
CANADA / JUDGMENT

R. v. Nazarek

2018 BCSC 1357

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 1357 R. v. Nazarek

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Nazarek,

2018 BCSC 1357

Date: 20180711

Docket: 29585-2

Registry: Fort St. John

Regina

v.

Dana Andrew Nazarek

Before: The Honourable Madam Justice Watchuk

Oral Reasons for Sentence

Counsel for Crown:

P. Mann

Counsel for Defence appearing by teleconference:

M. Jasper

Place and Date of Trial/Hearing:

Fort St. John, B.C.

July 9-10, 2018

Place and Date of Judgment:

Fort St. John, B.C.

July 11, 2018

Introduction

- [1] THE COURT: This is the sentencing of Dana Nazarek after he was found guilty on Counts 1, 2, and 4 of Indictment 29585. The offences are possession of cocaine and fentanyl for the purposes of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act, and possession of the proceeds of crime contrary to s. 354 of the Criminal Code. Count 3, which was possession of marihuana in an amount not greater than 30 grams, was stayed by the Crown.
- [2] The co-accused, Laura Nazarek, the former spouse of Mr. Nazarek, entered guilty pleas to charges of possession of cocaine and fentanyl for the purpose of trafficking on June 30, 2017. After a change in counsel she was sentenced on January 17, 2018 to two years imprisonment. I will return to the circumstances of that offender and those offences.
- [3] In this sentencing, Crown submits that five years is a fit sentence for Mr. Nazarek. Mr. Nazarek's submission is that the sentence should be two years in order to achieve parity with the sentence imposed on Ms. Nazarek.

Circumstances of the Offences

- [4] Mr. Nazarek was convicted on August 29, 2017. In Reasons indexed at 2017 BCSC 1909, the circumstances of the offences are summarized at paragraphs 3, 4, 5, and 7:
- [3] The charges arose on December 16, 2013 when members of the Fort St. John RCMP, including the Drug Section led by Cpl. Jon MacIntyre, attended at a residential property in Fort St. John, British Columbia (the "residence"). The police executed a search warrant pursuant to s. 11 of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA]. Cst. Corbeil had sworn the Information to Obtain the warrant attesting to his belief that the offence of possession for the purposes of trafficking was occurring at the property.
- [4] The residence is a relatively small house with a main floor and basement. On the main floor are a living room, kitchen, bathroom, two children's bedrooms and a master bedroom. The only access to the basement is by stairs from the main floor. In the basement are a recreational room, bathroom, laundry room and storage room. The storage room is entered through the laundry room.
- [5] Cst. Corbeil, a member of the search warrant entry team and drug section, arrested both accused. Ms. Nazarek and her two young children were inside the residence when he entered. Mr. Nazarek was outside of the residence on the property. Identity is not in issue.

- [7] In the search of Mr. Nazarek incident to his arrest, Cst. Corbeil located and seized crack cocaine with a total weight, including packaging, of 2.8 grams in the front pocket of Mr. Nazarek's jacket. Cst. Corbeil also located \$4,015 in the same pocket in denominations of: 4 x \$100; 33 x \$50; 96 x \$20; 2 x \$10; and 5 x \$5. The money was subsequently seized from Mr. Nazarek at the cells at the Fort St. John RCMP detachment.
- [5] At paragraph 93 of the Reasons, the total amount of cash and drugs seized and the value of the drugs is set out. That paragraph reads:
- [93] The cash and drugs seized from the residence were: \$112,089 and \$2,230 US; and, 1.54 kilograms of cocaine and 2,116 fentanyl pills with a combined value of between \$125,720 and \$137,920.
- [6] The items located in the search of the residence are listed in paragraphs 47 to 51 of the Reasons:
- [47] Located in the search and seized from the Master Bedroom were:
- In the left dresser drawer:
 - o 8 separate bundles (bound by elastic bands) of cash, totaling \$11,000 (6 bundles of \$1000; 2 bundles of \$2500);
 - o an additional \$360 loose bills; and
 - o \$730.50 change in a bag; and
 - A bag of elastic bands found adjacent to the dresser on a lower shelf, and another bag of elastic bands.
- [48] In the downstairs room used for storage, which contained piled up boxes, and which was entered by way of the laundry room, these items were located:
- A black backpack containing 13 separate bundles of cash (most of which contained "sub-bundles"), totalling \$95,154 CAD and \$2,340 USD, bound by elastic bands, as follows:
 - o 1 bundle: \$2500;
 - o 4 bundles: \$2500 each (\$10,000);
 - o 4 bundles: \$2500 each (\$10, 000);
 - o 1 bundle: \$2500;
 - o 4 bundles: \$2500 each (\$10,000);
 - o 4 bundles: \$2500 each (\$10,000);
 - o 4 bundles: \$2500 each (\$10,000);
 - o 4 bundles: \$2500 each (\$10,000);

