

CANADA / JUDGMENT

R. v. Posavac

2019 BCSC 2394

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Posavac,

2019 BCSC 2394

Date: 20190621

Docket: X080618

Registry: New Westminster

Regina

v.

Jason Mato Posavac

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Before: The Honourable Mr. Justice Schultes

Oral Reasons for Sentence

Counsel for the Crown:

L.E. Gibb

Counsel for the Accused:

Z. Myers

Place and Date of Hearing:

New Westminster

April 8 and May 15, 2019

Place and Date of Judgment:

New Westminster, B.C.

June 21, 2019

Introduction

- [1] Mr. Posavac has entered guilty pleas to three counts of possession for the purposes of trafficking - of methamphetamine, GHB, and cocaine respectively - all on February 15, 2017, in Surrey.

Circumstances of the Offences

- [2] The Crown and defence have arrived at a helpful agreed statement of facts, which I will summarize.
- [3] Acting on confidential information and surveillance, the police obtained a search warrant for a house on 32nd Avenue in Surrey, which was executed on the offence date. Inside the house, they found a large amount of drugs and cash, as well as firearms and ammunition in various rooms. Six people were inside, including Mr. Posavac.
- [4] In the room in which Mr. Posavac was found and arrested were numerous Ziploc bags containing different amounts of the drugs that are the subject of his guilty pleas. The total amounts of the drugs in that room were 1,115 grams of methamphetamine, 211 grams of cocaine, and 11 litres of GHB. The approximate values of these drugs if they had been sold in their usual retail amounts were in the range of \$20,000 to \$30,000 for the methamphetamine, \$10,000 to \$12,000 for the cocaine, and \$1,700 to \$2,600 for the GHB.
- [5] Although they were not part of the counts to which he has entered his pleas, he admitted as part of the overall circumstances that other relevant items were found in his room: 143 grams of a heroin/fentanyl mixture, two handguns (one that was missing a part and another that was not submitted for analysis) and ammunition, a money counter, just under \$14,000 in cash, and equipment and material suitable for the measuring, preparation, and packaging of drugs.
- [6] An unlocked iPhone in the room was analyzed and found to contain over 17,000 text messages, a considerable number of which were to or from a number that was registered to Mr. Posavac. There were also a significant number of messages to and from a number connected to Mr. Voszler, his former co-accused. Overall, the messages clearly demonstrate a robust trade from the house in a variety of illicit drugs. The messages showed Mr. Posavac communicating about drug orders, payment details, and the resolution of debts arising from previous purchases.

- [7] The search yielded a much larger quantity of drugs elsewhere in the house, with a total value in the \$60,000 to \$80,000 range, as well as numerous additional firearms and items relating to the operation of a drug trafficking business. Stolen property, including ATVs and trailers, was found in the back yard. Identification in Mr. Posavac's name was found in the basement.

Circumstances of the Offender

- [8] The thorough presentence report that was prepared for Mr. Posavac's most recent previous convictions, in May 2018, was also relied on in this sentencing. It helpfully set out Mr. Posavac's background and the ongoing positive changes in his life, which his counsel updated with additional information.
- [9] He is now 43 years old. His childhood was marked by his father's excessive drinking and serious ongoing physical abuse of his mother. He encountered behaviour problems in school and had difficulty focusing. He became involved in alcohol and drugs during a year that his family lived in the United States. After they returned to Canada he dropped out of school in grade 12.
- [10] After leaving high school he worked full-time in the business that his family operated, until his father sold it precipitously. This left him in a poor position to get another job because of his lack of a high school diploma or other employment experience. He started involving himself in criminal activities related to drugs. He candidly admitted during the 2018 sentencing that these activities went on for about 10 years.
- [11] He began his own substance abuse with alcohol and progressed to experimenting with a variety of illicit drugs. He ultimately developed a serious methamphetamine addiction in 1999. It continued, eventually supplemented with GHB. He was a daily user of both drugs at the time of his arrest for these offences.
- [12] He also developed a serious gambling addiction - losing tens of thousands of dollars, which in many cases was financed by credit card debt. At one point he declared bankruptcy as a result.
- [13] He had two previous unsuccessful attempts at drug treatment, one in 2005 as part of a conditional sentence, and another in early 2017 as part of his bail conditions. Once again in a candid manner, he admitted that in both cases he failed to embrace the programs sincerely and continued to use drugs, despite the abstinence that was required.
- [14] Later in 2017, he perceived that he had hit rock bottom in terms of the effect of his addictions, in particular the risk of losing his one remaining supportive relationship. He resolved instead to embrace sobriety, which he says he has maintained since the beginning of September 2017. He began to attend the Last Door Recovery Society's program and participated in it successfully. The program manager at Last Door gave Mr. Posavac's efforts and level of commitment there a very strong endorsement in the presentence report.

