

CANADA / JUDGMENT

R. v. McMillan

2020 BCSC 2269

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. McMillan,

2020 BCSC 2269

Date: 20200904

Dockets: 40746-2

42001-2

Registry: Duncan

Regina

v.

Shawn Carl McMillan

Before: The Honourable Mr. Justice Crabtree

Oral Reasons for Sentence

Counsel for the Crown:

T.I. McFadgen

Counsel for the Defence:

T.W. Morino

Place and Date of Trial/Hearing:

Duncan, B.C.

February 4, 2020

Place and Date of Judgment:

Duncan, B.C.

September 4, 2020

- [1] THE COURT: Mr. McMillan appears before the court today to be sentenced on two separate indictments. On Indictment 40746-2, on a previous date, Mr. McMillan entered pleas of guilty to Counts 4 and 5. On Count 4, that he, on June 30, 2018, unlawfully possessed a controlled substance, to wit cocaine and fentanyl, for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA]. On Count 5, on the same date, that he unlawfully possessed a controlled substance, methamphetamine, for the purpose of trafficking, contrary to s. 5(2) of the CDSA. On today's date, he appeared on Indictment 42001-2 and entered a plea of guilty to one count, on March 14, 2019, that he unlawfully possessed a controlled substance, methamphetamine, for the purpose of trafficking, again contrary to s. 5(2) of the CDSA.
- [2] I pause here to say that in the event these reasons are transcribed, I reserve the right to edit for clarity, but not to change the reasoning or result.
- [3] I turn first to the circumstances of the offences that Mr. McMillan has entered pleas of guilty to. They were summarised in detail by the Crown during the course of their submissions. Mr. Morino, on behalf of Mr. McMillan, took no issue with any of the circumstances that were recounted, and it is on that basis I will proceed to sentencing of Mr. McMillan and briefly summarise those circumstances.
- [4] Turning first to Indictment 40746, an undercover operation was initiated here in the Duncan area of Vancouver Island, in March of 2018. As a result of information obtained, a search warrant was obtained and executed at the residence at 2878 Hillside in Duncan, B.C. In the course of the execution of the search warrant, Mr. McMillan was located in the upstairs kitchen area of the residence. RCMP members attending at the residence undertook a search of the entire residence. As a result, they located a bedroom in the basement which was connected to Mr. McMillan. Within that area, they located three grams of a mixture of cocaine and fentanyl, and six grams of methamphetamine, together with scales and some packaging material. Of note, there was a replica .45 handgun, which was described as a BB gun, located in that room; together with score sheets, setting out various transactions that Mr. McMillan was connected to.

- [5] A review of those score sheets indicates that Mr. McMillan was engaged in the sale of illicit substances. Also in those same score sheets, there were notations that he was using the substances for his own personal consumption. That is a relevant factor in these circumstances, for reasons that I will come back to in a moment. But simply put, throughout the course of these events, it is acknowledged and accepted that Mr. McMillan was an addict and in the throes of an addiction, most recently an addiction to heroin.
- [6] The house itself could only be described as a drug house for the purposes of packaging illicit substances, the sale of illicit substances from that area; and also, as a base from which individuals would be engaged in a dial-a-dope operation. It is clear Mr. McMillan was engaged in that activity but I draw the distinction here, based on the evidence before me, he was not the organiser of the activity but one of the participants. It was not his residence, though he had a room in the residence.
- [7] As a result of his involvement on that date, Mr. McMillan was ultimately arrested, released, and returned to the community. Approximately one year later, as a result of another police investigation, he became involved in the circumstances giving rise to the charge in Indictment 42001-2. On that occasion, as a result of observations made between Mr. McMillan and another individual by members of the investigating team, Mr. McMillan was arrested and searched. As a result, he was found in possession of a substantial amount of methamphetamine. All totalled, it was just short of 1½ ounces. At the time that his involvement was noted, he appeared to be engaged in a drug transaction.
- [8] The value of the substance involved in the second offence was approximately \$4,000. As I say, a significant amount, which takes it out of the range of the regular individual involved or engaged in a dial-a-dope form of operation. Here, his involvement appears to approximate that of a mid-level trafficker. But as the Crown notes, it did not have all the trappings or reach level of a sophisticated enterprise. Nonetheless, you were in possession of a significant amount of an illicit substance.
- [9] To go back and just to round out the first set of circumstances, the value attributed to the methamphetamine and the cocaine and fentanyl which Mr. McMillan was found in possession of on June 30, 2018, totalled approximately \$520 to \$1,000. Of significance is that as a result of his involvement in the second matter in 2019, he was arrested and taken into custody. He spent three months, real time, in pre-trial detention. Following that and on the basis, I presume, of a review of his pre-trial detention status, he was released, as a plan had been put forward for him to attend a recovery facility. At the end of July 2019, he became a resident at the Realistic Success Recovery Society, located in Surrey, B.C. He was essentially under house confinement, required to remain at that facility. I will come back to that in more detail, because his involvement in that recovery house plays a significant role in the ultimate determination of sentence in this matter.

