
CANADA / JUDGMENT

R. v. Schirmer

2019 BCSC 1404

COURT

Supreme Court of British Columbia

DECIDED

9 July 2019

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2019 BCSC 1404 R. v. Schirmer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Schirmer,

2019 BCSC 1404

Date: 20190709

Docket: 170268-3

Registry: Victoria

Regina

v.

Horst Francisco Schirmer

John Macdonald Mclean Turner

Before: The Honourable Mr. Justice Ehrcke

Oral Reasons for Sentence

Re Horst Francisco Schirmer

Counsel for the Crown:

O.L. Bick

Counsel for H.F. Schirmer:

C.S. Johnson, Q.C.

Place and Date of Hearing:

Victoria, B.C.

June 18, 2019

Place and Date of Judgment:

Victoria, B.C.

July 9, 2019

INTRODUCTION

- [1] THE COURT: The accused, Horst Francisco Schirmer, was jointly charged with John Macdonald Mclean Turner on an indictment with six counts of unlawful possession of various controlled substances on February 9, 2017, contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA].
- [2] Count 1 of the indictment is in relation to cocaine. Count 2 is in relation to heroin. Count 3 is in relation to GHB. Count 4 is in relation to heroin and fentanyl. Count 5 is in relation to MDMA. Count 6 is in relation to methamphetamine.
- [3] Mr. Turner entered guilty pleas to all six counts on October 5, 2018, and on January 28, 2019, following a joint submission by Crown and defence, he was sentenced to 31 months' imprisonment on Counts 1 and 4, after receiving five months' credit for time already spent in custody awaiting sentence. He was given concurrent sentences of two years on Counts 2 and 6, and one year on Counts 3 and 5. Those reasons for sentence are indexed at 2019 BCSC 295.
- [4] Mr. Schirmer proceeded to trial on the six-count indictment. On February 1, 2019, he was found guilty on Counts 1, 2, 4, 5, and 6, but was acquitted on Count 3. All of the drugs mentioned in those counts are listed in Schedule I of the CDSA, and accordingly, each of those counts carries a maximum penalty of life imprisonment.
- [5] A pre-sentence report was ordered, and March 19, 2019 was set as a sentencing date, but that was adjourned at the request of the defence. Sentencing submissions were made on June 18, 2019. These are my reasons for sentence with respect to Mr. Schirmer.

CIRCUMSTANCES OF THE OFFENCE

- [6] The facts found at Mr. Schirmer's trial are set out in the reasons for conviction: 2019 BCSC 297. They may briefly be summarized as follows.
- [7] As a result of an investigation, the police executed search warrants at John Turner's apartment on Qu'Appelle Street in Saanich, and also at Mr. Schirmer's apartment on Admirals Road in Esquimalt, British Columbia. Police also searched Mr. Schirmer's Cadillac Escalade automobile following his arrest.

- [8] The police found drugs in a number of locations at Mr. Turner's apartment, but the greatest quantities were in a large Honeywell safe, which contained cocaine, heroin, a mixture of heroin and fentanyl, MDMA, and methamphetamine.
- [9] Surveillance evidence in January and February 2017 established Mr. Schirmer's association with John Turner's apartment on Qu'Appelle Street. Mr. Schirmer, or automobiles associated with him, were seen in and around the Qu'Appelle Street apartment building on several occasions. Those sightings were sometimes followed by activity that the police considered to be consistent with drug transactions.
- [10] Cst. Jorgensen, who was qualified as an expert witness, testified that drug dealers sometimes store their drugs away from their own residence at a location known as a stash house.
- [11] The drugs found in the large Honeywell safe at Mr. Turner's apartment included 280 grams of methamphetamine, 953 grams of cocaine, 68 grams of MDMA, 64 grams of pure heroin, and 105 grams of a heroin/fentanyl mixture. The large safe also contained four notebooks with score sheets and a white envelope with \$1,000 in Canadian currency.
- [12] From the evidence at trial, including the evidence that Mr. Schirmer had one of the two keys to the large Honeywell safe, and evidence of his possession of score sheets, it is clear that he had knowledge and control amounting to possession of the contents of that safe. In particular, he possessed the methamphetamine, the cocaine, the MDMA, the heroin, and the heroin/fentanyl mixture for the purpose of trafficking.
- [13] From the surveillance evidence and from the notations on the score sheets, I am satisfied that Mr. Schirmer's involvement in these activities continued for at least several weeks, and most likely for considerably longer.
- [14] I do not draw any specific inference from the fact that police found tens of thousands of dollars in envelopes in Mr. Turner's apartment, but quite apart from that evidence, it is clear that large amounts of money were involved in this operation. Based on the expert testimony of Cst. Jorgensen, the value of the 280 grams of methamphetamine found in the large safe would be between \$6,000 and \$10,000. The value of the 953 grams of cocaine would be \$47,600 to \$61,200. The heroin, whether pure or mixed with fentanyl, would be worth \$15,000 to \$18,000. Thus, the total value of the drugs possessed by Mr. Schirmer for the purpose of trafficking was at least \$68,600, and perhaps as much as \$89,200.
- [15] This was not street-level trafficking. Counsel for Mr. Schirmer concedes that it could properly be characterized as mid-level trafficking.