- o 4 bundles: \$2500 each (\$10,000);
- o 10 bundles: \$1000 each in \$20s (\$10,000);
- o 10 bundles: \$1000 each in \$20s (\$10,000); and
- o "old bills" amounting to \$154.
- A "Stink Sack" brand black coloured bag; and
- Various items with security tags or store tags.

[49] Cst. Corbeil observed a substantial amount of powder on the bills contained in each of the bundles he designated as Bundles #4, #5, and #6. A NIK test confirmed the powdered substance as cocaine.

[50] In the basement were also located bags with drugs as follows:

- A black camera bag on a drying rack next to the side of the doorway leading into the storage room from the laundry room, containing:

- o Outside Pocket:

- § 1 bag containing 1000 blue fentanyl "CDN" "80" pills;

- § 1 bag containing 557 green "CDN" "80" pills;

- o Side pocket:

- § 1 baggy with "252" written on it in red ink, containing cocaine either in powder or hard form, weighing 16.3 grams;

- o Main compartment:

- § 1 bag containing 200 "CDN" "80" fentanyl pills with black spots pressed within the pills;

- § 1 vacuum sealed bag, "brick of powder cocaine", weighing 526 grams, a sample of which tested as hydrochloride 27%;

- § 10 pre-packaged "ounce" bags of crack cocaine, weighing 275.8 grams (4 x 27.5 g, 4 x 27.6 g, 2 x 27.7 g); and

- § 1 bag of cannabis resin, weighing 17.2 grams.

- A green plastic bag inside the bottom backside of an old washing machine, which Cst. Corbeil testified was recovered without moving anything, containing:

- o 1 bag containing 300 blue/green fentanyl pills marked "CDN" "80";

- o 1 bag with 10 pre-packaged "ounce" bags of crack cocaine (6 x 27.6 g, 3 x 27.4 g, 1 x 27.5 g); and

- o 1 bag with 9 pre-packaged "ounce" bags of powdered cocaine (2 x 28.6 g, 3 x 28.5 g, 2 x 28.4 g, 2 x 28.7g), which tested as hydrochloride 66%.

[51] The Crown submits that in addition to the presence of these items, there were several indicia that would have made it obvious to any person occupying the residence that a drug operation was in place. At the very least, the items would have aroused suspicion that some criminal activity was occurring on the property and that there was a need to make further enquiries. Such indicia included the following very visible items in the laundry room:

- A functional "Infinity" scale with white residue (tested as cocaine via a NIK test) on top of a new washing machine;
- A functional "Easy-E" scale with white residue (tested as cocaine via a NIK test) on top of the new washing machine;
- A "Seal Store" sandwich bags box on top of the new washing machine;
- A see-through Rubbermaid container with a green lid on top of the new washing machine, containing 20.7 grams of powder cocaine;
- An "IRobot" box on top of the new washing machine containing:
 - o A Ziploc bag containing 69.6 grams of a white substance believed to be cocaine by virtue of its appearance, although no sample was taken;
 - o A baggie containing 4.2 grams of an unknown white powder (no sample taken);
 - o A baggie containing 0.5 grams of an unknown white powder (no sample taken);
 - o A "smiley face" baggie containing 10.5 grams of an unknown white powder (no sample taken); and
 - o 11 white fentanyl pills;
- A see-through Rubbermaid container with a red lid on top of the new washing machine, containing 90.2 grams of cocaine;
- A Mason jar on top of the new washing machine containing pills (59 blue/green fentanyl pills marked as "CDN" "80"); and
- Sandwich bags appearing to have their corners cut off in a garbage can next to the new washing machine. When these bags were examined by Cst. Corbeil, the bags were observed to be the same type of bags as those in the "Seal Store" sandwich bags box on top of new washing machine, but with the bottom ends cut off.