- [10] In terms of Mr. McMillan's personal circumstances, they are amply set out in a pre-sentence report which was filed August 26, 2020. I will not review it in great detail, but I think it is important to highlight several aspects of it, including that Mr. McMillan is approximately 41 years of age, and he had a background which I think is certainly fairly described as tragic circumstances. He was raised by his mother up until age 17. She served as the sole means of support for Mr. McMillan, and passed in his 17th year. Mr. McMillan then was raised by extended family. It appears that he became addicted to both alcohol and drugs as a way in which to cope with the circumstances that occurred during his teenage years. Reliance on alcohol and more recently drugs, including an addiction to heroin, is the result of an accident he suffered. The pre-sentence report notes that Mr. McMillan was struck by a drunk driver. He started using heroin to manage his pain relief and became fully addicted. He engaged in drug trafficking to support that habit. Mr. McMillan does not offer this as an excuse, but his addiction does lie at the base of why he became involved in the activities in 2018 and 2019 now before the court.
- [11] Throughout his addiction he has maintained, to the extent that he can, relationships with three of his children. He has a daughter, 17; a daughter, 10; and a daughter, seven. It is clear that they mean a great deal to Mr. McMillan. He has in recent times attempted to become actively involved in their lives; and if given the opportunity and the ability to move back to this area, he will continue to be engaged in their support and development.
- [12] The report from the recovery house is, in a word, glowing. The manager of the resource described Mr. McMillan as a positive contributor to that particular resource, to the extent that he is most recently the house manager; and that after having come to grips with an understanding as to his addiction, he has attempted to support others that were in the residence who were working towards a similar end. I was struck by the reports and the notes. First, a letter by Susan Sanderson, the executive of that resource. I will not read it all. That letter contains passages in Mr. McMillan's own words, which demonstrate his involvement in the program. He was noted to be respectful, helpful, and works well with both the men and women in the facility. In his role as house manager he excelled. He guided a group of young men to follow the rules, accept responsibility for their actions, and participate in the recovery programs offered to them. Mr. McMillan also took a position in what was described by the home group as a weekly A.A. meeting.
- [13] While at the recovery centre, Mr. McMillan has put in place a plan for reintegrating with the community, when that occurs. His desire is to return to this area so that he can be closer to his daughters, and because he has a work opportunity available to him. I understand that there is a former employer who is prepared to re-hire Mr. McMillan. Mr. McMillan trained as a carpenter and had been engaged in that particular industry for about 20 years or so. This individual has offered to come forward to not only offer Mr. McMillan a job, but also to offer a place to reside as he reintegrates in the community. All of which is important when one is attempting to deal with, as Mr. McMillan has and will continue to do for the rest of his life, the issue of addiction.

- [14] The report from Ms. Sanderson was dated February 21, 2020. As counsel notes, a certificate of achievement dated August 21, 2020 indicates that his involvement continues and is current. In addition, there was a letter filed on his behalf by a Matthew Lawless, dated March 13, 2020, which I have read and should also become part of the record. I will pause here to say that I have referred to three documents, the letter of Ms. Sanderson, the certificate that Mr. McMillan obtained or was granted, and the note from Mr. Lawless, all of which should become the next three exhibits on the proceeding. My suggestion is to mark photocopies, so these letters can be returned to Mr. Morino and/or Mr. McMillan in -
- [15] CNSL T. MORINO: Thank you, My Lord. Thank you.
- [16] THE CLERK: Exhibits 3, 4, and 5, My Lord:
- EXHIBIT 3 (On Sentence): Copy of 1 page Letter dated February 21, 2020 from Susan Sanderson.
 - EXHIBIT 4 (On Sentence): Copy of 1 page Certificate of Achievement awarded to Shawn McMillan.
 - EXHIBIT 5 (On Sentence): Copy of 1 page letter dated March 13, 2020 from Mathew Lawless.
- [17] THE COURT: Back to the pre-sentence report, the heading "Assessment," at p. 6, the author notes that Mr. McMillan has complied with the terms of his release, and there are no concerns in that regard. I have not been apprised of any breaches or misconduct that has arisen while he has been in the recovery centre this past 13 months. The pre-sentence report also indicates Mr. McMillan's awareness as to the danger of drugs, and how drugs and the crime that is associated with it make the community unsafe. He is embarrassed by his actions. He recognises that his actions have brought pain to his loved ones by letting them down, and it is further noted that Mr. McMillan expressed to the probation officer that he is not proud of the life he was living, and it is important for him to turn his life around to be a role model for his children. Again, those are some of the highlights from what is a positive pre-sentence report.
- [18] While Crown did not specifically refer to the impact on the community as it relates to fentanyl in a direct and specific way, they certainly alluded to information that has been available over the past several years. I think it is important for the record to recognise that fentanyl is a highly addictive synthetic opioid that is plaguing our communities, and many of the more vulnerable members of it. As a result of the impact it has on those vulnerable members, it impacts their families, friends, and acquaintances, often with devastating results. The crisis, and I will describe it as a crisis, has been outlined by the B.C. Coroners Service in reports that they have issued. Taking from their 2018 report, an example: in 2016, there were 668 deaths; 2017, 1,220 deaths; and in 2018, as of August 31, 856 deaths. So, I simply say that to Mr. McMillan because it demonstrates in real terms the grim reality that your involvement, and particularly in dealing with fentanyl, causes people of this province and in the community.