- [15] He was able to move out of living in the Last Door's facility after nine months and, as of the time of the sentencing submissions, he lived with a group of other men who are also maintaining their sobriety after having been involved in the program.
- [16] It is fair to say that he has enthusiastically engaged in efforts towards his rehabilitation. At the time of the presentence report, he was attending multiple Narcotics Anonymous meetings per week. For approximately the last six months, he has been the secretary of his home Narcotics Anonymous group, organizing and running meetings that involve up to 200 attendees. He continues to attend the weekly alumni night for those who have graduated from the Last Door's program, and provides his support to other men who are going through the earlier stages of the recovery process. At the time of the presentence report, he was also attending schools, detox centres, and other institutions on behalf of NA, to inform people of its potential benefits.
- [17] In addition, he attended regular meetings to deal with his gambling, which is a discrete type of addiction, and has voluntarily placed himself on the exclusion lists at local casinos.
- [18] He is now employed in a machine shop, a position he obtained through people he knew at Last Door, and has held that job for about 10 months. We have a letter from the operations manager describing Mr. Posavac's positive efforts and attitude in the job.
- [19] His previous relationship was with someone who had similar struggles with addiction. He is now in a committed relationship with a person who has maintained her own drug-free status for about eight years. Mr. Posavac and his partner attend church regularly together, and he has a very good relationship with her nine-year-old daughter. She has provided a letter that describes the very positive nature of these relationships, and what she observes as his dedication to maintaining an ongoing sober life for himself.
- [20] He has also re-established contact with his parents and his sister, after significant periods of estrangement arising from his substance abuse.
- [21] Additional references that were submitted on his behalf describe his excellent performance in the Last Door's various programs, his additional volunteer activities in the New Westminster community, and the close personal connections he has formed with several fellow participants in the recovery process.
- [22] In his comments to the author of the presentence report, Mr. Posavac displayed what I would describe as a notable level of insight about the underlying causes of his addiction and his need to take responsibility for the choices he has made and continues to make in his life. He did not put the blame on external causes, as some who struggle with addiction do. In a letter that he wrote for this sentencing, he expresses his gratitude to the recovery process, his desire never to return to his former tumultuous life, and his wish to serve as a support to others who are trying to get out of that difficult situation.

- [23] He has a previous criminal record. Most of the convictions occurred a significant time before the current offences. The older convictions were for possession of a narcotic in 1995 and for property-related offences in 2004 and 2005. Except for one pair of convictions, for which he received a nine-month conditional sentence followed by probation in 2005, his offences were all dealt with by the imposition of probation orders.
- [24] For the offences for which the May 2018 PSR was prepared, he received a sentence of time served based on credit for 12 days of presentence custody, followed by a 12-month probation order. This was for three counts of possession of a controlled substance. The offence dates were in January of 2016, before the current offences were committed.
- [25] The PSR indicated that there were no concerns about Mr. Posavac's compliance during his conditional sentence order, or while he was on bail supervision for the offences that he was then facing. He expressed a positive view of his bail supervision at that time.

Positions

- [26] For the Crown, Ms. Gibb submits that a community-based sentence is not appropriate. The general range for these offences is imprisonment for 12 to 18 months. However, she fairly concedes that in this case that range should be reduced somewhat, perhaps to 12 to 15 months, to recognize Mr. Posavac's progress since he committed the offences.
- [27] While she acknowledges that Mr. Posavac was himself an addict during his participation in the offences, she argues that he was still not living the same kind of hand-to-mouth existence - merely selling to finance his own next personal use - as those for whom addiction is has been considered a mitigating factor in other cases. Instead, he was a full participant in a large trafficking operation that was located in a residential community (the location itself being an additional aggravating factor).
- [28] This operation had all of the usual features of such activity, including multiple varieties of hard drugs, cash, firearms, and associated equipment. On this point, Ms. Gibb cited the comments of the Court of Appeal in *R. v. Rutter*, 2017 BCCA 193, at para. 33, that:

it is highly blameworthy for an offender to engage in the commercial distribution of drugs for financial gain to the detriment of those who are unfortunate enough to be victimized by the drug trade

- [29] However, she fairly advises that it is Mr. Voszler who is regarded, in the Crown's theory, as the overall leader of this drug-selling enterprise, with Mr. Posavac acting at his direction (although Mr. Posavac's sales of GHB are said to be a trafficking activity that he undertook in his own right).