Circumstances of the Offender

[7] Very little is known regarding Mr. Nazarek's personal circumstances or antecedents. Other than to address his criminal record, the defence made no submissions at this sentencing hearing about the offender. As his date of birth is on the criminal record, I note that he is now 47 years old and was 42 at the time of the offences. Mr. Nazarek's criminal record is short and dated. In 1990, in Edmonton, he was convicted of two counts of break and enter

and sentenced to 12 months of probation on each charge by way of a suspended sentence. In 2002, in Fort St. John, he was convicted of aggravated assault and sentenced to a \$6,000 fine with a ten year firearms prohibition.

- [8] A pre-sentence report was not sought by previous counsel for Mr. Nazarek for the sentencing set for January 2018, nor was one sought by Mr. Nazarek when he was self-represented, nor did his present counsel request a pre-sentence report either written or oral. A pre-sentence report is not necessary although in the absence of oral submissions regarding the offender, it would have been of assistance to the court.
- [9] In the Jordan delay application heard following Mr. Nazarek's conviction in August 2017, I referred to submissions made on his behalf. The following paragraphs which provide some information about his circumstances are therefore taken from the reasons referred to as the "Jordan Reasons" reported at 2017 BCSC 2340:
- [157] Mr. Nazarek's evidence is that his circumstances include being arrested and detained in custody on a subsequent drug charge in February 2015. That charge was later stayed. Bail on this matter was cancelled in August 2015. For part of the time in custody, he was held in Prince George where family visits were not possible. It was also not possible to attend his father's funeral while in custody.
- [158] When he was released in May 2016 after 16 months, of which eight months was related to this matter, he faced many hardships. His marriage had ended and his two young children were in the care of the Ministry of Children and Family Development. A property of his was previously sold and the bank erroneously released a \$82,000 profit, which was intended to pay a CRA debt, to Ms. Nazarek, leaving him financially destitute. The tanning salon business which he had owned with Ms. Nazarek had been sold by her without his consent. In the result, he is attempting to support himself with small jobs, keep his home which is in foreclosure, provide childcare for his young children now in his care, and keep his health as a single parent.
- [10] It is understood that Mr. Nazarek became the primary caregiver of his two sons that he has with Ms. Nazarek. The boys were five and one years old at the time of the offences and would now be about nine and six. It is also understood that he has an older son, approximately 20 years of age.
- [11] Being mindful of the vagaries of reliance on demeanour, I have observed Mr. Nazarek over the course of these long proceedings. He was always punctual and respectful of the court and of Ms. Nazarek who often had health issues during court time. He attended on every one of the many telephone pre-trial conferences, even when he was represented by counsel. He was well-spoken when he made inquiries about the process. However, I observed that Mr. Nazarek in this sentencing, six months after the last court appearance when in a puzzling event his lawyer applied to be taken off the record thus regrettably delaying the sentencing, appears to have deteriorated physically and emotionally. It is apparent that he is in custody. To be clear, I place no weight on his custodial status.

- [12] Mr. Nazarek declined the opportunity to address the court at the close of defence sentencing submissions as is his right. However, I know nothing about his plans for the future, his steps, if any, towards rehabilitation, his attitude towards these offences, or his present health and circumstances. I am very sorry not to have heard from him.

Aggravating and Mitigating Circumstances

- [13] There are numerous aggravating circumstances, some of which also bear on the absence of a related mitigating factor. Mr. Nazarek has a criminal record. It is short and dated as set out above, but he is not a first-time offender. Mr. Nazarek, at age 42 when the offences were committed, does not have the mitigating factor of being a youthful offender.
- [14] The drug trafficking operation in the residence was ongoing in the opinion of the expert witness at the trial. It was not set up overnight or on impulse. It was a continuing venture evidencing sophistication, premeditation, and planning. As evidenced by the cash and the amount of drugs located in the search, it was a profitable venture. The nature of the drug trafficking operation was, again in the opinion of the expert witness, a mid-level operation. It was not street level trafficking nor was it trafficking at the wholesale level. The operation, as a whole, presented a danger to the community.
- [15] Mr. Nazarek's active role in the drug trafficking operation is also evidenced by the processing centre set up on the washing machine and in the laundry room. The residence was not a location used only for storage, although there were also a large amount of drugs stored there. The variety of drugs, powder and crack cocaine, and fentanyl pills, with a value of between \$125,720 and \$137,920, and amount of drugs, 1.54 kilograms of cocaine and 2,116 fentanyl pills, are aggravating factors. Both cocaine and fentanyl are Schedule I substances in the CDSA. I will return to the particularly concerning dangers and evils of fentanyl.
- [16] Finally, and importantly, two young children were present in the home with the danger of the drugs themselves and the danger inherent in the presence of a significant amount of drugs. Only a flimsy baby gate separated the living area of the family residence from the laundry room downstairs where there was an open Mason jar containing 59 fentanyl pills on the dryer, in addition to loose cocaine powder on top of the washing machine and other cocaine in various containers. In addition to the accessibility of the drugs to curious young children, the cocaine powder in the laundry room being used for the family laundry could easily have been transferred to their clothing. This reckless disregard for the safety of the children is a serious aggravating factor.
- [17] Neither counsel at sentencing made any submissions regarding any mitigating factors. I am not aware of any such factors.
- [18] With regard to defence submissions at sentencing, there were submissions with regard to the weight to be placed on the aggravating factors that I have listed.