- [19] Now, in terms of sentencing Mr. McMillan, the Crown and defence have put before the court a joint submission that Mr. McMillan, taking into account the circumstances of the offence, the circumstances of the pre-trial custody, the efforts that Mr. McMillan has engaged in over this past 13 months, the insight that he has demonstrated, and the plan that he has in place, be sentenced to a suspended sentence and a period of probation of three years be imposed.
- [20] On sentencing, the Crown notes that the following factors should be taken into account: that this case involves the possession of illicit substances, including one count involving fentanyl; Mr. McMillan's prior criminal record, which I will refer to in a moment; and that Mr. McMillan was motivated, in these circumstances, by addiction. Defence counsel takes the position, recognising the seriousness of the offence, that the court should consider the efforts that have been taken by Mr. McMillan, and that he has entered a guilty plea in the circumstances.
- [21] So, Mr. McMillan, the vexing question that I have is: What is the appropriate sentence I am required to impose based upon the framework of the Criminal Code and the CDSA, which sets out the various sentencing principles and the considerations that the court needs to take into account? You know that the court is not bound by a joint submission that is made by the two lawyers today. You also know that the court must give that submission very serious consideration. So, let me just tell you some of the considerations I have taken into account. I am going to refer to a couple of cases to impress upon you the seriousness of this event, but I am going to tell you at this point that I am going to accede to the joint submission that was made to me by counsel. But you need to know that the manner of this sentence will enable the Crown, if you find yourself in breach of the probation order over the course of the next three years, the right or opportunity to bring this matter back before the court for you to be sentenced on those matters. So, you need to know what courts have done in the past when faced with offences similar to the ones that you have committed, but did not have the exceptional circumstance which I find exist, in this case.
- [22] Section 718 of the Criminal Code sets out some general guidelines and principles and importantly, they include to denounce the unlawful conduct, to deter the offender and others who are of a like mind from committing these types of offences. In the sentencing of this particular type of offence, denunciation and deterrence are, in my view, paramount.
- [23] Sentencing is also guided by the mitigating and aggravating factors, some of which I have referred to. I place significance on the fact that you acknowledge responsibility by entering a guilty plea to these offences. I see as a mitigating factor that you took steps, on your own initiative, to begin a road to recovery; and that you have achieved considerable success, thus far, in achieving that goal. The aggravating factors which also are at play are that these two offences that I am sentencing you on, are separated in time by approximately a year, and that you have a criminal record.