THE CIRCUMSTANCES OF THE ACCUSED

- [16] Mr. Schirmer is currently 46 years old. He was born in Toronto, but his parents separated when he was very young, and his mother took him to Brazil, where she subsequently abandoned him. He was eventually returned to his father in North America. By the age of 15, he was living in Seattle and associating with the wrong people. He began using drugs. At age 19, he moved to Victoria, where his grandmother was living, and Victoria has been his primary residence since that time.
- [17] According to the pre-sentence report that was prepared in this matter, Mr. Schirmer has no real family support. His parents and his grandmother have died. He does not have any siblings, and he never married.
- [18] In terms of education, Mr. Schirmer completed his GED, as well as a certified nursing assistant program. He has an extensive work history in various jobs, most recently as a mechanic.
- [19] Mr. Schirmer has struggled with substance abuse over the years, with cocaine being his drug of choice. While in custody, he has completed a substance abuse management course and the Living Without Violence program.
- [20] At the sentencing hearing, Mr. Schirmer told the court that he was sorry for these offences, and that when he is released, he wishes to relocate away from Victoria.
- [21] The pre-sentence report notes that Mr. Schirmer thinks his mother was of Métis descent, although he is not certain, and he has not seen his mother or any of her family since he left Toronto. The report goes on to state:

Mr. Schirmer was not raised with any Indigenous teachings or culture and states that he is not interested in perusing [sic] further information or connection at this time.

- [22] Mr. Schirmer has a criminal record in Canada. In 1996, he was sentenced to six months' imprisonment for two counts of possession of a narcotic for the purpose of trafficking. He also has convictions in the 1990s for property offences. More recently, he was convicted in 2015 for failing to appear in court, and in May 2018 for breach of a recognizance.
- [23] He also has a criminal record in the United States. In 2005, he pleaded guilty in Texas to possession of 113.8 kilograms of marihuana with intent to distribute, and to possession of 1.96 kilograms of cocaine with intent to distribute. He was sentenced to 72 months' imprisonment.

THE PRINCIPLES OF SENTENCING

- [24] The principles of sentencing have evolved in Canadian common law and are now largely codified in Part XXIII of the Criminal Code. Section 718 of the Criminal Code provides that the fundamental purpose of sentencing is to contribute to respect for the law and the maintenance of a just, peaceful, and safe society. As set out in s. 718, the objectives of

sentencing include the denunciation of unlawful conduct, deterrence of the offender and others from committing further offences, separation of the offender from society where necessary, rehabilitation of the offender, reparation for harm done, and promotion of a sense of responsibility in the offender, including acknowledgment of the harm done.

- [25] Section 718.1 articulates the most basic principle of sentencing, namely that the sentence imposed must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
- [26] Section 718.2 sets out a number of specific principles: A sentence should be similar to sentences imposed on similar offenders for similar offences in similar circumstances. An offender should not be deprived of liberty, if a less-restrictive sanction is appropriate. All reasonable sanctions, other than imprisonment, should be considered if they are reasonable and consistent with the harm done, with particular attention to the circumstances of aboriginal offenders. Where consecutive sentences are imposed, the total sentence should not be unduly long or harsh. A sentence should be increased or reduced to take account of any aggravating or mitigating circumstances.
- [27] Additional principles of sentencing in relation to drug offences are set out in s. 10 of the Controlled Drugs and Substances Act. Section 10(1) refers to the importance of encouraging rehabilitation and treatment in appropriate circumstances.

THE POSITION OF THE CROWN AND THE DEFENCE

- [28] The Crown submits that the most serious offence here is Count 4 relating to heroin and fentanyl, and on that count it seeks a sentence of seven years' imprisonment, less credit for time in custody. The Crown seeks a sentence of five years concurrent on Count 1 relating to cocaine. On Counts 2 and 6 relating to heroin and methamphetamine respectively, the Crown seeks a sentence of four years concurrent. On Count 5 relating to MDMA, the Crown seeks a sentence of two years concurrent.
- [29] The defence submits that the Crown position is overly harsh and suggests that appropriate sentences would be three to five years on Count 4, three years on Count 1, two years on Counts 2 and 6, and one year on Count 5.