The Sentencing of the Co-Accused

- [19] The primary submission of the defence is that Mr. Nazarek is entitled to parity in sentencing with the sentence imposed on the co-accused, his former spouse, Ms. Nazarek. In order to address this submission fully, I will set out here in proximity to the aggravating factors for Mr. Nazarek above, those that were identified in the sentencing of Ms. Nazarek on January 17, 2018. The reasons referred to as the "Co-Accused's Sentencing Reasons", are reported at 2018 BCSC 259.
- [20] The aggravating factors discussed at paragraphs 26 and following of the Co-Accused's Sentencing Reasons are that the drug processing and distribution centre in the family residence was a continuing enterprise not an overnight operation; that it was a mid-level commercial operation with a profit motive; that the children were present in the home; and that the drugs are Schedule I substances with quantity and variety. Ms. Nazarek's poor performance on bail and negative peer associations were also aggravating factors.
- [21] Mitigating factors for Ms. Nazarek on sentencing were the guilty pleas, although they were late in the proceeding towards the end of the trial, her expression of regret, as well as her willingness to get treatment and the commitment to recovery from addiction with increasing insight into her offending.
- [22] Ms. Nazarek's personal circumstances as set out in the presentence report and Co-Accused Sentencing Reasons are as follows. She was 31 at the time of the offences. She had ADHD. She had been using cocaine for nine years at the time of the sentencing and her addiction had been of such seriousness that she used cocaine the day her labour started with her younger son. Her only criminal record was, at most, a 2012 breach conviction at the time of her offences. Post-offence, she had convictions for a breach, a theft under, and a failure to comply. There were also two s. 524 warrants in 2017. She had hit-and-miss reporting to the bail supervisor, but called in to reschedule when she missed an appointment.
- [23] Ms. Nazarek, in her report to the writer of the presentence report, characterized her participation in the drug trafficking as minimal and only at the insistence of Mr. Nazarek who she described as mentally and physically abusive. In her sentencing, her view was not challenged. It is not of any weight in this sentencing other than as a comparison of the circumstances of the offenders. She stated that she had the benefit of money from the trafficking, but regretted exposing her children to the dangers. In her sentencing hearing, Ms. Nazarek addressed the court in a heartfelt statement expressing sincere regret for this part of her life. She said that more than anything she wants to get better and be a good mom and good person again. The request to be sent to rehab was manifested in a federal sentence furthering her goal of better addiction treatment programming.
- [24] Ms. Nazarek entered into the guilty pleas on the basis of certain agreed facts. Ms. Nazarek's guilty pleas relate to the 195.7 grams or 6.9 ounces of cocaine contained in various packages and amounts on top of the washer and dryer in the laundry, and the 59 fentanyl pills in an open Mason jar on top of the dryer. There were also 11 white tablets, but those tablets were

not tested. They were believed to be fentanyl but there is no evidence that they were fentanyl. The approximate value of the cocaine, 195.7 grams, and 59 fentanyl pills, is \$13,230. The guilty pleas were recorded when entered in June 2017 and accepted by the court on sentencing. The other items located in the residence formed part of the circumstances of the offences generally, but not the circumstances specifically relating to the offences to which Ms. Nazarek entered guilty pleas.