- [30] While this was not a dial-a-dope operation, she submits that there are parallels to such activity that raise the same concerns about the need for denunciation and deterrence in sentencing. In particular, there is the ability of such an operation to make drugs readily available to addicted purchasers.
- [31] In Ms. Gibb's submission, *R. v. Voong*, 2015 BCCA 285, the leading case on the exceptional circumstances needed to depart from the usual range of a custodial sentence of six to 18 months for a first-time offender in dial-a-dope operations, also offers useful guidance here. Citing the subsequent decision of the Court of Appeal in *R. v. Serov*, 2017 BCCA 456, at para. 59, she stresses that Voong envisioned that non-custodial sentences in such circumstances would "rarely" be imposed, in part because they cannot usually provide the necessary level of denunciation and deterrence. The burden lies on the offender to demonstrate that they fall within that rare set of circumstances and, given Mr. Posavac's history and the circumstances of his offending here, the Crown's submission is that he is unable to meet that burden.
- [32] However, she fairly acknowledges that the fact that Mr. Posavac has gone beyond simply achieving his own recovery, and is also actively facilitating the recovery of others, is a significant mitigating factor.
- [33] Mr. Posavac's counsel, Mr. Myers, seeks the imposition of a suspended sentence, with a detailed list of proposed probation conditions to address the applicable principles of sentencing in cases of this kind. He stresses the numerous meaningful mitigating factors in this case, which include Mr. Posavac's guilty plea (foregoing the opportunity to challenge several aspects of the search and conserving valuable court time), the genuine remorse he has demonstrated through his comments in the presentence report and his written comments to the Court, the extensive steps he has already taken towards his own rehabilitation and the considerable amount of time that he has been able to maintain his sobriety, and the role of his own serious addiction in this offending. In addition, given the age of most of the previous convictions, Mr. Myers submits that Mr. Posavac is more comparable to a first offender.
- [34] Voong makes it clear that in appropriate circumstances denunciation and deterrence can be properly addressed by a suspended sentence, he points out. In particular, he submits that an enlightened member of the public who looked at the current circumstances would readily grasp that seizing this opportunity to support Mr. Posavac's effort to live a sober and law-abiding life will offer much better long-term protection to society than the reflexive imposition of imprisonment.
- [35] Mr. Myers refers to cases offering examples of suspended sentences that have been imposed for similar serious drug-related conduct, including where the offenders had significant related convictions, based on what were found to be exceptional efforts towards rehabilitation. Those decisions were *R. v. Yang*, 2016 BCPC 381, and *R. v. Green*, 2017 BCSC 1528. In the latter case, the sentencing judge was satisfied that a suspended sentence should

be imposed despite the offender's participation in an extensive residentially-based trafficking operation, in which drugs were also being sold outside of the residence (although the amounts of cash and drugs involved in it were not as great as in our case).

Discussion

- [36] First of all, I accept counsel's submissions that (1) although this is not a dial-a-dope offence, it would normally result in a jail sentence in the general range sought by the Crown; and (2) the reasons for departing from such a sentence are, practically speaking, indistinguishable from the kind of exceptional circumstances that are envisioned in Voong. Thus, that decision offers a useful tool for determining whether a non-custodial sentence could be a fit one in the present circumstances.
- [37] The aggravating factors here are fairly obvious.
- [38] Mr. Posavac was unquestionably a fully-engaged participant in a sizable residential drug-trafficking operation, one that sold significant amounts of a variety of highly addictive and dangerous drugs, with firearms and an extensive amount of stolen property also present on the margins.
- [39] While his addiction moderates his participation to a degree, Ms. Gibb correctly observes that his participation still went beyond the immediate need to satisfy it, and extended well into the commercial sphere.
- [40] Further, while most of his convictions are dated, he has received community-based sentences previously and cannot be treated as the complete equivalent of a first offender.
- [41] On the mitigating side, his guilty pleas represent a meaningful expression of remorse in themselves.
- [42] I also found his expressions of awareness of, and regret for the harm that is caused by this type of activity in the community to be more insightful and less self-serving than one frequently sees.
- [43] Most importantly, he has so far defied the odds, given his age and the entrenched nature of his previous addictions, and established a credible, objectively verified, and long-term path to sobriety, law-abiding behaviour, and employment. He has positive social supports and what seems to me to be a realistic and clear-headed view of the daily challenges he will have to overcome to stay on this path. The Crown correctly observes that developing the capacity to help others who suffer from the same addiction is a significant further achievement, in addition to furthering his own rehabilitation. I would characterize this particular mitigating factor as strong and persuasive.
- [44] Denunciation and deterrence are, of course, critically important in trafficking cases, but as it was expressed in Voong at para. 43:

imposing conditions for the protection of the community may have a deterrent and denunciatory effect in addition to a rehabilitative effect. Put another way, a condition need not be punitive in nature in order to achieve deterrence or denunciation.