TIME IN CUSTODY

- [30] Mr. Schirmer has spent a total of 694 days in pre-sentence custody attributable to this matter. He should receive credit at a rate of roughly 1.5 to one, for a total credit of two years and 10 months.

CASE AUTHORITIES

- [31] Both counsel referred to *R. v. Smith*, 2017 BCCA 112, where our Court of Appeal discussed at length the pernicious nature of fentanyl and how that should affect sentencing.

- [32] In addition, counsel for Mr. Schirmer submitted a book of authorities, including: *R. v. Turner*, 2010 BCSC 1690; *R. v. Harris*, 2017 BCSC 1552; *R. v. Nagy*, 2013 BCCA 419; *R. v. Murray*, 2009 BCCA 426; *R. v. Fraser*, 2009 BCCA 179; and *R. v. Ziaee*, 2017 BCSC 569.
- [33] Crown counsel submitted the following British Columbia authorities: *R. v. Toth*, 2017 BCSC 501; *R. v. Perkins*, 2018 BCSC 1055; *R. v. Nazarek*, 2018 BCSC 1357; *R. v. Khosravi*, 2018 BCSC 1793; *R. v. Shah*, 2018 BCSC 2238; *R. v. Turner*, 2019 BCSC 295; and *R. v. Lloyd*, 2019 BCCA 128.
- [34] I have reviewed the cases submitted by both the Crown and the defence. They cover a wide range of circumstances, both of the offences and of the offenders, and as one would expect, the sentences vary accordingly. While the cases provide useful guidance in determining a range of sentence that is comparable to the sentences imposed on similar offenders in similar circumstances, the fact remains that sentencing is an individualized process and the sentence I impose must be one that is a fit sentence for this particular offence and this particular offender.
- [35] In the cases cited by the defence, the global sentences ranged from three years to five years, although some of those cases did not involve fentanyl.
- [36] I should say something in particular about *R. v. Turner*, 2019 BCSC 295, as that is the sentencing decision involving Mr. Schirmer's co-accused. *R. v. Turner* is distinguishable because that case involved a guilty plea and a joint submission with agreed facts that Mr. Turner was not the beneficial owner of the bulk amount of the drugs and he felt obligated to keep the drugs and cash at his apartment. As well, Mr. Turner had no criminal record.
- [37] Among the cases cited by the Crown, I note that in *R. v. Toth*, Ker J. found at para. 84 that the range for a serious, sustained, and relatively sophisticated mid-level drug operation is between 28 months and seven years' imprisonment.
- [38] In *R. v. Lloyd*, our Court of Appeal, in upholding a sentence of six years' imprisonment, commented that the presence of any amount of fentanyl in a heroin/fentanyl mixture is an aggravating factor. The Court noted at paras. 29 to 34:
- [29] In my opinion, the judge correctly identified, as an aggravating factor in sentencing, that the presence of fentanyl in the heroin impacted the seriousness of the nature and quality of the drugs . . .
- [30] Mr. Lloyd submits that since there was no quantitative analysis of fentanyl in the heroin the judge could not consider the dangerous character of the fentanyl present in the heroin. He says fentanyl is not an inherently dangerous drug because it is used for medicinal purposes. He says the judge erred when she said, relying on Smith, that "any amount of fentanyl is harmful" and "a lethal dose is described as being as small as a grain of salt": at para. 21.

- [31] In my view, the judge had ample authority before her to support this statement, and her comments related particularly to the form in which Mr. Lloyd possessed fentanyl -- in a mixture of heroin laced with fentanyl.
- [32] Mr. Lloyd's suggestion that the judge was displaying "fentanyl hysteria" is out of line and has no merit. The judge's concern about the fentanyl epidemic is well-supported in the materials she had before her and the authorities she considered. Her comments are a recognition that fentanyl is a highly lethal drug when used in non-medical circumstances and of the resulting public health crisis rocking the country in recent years.
- [33] Newbury J.A. in Smith (at para. 2) noted the apt comments of then Crown counsel (now Riley J.) that fentanyl is a "pernicious drug responsible for grievous loss of life, immense and unsustainable strain on our public health system, and devastating impacts on the safety and integrity of our communities." She also quoted the comments of Danyliuk J. (R. v. Fyfe 2017, SKQB 5 at para. 2) that "perdition is precisely the correct term for the ultimate destination of purveyors and users of [Fentanyl]": at para. 40. Also, in Smith Harris J.A. commented,
- [48] fentanyl is a scourge. It poses intolerable risks of accidental overdosing because it is so much more powerful than morphine. Illegally manufactured fentanyl can be particularly and unpredictably potent, even tiny amounts of fentanyl mixed into other drugs such as cocaine or heroin may be fatal; often street drugs have fentanyl cut into them, and it is practically impossible for drug users to recognize whether the drugs they buy contain fentanyl.
- [34] In my view, the judge correctly concluded that heroin laced with fentanyl is an aggravating factor in sentencing whether or not there is a quantitative analysis of the fentanyl.