- [24] I pause here to talk about your criminal record for a moment, to say that your criminal record is dated, which does not mean that the court can ignore it, but it is a significant factor to take into account, as well as the fact that it is unrelated to what I am called upon to sentence you on today.
- [25] In addition, the Court of Appeal cases that guide this Court in terms of the appropriate sentence, several of them were referred to this morning. I will give you some detail with respect to the cases that I have to consider.
- [26] The case of *R. v. Voong*, 2015 BCCA 285, a decision of our Court of Appeal, stated in the first paragraph:
- [1] Those who embark in drug trafficking engage in serious criminal conduct. Absent exceptional circumstances, in British Columbia, they should expect to be sent to prison.
- [27] So, that is the starting proposition. In that same case, Madam Justice Bennett talked about exceptional circumstances, but she also said that a sentence for a first offence, or with a criminal record, a dial-a-dope drug seller will be in the range of six to 18 months in prison. Later, in the decision of *R. v. Smith*, 2017 BCCA 112 that range the Court discussed when dealing with sentencing an individual such as yourself involving fentanyl, that sentence could be between 18 to 36 months in prison. But, there is an avenue through exceptional circumstances, where an individual is not required to be sent to jail or a period of imprisonment imposed.
- [28] Returning to the comments of Bennett J. in *Voong*, she said:
- [59] Exceptional circumstances may include a combination of no criminal record, significant and objectively identifiable steps towards rehabilitation for the drug addict, gainful employment, remorse, and acknowledgment of the harm done to society as a result of the offences.
- [29] Mr. McMillan, you have a record but you fit in with those other factors that the court identified. You should know that exceptional circumstances does not mean the court having sympathy for an individual's background, such as yours. It is fair to say, rather, that you had a difficult background brought about not by your own doing, and that creates a certain set of sympathetic circumstances, but that does not factor into the assessment, in my view. The exceptional circumstances are what has occurred more recently, in the steps that you have taken. That is what brings you, in this case, into a non-custodial sentence. Your lawyer, Mr. Morino, referred to another case, *R. v. Schneider*, 2019 BCCA 310. In this case, the Court reiterated, first, that periods of incarceration are normally to be imposed but again, in exceptional circumstances a suspended sentence may be an appropriate disposition.
- [30] In summary, Mr. McMillan, I accept that you have demonstrated a degree of remorse by your conduct. I take into account the 13 months that you have devoted your energies full-time to your recovery, but in addition that you have gone beyond your own recovery and recognise and have insights and understanding to your addiction and shared that with

others. Taking into account those letters in support and the fact that you have put together a transition plan in the event you were to be released, and that you have work and a residence which can be at least made available to you in the short term while you get your feet back on the ground here in Duncan, B.C.

- [31] For all of those reasons, I am going to suspend the passage of sentence and place you on probation for a period of three years. It is not going to be an easy three years, because during that time you will be subject to the oversight of the probation office. Your activities in the community and in your personal life will continue to be curtailed as a result of this order. As I say, in the event that you find yourself having breached the order, you will face the very real possibility that you will be back before this Court, with the Crown seeking to impose a sentence on this matter.
- [32] So, the terms of your probation are as follows, sir. You must keep the peace and be of good behaviour. You must appear before the court when required to do so by the court. You must notify the court or the probation officer in advance of any change of name or address. And, Madam Clerk, I do not know if you have a copy of this, but I am certainly prepared to have that filed afterwards.
- [33] THE CLERK: [Indiscernible].
- [34] THE COURT: Thank you. You must report by phone to a probation officer at 238 Government Street, Duncan, B.C., by 3:00 p.m. today. After that, you must report as directed by your probation officer - such reporting, which can include by telephone, at the discretion of your probation officer. On first reporting to the probation officer, you must provide your residential address and phone number, and not change your address or phone number without the prior written permission of your probation officer.
- [35] You must obey a curfew by being inside your place of residence between 8:00 p.m. and 6:00 a.m. daily, for the first 12 months of this order. For the following 12 months of this order, you must obey a curfew between the hours of 12:00 a.m. and 6:00 a.m. So, essentially, I pause here just to say for the first two years of your probation you have a curfew, where you are to be at home. Now, you may be away during the curfew, with the written permission of your probation officer. Such permission is to be provided only for employment, childcare, or other compelling reasons as determined by your probation officer. When you are provided that written permission to be outside of your residence during the curfew, you must carry that permission with you.
- [36] You must present yourself immediately at the front door of your residence or answer the telephone when any peace officer or probation officer attends, or calls to check on you, during the curfew period.
- [37] You must complete 100 hours of community work service, to the satisfaction of your probation officer, within the first 24 months of this order.