[45] In my opinion, the critical language in Voong concerning the assessment of exceptional circumstances is at para. 59:

There must be something that would lead a sentencing judge to conclude that the offender had truly turned his or her life around, and that the protection of the public was subsequently better served by a non-custodial sentence.

[46] Note that this analysis does not simply ask what good jail would do in a particular circumstance. That would be an unprincipled approach, disregarding the weight to which principles of sentence other than rehabilitation are entitled to in serious cases of this kind. Rather, it asks the sentencing judge to consider how the protection of the public is best achieved on the particular facts before the court, bearing in mind that denunciation and deterrence must always be given their due in an appropriate way.

[47] Where an offender has made substantial, enduring, and verified gains towards their own rehabilitation by the time of sentencing, it may be possible for a court to conclude that public protection is indeed better served by basing the sentence in the community, with appropriate conditions and safeguards.

[48] I conclude that despite the seriousness of Mr. Posavac's offences, which I readily acknowledge, this is such a case.

Sentences

[49] Therefore, on each count, I suspend the passing of sentence and place Mr. Posavac on probation for a period of three years.

[50] His counsel's suggestions form a helpful basis for the probation conditions, although I will be adjusting them somewhat.

[51] First, there are the compulsory conditions required by the Criminal Code.

[52] He will keep the peace and be of good behaviour, appear before the court when required to do so by the court, notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or the probation officer of any change of employment or occupation.

[53] In addition, he will be subject to the following optional conditions.

[54] He will report in person to a probation officer within two business days and thereafter report as and when directed by the probation officer and in the manner directed by the probation officer.

- [55] He will perform 100 hours of community service within the first 18 months of this order to the satisfaction of the probation officer. If it is approved by the probation officer, this may include his participation in and volunteering at the Last Door Recovery Society or Narcotics and Alcoholics Anonymous. I expect that Mr. Posavac will embrace this opportunity to further give back to the community in the manner that he already has.
- [56] He must remain in the Province of British Columbia unless he has the prior written permission of his probation officer to be outside it.
- [57] He is to have no contact or communication, directly or indirectly, with Richard Voszler. I would not expect that he would want to have any contact, but it is a requirement.
- [58] He will obey a curfew of 10:00 p.m. to 6:00 a.m. seven days per week for the first 12 months of the probation. He is not to be outside of his residence during that time without prior written permission from the probation officer, which must be carried on his person.
- [59] He will present himself at the door of the residence to any peace officer or probation officer for the purposes of determining his compliance with the curfew condition of this order.
- [60] He will respond personally and immediately to the telephone when a peace officer or probation officer that makes a telephone call to his residence for the purpose of determining his compliance with the curfew condition of this order.
- [61] He is not to possess any weapon as that term is defined in s. 2 of the Criminal Code.
- [62] He is not to possess or consume any alcohol or controlled substance within the meaning of s. 2 of the Controlled Drugs and Substances Act except as prescribed by a licensed physician and taken in the matter as prescribed by that physician.
- [63] Finally, he will attend in and successfully complete to the satisfaction of his probation officer any course of counselling directed by the probation officer. He has a strong regime in place, but I would still give the probation officer the option to recommend additional matters for his benefit.
- [64] Once again very fairly, Ms. Gibb advised that if I were to impose a community-based sentence, the issue of the protection of the public in relation to a secondary designated DNA offence is not engaged, so I decline to make an order for the taking of bodily substances in relation to DNA analysis.
- [65] Pursuant to s. 109(2) of the Criminal Code, Mr. Posavac is prohibited from possessing any of the items set out in ss (a) for 10 years and any of the items set out in ss (b) for life.
- [66] Although the order will actually be made after Mr. Voszler has been sentenced, Mr. Myers advised that Mr. Posavac consents to the forfeiture of the firearms and other property that were seized during this search, other than personal identification in his own name, which should be returned to him.

"Schultes J."

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