AGGRAVATING AND MITIGATING FACTORS

- [39] A mitigating factor in this case is Mr. Schirmer's expression of remorse. He is also to be commended for the programs he completed while in custody.
- [40] As noted in the pre-sentence report, Mr. Schirmer is uncertain whether his mother was of Métis descent, but as set out in the report, he is not interested in pursuing the matter. In any event, I take into account the fact that he had a difficult childhood and had to overcome many obstacles in his life as a result of his unusual family history.
- [41] There is an error in the pre-sentence report, in that it indicates Mr. Schirmer pleaded guilty to these offences. That, of course, is not the case. However, the fact that Mr. Schirmer chose to proceed with a trial of these charges is not an aggravating factor.
- [42] Mr. Schirmer's criminal record, and especially his convictions for similar offences, is an aggravating factor. Other aggravating factors include the nature and quantity of the drugs Mr. Schirmer possessed for the purpose of trafficking, and the fact that he carried on this illegal activity for at least several weeks. Large amounts of drugs and large amounts of money were involved. Mr. Schirmer was not a street-level trafficker, but rather a mid-level

drug trafficker. This venture was clearly very profitable for him. I note, however, that he had to struggle with drug use himself.

- [43] The drugs that Mr. Schirmer possessed for the purpose of trafficking were extremely harmful. The Crown introduced evidence showing the dramatic and disturbing increase in the number of drug overdose deaths in British Columbia attributable to the rise in fentanyl trafficking. As already noted, the pernicious nature of this drug was discussed at length by our Court of Appeal in *R. v. Smith* and *R. v. Lloyd*.
- [44] Cst. Jorgensen testified that a single dose of heroin or of a heroin/fentanyl mixture is typically one-tenth of a gram. Mr. Schirmer possessed 105 grams. Accordingly, the amount in Mr. Schirmer's possession was sufficient for more than 1,000 doses. The potentially devastating harm that could be caused by distribution of those 1,000 doses is a matter of grave concern.

DECISION

- [45] Mr. Schirmer, would you please stand.
- [46] As I have already explained, in imposing sentence, you are entitled to a total of two years and 10 months' credit for the time you have already spent in custody relating to this offence.
- [47] Given all the circumstances of the offence and of you as an offender, including your difficult and unusual upbringing, I find that on Count 4 relating to heroin and fentanyl, a fit sentence, apart from credit for pre-sentence custody, would have been six years' imprisonment. The actual sentence I impose on Count 4 is a sentence of three years and two months' imprisonment, after giving you two years and 10 months' credit for the time you have already spent in pre-sentence custody.
- [48] On Count 1 relating to cocaine, I impose a sentence of two years, after giving you credit for the time you have already spent in pre-sentence custody.
- [49] On Counts 2 and 6 relating to heroin and methamphetamine respectively, I impose a sentence of one year after giving you credit for the time you have already spent in pre-sentence custody.
- [50] On Count 5 relating to MDMA, I impose a sentence of one day imprisonment after giving you credit for the time you have already spent in pre-sentence custody.
- [51] The sentences on all counts will be concurrent.
- [52] In addition, the Crown seeks an order under s. 487.051(3) of the Criminal Code for the provision of samples for DNA analysis. For these offences, such an order is discretionary. Applying the principles set out in *R. v. Awasis*, 2009 BCCA 134, and considering your criminal record and the nature and circumstances of the offences, I am satisfied that such an order should be made.