- [38] You must not possess or consume alcohol or controlled substances, except with a medical prescription. You will not breach this order, if after consumption of any alcohol or drugs you inform your sponsor and provide your probation officer with written confirmation from your sponsor that you had notified him or her and that you are attending a recovery meeting.
- [39] You must not enter any liquor store, beer and wine store, bar, pub, lounge, nightclub, beer garden, or any other business from which minors are prohibited, by the terms of the liquor licence. You must not possess any drug paraphernalia, which includes but is not limited to scales, syringes, score sheets, baggies, and pipes.
- [40] I presume he is consenting to the next term, but I will confirm at the end of it. You must participate in any drug screening or urinalysis as directed by your probation officer. That is made by consent?
- [41] CNSL T. MORINO: Are you consenting to agree to that?
- [42] THE COURT: Yes, thank you, Mr. McMillan. You must not possess any weapon, as defined by s. 2 of the Criminal Code, or any imitation or replicas thereof. You must not have contact or communication directly or indirectly with Timothy James Greer, Amanda Michelle Harrison Bastian, or Steven Sharanowski.
- [43] CNSL I. MCFADGEN: Sorry, I think Your Honour missed 14. Or, sorry, Your Lordship.
- [44] THE COURT: Yes. Thank you. Most important, or one of the most important terms. You must attend, participate in, and successfully complete any intake, assessment, counselling or program, as you may be directed to by your probation officer.
- [45] So, in addition to that, sir, there is the following orders. First, there is a firearms prohibition, pursuant to s. 109(2) of the Criminal Code. That order will be set out in its entirety. It will be reviewed with you today, and which you will then acknowledge it, but it provides a 10-year firearms prohibition for non-restricted firearms, crossbows, restricted weapons, ammunition, and explosive substances. It also contains a lifetime firearms prohibition for restricted and prohibited firearms, prohibited weapon, prohibited device, and prohibited ammunition.
- [46] In addition, there will be a secondary DNA order, the taking of a DNA sample pursuant to s. 487.051 of the Criminal Code. I recognise that a secondary DNA order can be made if the court is satisfied that such an order is in the best interests of the administration of justice. Considering the offences which you were engaged in and convicted of, the circumstances surrounding the commission of those offences, and what I would describe as a minimal impact that such an order would have on your privacy and security, I am satisfied that the order ought to be made in the circumstances. In brief, a swab from the interior of your mouth, generally, or possibly a blood sample, but either one will be taken and will be submitted to the DNA Databank in Ottawa, Ontario. For that purpose, do we need to designate a time by which that is to be accomplished?

- [47] CNSL I. MCFADGEN: Yes, Your Lordship. My - my understanding, and I actually just had one done yesterday on another file, I think the court in that instance gave until November 30th, and the direction - I'm not sure how quickly Mr. McMillan is going to be making his way back to Duncan, but assuming he's coming back to Duncan, I think the direction is just that he attend and the Duncan North Cowichan RCMP detachment. I'd suggest November 30, 2020, as an end date, but if - if it looks like that's unrealistic, we can move that a little further.
- [48] CNSL T. MORINO: Well, my understanding is Mr. McMillan is staying - he came over, I think, two days ago, to be here in time, staying with a friend, so there's no difficulty in whenever - and providing it. My only concern is I notice that he's to report today. It's a long weekend. Boy, I hope - pretty sure he can make it. Madam Registrar, do you have any reason to doubt that they could get it typed up and have him out of here in an hour or so?
- [49] THE CLERK: I [indiscernible].
- [50] CNSL T. MORINO: All right, well, then he should be able to make it.
- [51] THE COURT: Where is the probation officer, in relation to here?
- [52] CNSL T. MORINO: Nearby. I've never been.
- [53] UNIDENTIFIED SPEAKER: I think it's [indiscernible].
- [54] THE CLERK: My Lord, it's about a block away.
- [55] THE COURT: All right.
- [56] CNSL T. MORINO: Okay. All right. Very good.
- [57] THE COURT: All right, so -
- [58] CNSL T. MORINO: And whatever, the blood sample.
- [59] THE COURT: So I take that he is now in the process of having relocated back?
- [60] CNSL T. MORINO: Correct.
- [61] THE COURT: All right, so what I will direct is that on or before October 15, 2020, he will attend at the Duncan North Cowichan RCMP detachment, for the purposes of providing the DNA sample. So, my suggestion there is that you phone first, because they usually set up a time in each week, or times, and then you can make arrangements to attend, so that you are not there, waiting.
- [62] In addition, is the final matter that relates to the order of forfeitures. There will be the order of forfeitures granted in relation to, first, File 42001, pursuant to s. 16 of the CDSA, forfeiture of the tinfoil, scale, pipe, Ensure bottle, and blue container. With respect to File 40746, there will be an order of forfeiture, pursuant to s. 16, of all of the items that were identified on the major exhibit flowchart which was marked as Exhibit 2 to the proceedings. Of course, that order of forfeiture is subject to completion of the matters relating to the co-accused, but

nothing you need to worry about, Mr. McMillan. It is more of a technical issue as to when they can actually destroy those items.

[63] All right, sir? So the order will be prepared. You will review it, sign it, and then you can make your way to the probation office today, to start your return to the Duncan community. Good luck, sir. Thank you.

"T.J. Crabtree J."

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