The Law

[25] The principles of sentencing are set out in s. 718 of the Criminal Code. It is well established that in cases such as this involving the trafficking of fentanyl, the principles of primary importance are denunciation and deterrence. Rehabilitation is also to be considered. In drug cases, the court must be mindful of s. 10(1) of the CDSA, Controlled Drugs and Substances Act which states:

10(1) Without restricting the generality of the Criminal Code, the fundamental purpose of any sentence for an offence under this Part is to contribute to the respect for the law and the maintenance of a just, peaceful and safe society while encouraging rehabilitation, and treatment in appropriate circumstances, of offenders and acknowledging the harm done to victims and to the community.

[26] Section 718.1 contains the fundamental sentencing principle of proportionality. In *R v. Mann*, 2018 BCCA 265 at paragraph 73, it is stated to be the sine qua non of a just sanction, citing *R v. Ipeelee*, 2012 SCC 13. That section states:

A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[27] In the context of these principles, particularly the gravity of the offence and the moral blameworthiness or responsibility of the offender, and the entirety of the sentencing principles set out in the Criminal Code, I turn to the cases relied upon by counsel. Although only some of the cases will be referred to below, all have been considered and are listed in an appendix to these reasons. I also have the benefit of a chart prepared by Crown counsel, summarizing the salient features of each of the cases in the Crown's brief of authorities, which was relied upon by both counsel.

[28] An important factor in the analysis of relevant caselaw is the timing of the fentanyl offence. The circumstances of the offence at the time it was committed, must be assessed: *R v. Smith*, 2017 BCCA 112 at paragraph 53. Many cases address conduct which occurred during or after the emergence of full public awareness of the dangers associated with fentanyl use as evidenced by the increase in deaths from its use.

[29] In this case, the offence date is December 2013 which is prior to that public awareness. This timing issue and many of the statistics provided by the Crown in this case are addressed in the seminal British Columbia Court of Appeal case of Smith at paragraphs 54 to 64 by Mr. Justice Harris who concludes that:

[63] In my view, the landscape in 2015 and 2016 was transformed and is now qualitatively different from what it had been at the time of the offence [January 2015] in terms of the severity of the crisis and recognition of the role of fentanyl in it.

For example, the number of fentanyl-detected deaths in British Columbia increased from 50 in 2013; to 91 in 2014; to 152 in 2015; to 667 in 2016; and in 2017, to 1,210.

[30] Although the finer points of when the change in public awareness of the dangers of fentanyl occurred can be debated, it is clear that for this offence, Mr. Nazarek's offence, the date of 2013 is prior to the transformation of the fentanyl landscape as thoroughly discussed in Smith.

[31] The other preeminent case and most recent Court of Appeal case in British Columbia is Mann, which included an appeal of four-year sentences for 2017 offences of trafficking in fentanyl and possession for the purpose of trafficking fentanyl by two youthful first-time offenders. One offender also appealed a five-year sentence imposed for those offences involving carfentanyl. The Court of Appeal upheld all sentences imposed by the trial judge in a complex fact pattern which included offences arising from a loaded firearm and threatening. Mr. Justice Fitch discusses the issue of knowledge and the relevance of whether an offender knows the nature of the drug which is being trafficked at paragraphs 75 to 80. At paragraph 79 he concludes:

In my view, and as a general rule, where an offender knowingly traffics a controlled substance that is subsequently discovered to contain an additional, more harmful substance, the offender cannot maintain that his or her moral culpability is reduced simply because he or she was unaware of the additional substance.

Analysis

[32] In reviewing the cases submitted for guidance on the length of sentence, I am mindful of factors including whether the drug operation was street level such as in Smith, or wholesale, such as in R v. McCormick, 2017 BCPC 22. Here, Mr. Nazarek was involved in a mid-level commercial operation. The quantity of drugs involved and their nature are relevant to the gravity of the offence. The circumstances of the offender being in his forties with a dated record, a conviction after trial rather than a guilty plea, the absence of the mitigating factor of remorse, minimal role of rehabilitation as a sentencing principle, and whether he was an addict or not are all relevant on sentencing in determining his degree of responsibility.