- [53] Pursuant to s. 109(1)(a) of the Criminal Code, a firearms prohibition order is mandatory upon conviction for these offences. There shall be an order in the terms of s. 109(2) prohibiting possession of any firearm other than a prohibited firearm or restricted weapon, or any crossbow, restricted weapon, ammunition, and explosive substance for a period of 10 years, and prohibiting possession of 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.
- [54] There will be no victim surcharge under s. 737 of the Criminal Code, because the Supreme Court of Canada has declared that section to be unconstitutional in *R. v. Boudreault*, 2018 SCC 58.
- [55] Is there anything further?
- [56] MR. JOHNSON: No, thank you, My Lord.
- [57] MR. BICK: My Lord, the s. 109 prohibition order is on a second CDSA designated offence, it should have been the lifetime order, not a 10-year order, I believe. If that was not made clear in my submission, I apologize.
- [58] THE COURT: So you say that the firearms prohibition should be for life pursuant to which section?
- [59] MR. BICK: I'm pulling it up right now. Under s-s (3) which is for any case other than a case described in s-s (2), and s-s (2) indicates that it is in the case of a first conviction for or discharge from the offence to which the order relates. Although the previous CDSA offence is dated, that was the first offence under this section, s. 5 of the CDSA, and this is the second. So because it is not the first conviction for this type of offence, s-s (2) does not apply and s-s (3) applies, because this is a case other than a case described in s-s (2).
- [60] THE COURT: So you are referring not to the conviction in the United States?
- [61] MR. BICK: No.
- [62] THE COURT: But to the conviction in Canada.
- [63] MR. BICK: From 1996, which was for the same offence.
- [64] THE COURT: Mr. Johnson, do you have any submissions about this? I am actually going to stand down for a few minutes to go and look at these sections and consider this matter.
- [65] MR. JOHNSON: I'm just looking it up myself, My Lord, so I'm happy to stand down for a bit.
- [66] THE COURT: Okay, why don't we stand down for about 15 minutes, and we can both have a look at this, and I will hear any submissions that you might have at that time.
- [67] MR. BICK: Thank you.
- [68] THE COURT: Okay.

[69] MR. JOHNSON: Thank you, and Madam Clerk, will you call me back in 15 minutes?

[70] THE CLERK: Yes, I will

[71] MR. JOHNSON: Thank you.

[72] THE COURT: Thank you.

[PROCEEDINGS ADJOURNED]

[PROCEEDINGS RECONVENED]

[SUBMISSIONS AT 11:10:18 A.M. TO 11:13:53 A.M.]

[PROCEEDINGS ADJOURNED]

[PROCEEDINGS RECONVENED]

[SUBMISSIONS AT 2:07:33 P.M. TO 2:09:30 P.M.]

[73] THE COURT: After giving my reasons for sentence this morning, I asked counsel whether there was anything further, and Crown counsel submitted that the firearms prohibition that I imposed on Mr. Schirmer should have been a lifetime ban under s. 109(3) of the Criminal Code, rather than a 10-year ban under s. 109(2), on account of the fact that this is not Mr. Schirmer's first conviction.

[74] Section 109(2) provides that in the case of a first conviction, the ban must be for a period of at least 10 years. Section 109(3) provides that a lifetime ban is mandatory in a case where s. 109(2) does not apply. This is not Mr. Schirmer's first conviction, because he was previously convicted in 1996 of two counts of possession of a narcotic for the purpose of trafficking.

[75] I brought to counsel's attention the decision in *R. v. Friesen* (2004), 192 C.C.C. (3d) 67 (Man. C.A.), where the Manitoba Court of Appeal held that the mandatory lifetime ban under s. 109(3) does not apply unless the Crown has given notice under s. 727 that a greater punishment would be sought on account of a previous conviction.

[76] The Crown concedes that in this case, no such prior notice was given and for that reason, a lifetime ban is not mandatory.

[77] Nevertheless, numerous cases have held that even in the absence of notice, a lifetime firearm prohibition may be imposed if the circumstances warrant it: see, for example, *R. v. Ellis*, [2001] O.J. No. 1262 (C.A.) at para. 14; *R. c. Richer*, [2012] J.Q. No. 5058 (C.A.) at para. 12; and *R. v. Alexander*, [2013] N.J. No. 71 (C.A.) at para. 6.

[78] Having considered the particular circumstances of this case and the circumstances of the offender, I am satisfied that the 10-year firearm prohibition as initially imposed under s. 109(2) is sufficient, and indeed the Crown concedes as much in its very fair submissions on this point.

- [79] I would add that the record in this case should indicate that on the last hearing date, a forfeiture order was made under section -- what is the section number?
- [80] MR. BICK: Sixteen of the Controlled Drugs and Substances Act.
- [81] THE COURT: Under s. 16 of the Controlled Drugs and Substances Act.
- [82] Thank you. Is there anything further?
- [83] MR. BICK: Nothing, thank you, My Lord, I'm not going to open up another unnecessary can of worms.
- [84] MR. JOHNSON: No, thank you, My Lord.
- [85] THE COURT: All right.
- [86] MR. BICK: Thank you.
- [87] THE COURT: Thank you, counsel.
- [88] MR. JOHNSON: Thank you.

The Honourable Mr. Justice W.F. Ehrcke

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