff. Unfortunately, also for the reasons I have related, it cannot support a non-custodial sentence. I have not been provided with any submissions with regard to rehabilitation in determining the length of a sentence of imprisonment.
- [100] Since I have not found a conditional sentence to be appropriate because of the statutory pre-condition of community safety, I have not addressed Mr. Makortoff's health issues in relation to his request for a sentence served in the community. However, as I have also related, the information the Court has about his health condition does not include any information that would lead me to conclude that it cannot be managed in a prison setting.
- [101] I return to proportionality, the most fundamental principle. It is informed by parity and, to that end, I have taken into account the sentences in other cases. Proportionality is also highly individualistic. Mr. Makortoff is a person who has previous relevant and relatively recent convictions which have not deterred his offending, but he is also a person who is addicted and so perhaps it is not surprising that deterrence has not yet been effective. His

moral culpability is medium for this grave offence. While a two-year or a two-year-less-a-day sentence seems to accord best with the cases I have reviewed, I consider that it should be slightly less than that because I believe Mr. Makortoff wants to rehabilitate and take advantage of his currently strong family situation. He wants to play a positive role in his daughter's life and his stepson's life. He wants to be a positive role model within his family and his community.

[102] Taking all of this into account, I impose a sentence of 22 months in custody.

Ancillary Orders

[103] The Crown initially sought a lifetime weapons prohibition under s. 109(3) on the basis that this is not Mr. Makortoff's first conviction of possession of drugs for the purpose of trafficking. However, after considering *R. v. Schirmer*, 2019 BCSC 1404, at paras. 73-78, and the cases cited by Justice Ehrcke in that decision, the Crown has recognized that, by failing to give advance notice that it would be seeking a lifetime prohibition, it should restrict its request to an order under s. 109(2).

[104] The defence does not dispute the appropriateness of an order under s. 109(2) despite that Mr. Makortoff is under a lifetime prohibition outstanding order made by the Provincial Court. The Crown asserts that, notwithstanding the Provincial Court order, an order ought to be made by each court sentencing where an order is mandatory, because other orders are susceptible to being overturned on appeal. I am satisfied that it is appropriate to make the order under s. 109(2).

[105] The request for a DNA sample is a discretionary order pursuant to s. 478.04 of the Criminal Code. The Crown asserts that it is appropriate in this case due to Mr. Makortoff's prior related convictions. The defence does not object to this order. I make a DNA order.

[106] The order pertaining to forfeiture and return has been agreed to by the Crown and defence.

Decision

[107] Mr. Makortoff, please stand. I sentence you to 22 months incarceration.

[108] You are prohibited from possessing any weapon, other than a prohibited firearm or restricted weapon, or any cross-bow, restricted weapon, ammunition, and explosive substance for a period of 10 years. You are prohibited from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device, and prohibited ammunition for life. Any such items presently in your possession must be surrendered within 24 hours.

[109] Pursuant to s. 487.04 of the Criminal Code, I make an order authorizing the taking of samples of bodily substances for you. The samples will be taken from you while you are in jail and you must submit to the taking of the samples.

[110] I have signed the consent order of forfeiture and return.

[111] Mr. Makortoff, I have not acceded to your request to serve your sentence through house arrest. I know, from what you told me yesterday, and from your counsel's very able submissions, that this will be very hard for you. It is apparent to me that you have the support of your family and your new partner. You have children in your life whom you care about deeply. Even though you are not going to be pursuing rehabilitation at home, I urge you to take all the opportunities that you will be afforded to pursue it in custody. Use the programming you will be offered to come out of custody as a person who can take advantage of the support you have, and undertake the awesome responsibilities of being a father, free from the oppressive burden of addiction. I wish you the very best of luck in this regard.

"Matthews J."

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