- [33] As has often been stated, sentencing is a highly individualized process. There are no two cases with identical factors. With regard to the possession for the purpose of trafficking cocaine offences, the cases of *R v. Mauro*, 2015 BCPC 0379, which is close in date and quantity but involves a youthful first offender who indicated remorse; *R v. Friedel*, 2016 BCSC 1469, again which is close in time; and *Raccio*, which is more dated, provide guidance. For the possession of proceeds of crime offence, the cases of *R v. Castro*, 2016 NWTSC 8, *R v. Aujla*, 2016 ABPC 272, and *R v. Leach*, (25 May 2016), Port Coquitlam, 98238-1, 98241-1 (BCPC) are relevant. Possession for the purpose of trafficking fentanyl was the subject of sentences in *Friedel*, which involved a lesser quantity, a guilty plea, and an addict; and *R v. Toth*, 2017 BCSC 501 which involved a guilty plea, a mid-level operation, and June 2015 offence dates. Although cases from other jurisdictions contain helpful analyses and principles, for the range of sentence they are often guided by particular sentencing regimes not applicable in British Columbia.
- [34] Finally, I turn to the sentence imposed on the co-accused, Ms. Nazarek. The quantity of drugs, and thus the gravity of the offence, differs. For Ms. Nazarek, 195.7 grams of cocaine and 59 fentanyl pills, with a total value of \$13,230 was involved, while Mr. Nazarek was found guilty of possession for the purpose of trafficking 1.54 kilograms of cocaine and 2,116 fentanyl pills with a combined value of between \$125,720 and \$137,920.
- [35] Mitigating factors for Ms. Nazarek included that she pleaded guilty, although at the completion of the evidence in the trial. Ms. Nazarek was an addict, suffered from ADHD which may have had a role in the early days of her addiction, expressed sincere regret which is a form of remorse, some insight into the offences and her behaviour, and a sincere commitment to her treatment and rehabilitation for herself and her children.
- [36] Not only are the quantities of the drugs involved distinguishable, but the locations and packaging differ. Ms. Nazarek pleaded guilty to the drugs located in plain view and in a more accessible location in the laundry room or processing centre. As set out above, the drugs and cash that are subjects of the finding of guilt for Mr. Nazarek were also found in other locations in the residence with some secreted in bags and drawers. The elements of the two drug and proceeds offences, including knowledge and control, were proven beyond a reasonable doubt on the evidence as it related to Mr. Nazarek. The guilty pleas of Ms. Nazarek admitted only the elements of the offences with regard to the limited amount of drugs.
- [37] Mr. Nazarek submits that the court should take Ms. Nazarek to also be guilty of the offence of possession of proceeds of crime due to her statement to the writer of the presentence report that she enjoyed the benefit of the financial side of drug trafficking. That she made such a statement to the writer of the presentence report is not in dispute. That the admission of having the benefit of the avails of a criminal enterprise is equivalent to proof beyond a reasonable doubt of knowledge and control of the \$112,089 and \$2,230 U.S. located in the backpack and men's dresser drawer in the residence in 2014 is not a proposition known to law.

- [38] Many of the aggravating factors apply to both co-accused; the mid-level nature of the operation, the seriousness of the drugs involved, and the reckless endangerment of the children in the residence. Their criminal records played similar limited roles in sentencing. Mr. Nazarek has more serious offences on a very dated record with a long gap and Ms. Nazarek has more recent less serious offences. Neither were first-time offenders.
- [39] Finally, with regard to the issue of parity of the sentence for Mr. Nazarek with that of the co-accused, the cases of *R. v. Do*, 2007 BCCA 18 and *R. v. Montgomery*, 2018 BCCA 27 are of assistance. The Crown submits that the parity principle has no application in this case because there is no true parity between Mr. Nazarek and Ms. Nazarek. I agree. I take from those cases that the task of this sentencing judge remains to "weigh and balance the similarities and differences between the two co-accused and craft a sentence accordingly": *Montgomery* at para. 12.
- [40] To summarize, with regard to the gravity of the offences, the possession for the purpose of trafficking fentanyl is the most serious. I have referred above to the growing public knowledge and outcry regarding this truly evil substance in the context of drug trafficking. It was best described in *Aujla* at paragraph 1:

Once an insidious killer of opioid users, the drug fentanyl has emerged to become a notorious Grim Reaper stalking the streets of Canada's cities and towns. Anyone reading or watching the news understands that fentanyl use has become a serious public health crisis to which governments and law enforcement agencies are attempting to respond.

- [41] The dangers and the havoc wreaked by addiction to and the illicit use of fentanyl and cocaine are well documented. Drug dealers contribute to and create endless misery, danger, and death, all without regard for the devastating effects of their selfish efforts to make a profit.
- [42] With regard to the moral blameworthiness of Mr. Nazarek, although there is no evidence that he did not know that the pills contained fentanyl, the evidence of the expert witness described the situation as at December 2013 when fake oxycodone was often sold without knowledge of the presence of fentanyl. As set out in *Mann*, that possible lack of knowledge on his part is of no relevance on this sentencing because a seller of illegal drugs must be assumed to recognize an inherent risk that the composition of the drugs may be unknown.
- [43] Mr. Nazarek's knowledge that the pills contained fentanyl is one of two issues regarding knowledge. The other is the knowledge of the public regarding the danger posed by fentanyl. As discussed above, the date of the fentanyl offence is relevant in fixing the state of public awareness of the dangers associated with fentanyl use and the landscape at the time of the offence. The date of this fentanyl offence is in 2013. Of the cases cited by counsel, all offences occurred later in time than 2013: *Friedel* in 2014; *R v. Molemba*, (27 June 2016), Vancouver, 237398-2-C, 233321-3-C, 237513-2 (BCPC) in 2014-2015; *Toth* in 2015; and *Mann* in early 2017. As older cases are concluded in the courts, this factor will become less relevant as the limiting effect of the age of the offence will be less likely to be present when

determining the gravity of the offence. That the offence occurred at an early time in the prevalence and knowledge of the scourge of fentanyl is a factor which reduces the seriousness of the circumstances of this offence.

[44] The circumstances of the offender are not known to the court in any detail other than as set out above. However, Mr. Nazarek had the opportunity to address the court regarding his rehabilitation, a sentencing principle, including any insight to his offending behaviour and plans for the future, and with regard to his remorse or regret which is a possible mitigating factor. He chose not to do so. I respect that decision and will proceed on that basis.

[45] Mr. Nazarek, would you please stand, sir?

[46] Taking into account the principles of sentencing, the caselaw discussing those principles and the application to these offences, the nature of the offences and your circumstances, I sentence you as follows: on Count 1, possession for the purpose of trafficking cocaine, to 40 months in jail.

[47] On Count 2, possession for the purpose of trafficking fentanyl, you are sentenced to 40 months concurrent to that on Count 1.

[48] On Count 4, possession of the proceeds of crime, the sentence is two years concurrent to the sentences on Counts 1 and 2. The total sentence is, therefore, 40 months.

[49] You may be seated, sir.

[50] With regard to the ancillary orders sought by the Crown, I do not understand that there is any objection taken. There will therefore be the following orders.

[51] There will be forfeiture of all items seized. There will be a DNA sample pursuant to s. 487.051(3).

[52] THE ACCUSED: [Inaudible/not near microphone] sample on file?

[53] THE COURT: They will take another one, sir. It is a very minimally intrusive swab.

[54] There will be a weapons prohibition for life pursuant to s. 109.

[55] And with regard to the victim surcharge, Ms. Jasper, do you have any submissions as to how that should be put into place?

[56] MS. JASPER: My Lady, I have no information as to whether Mr. Nazarek is able to pay the victim surcharge. Given that he is a Legal Aid client, my assumption is that he does not. And unless he states otherwise, a willingness and ability to pay that in cash, I would ask for the default order.

[57] THE COURT: There will be five years time to pay and \$600 total with five years time to pay, sir, for when you are released.

[58] With that then, Ms. Mann, I thank you for your tremendous assistance throughout this long proceeding, and Ms. Jasper, I thank you for your attendance in this final important stage.

"The Honourable Madam Justice Watchuk"

Appendix

1. R v. Aujla, 2016 ABPC 272
2. R v. Bears and Raccio, 2013 BCSC 478
3. R v. Brown, 2011 BCSC 1544
4. R v. Cambiazo (20 October 2016), Edmonton, 150331155P1 (ABPC)
5. R v. Castro, 2016 NWTSC 8
6. R v. Chin, 2017 BCSC 501
7. R v. Do, 2007 BCCA 18
8. R v. Forsberg (27 September 2017), Victoria 167638-4-C, 167641-2 (BCPC)
9. R v. Friedel, 2016 BCSC 1469
10. R v. Godreau, 2016 ONSC 6318
11. R v. Leach, (25 May 2016), Port Coquitlam, 98238-1, 98241-1 (BCPC)
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