
CANADA / JUDGMENT

R. v. Schirmer

2021 BCSC 913

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 913 R. v. Schirmer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Schirmer,

2021 BCSC 913

Date: 20210503

Docket: 174439

Registry: Victoria

Regina

v.

Horst Francisco Schirmer

Before: The Honourable Madam Justice Murray

Oral Reasons for Sentence

Counsel for the Crown:

O.L. Bick

Counsel for the Accused:

R.S. Horne

Place and Date of Hearing:

Victoria, B.C.

March 23, 2021

Place and Date of Judgment:

Victoria, B.C.

May 3, 2021

Introduction

- [1] On February 27, 2020 I convicted Mr. Schirmer of seven counts: possession of cannabis and GHB; possession of cocaine, heroin, fentanyl and methamphetamine for the purpose of trafficking ("PPT"); and possession of brass knuckles, a prohibited weapon.
- [2] This is his sentencing. While I have made some grammatical changes to my oral reasons, the substance and result have not changed.
- [3] The circumstances are set out in detail in my reasons for judgment indexed at 2020 BCSC 291. I will set them out briefly here.
- [4] On August 2, 2017, the Victoria Police Department (VPD) was conducting surveillance on Mr. Schirmer. Police observed a man they identified as Mr. Schirmer sitting in the front passenger seat of a white van which they followed from Cobble Hill to Langford. Police attempted to pull the van over in Langford. The van stopped briefly, then sped off. Police followed the car into a residential area. The police vehicle was approximately half a block or less behind the van with its emergency lights and sirens activated. As the van slowed to take a sharp turn, an officer saw a man, who I found to be Mr. Schirmer, jump out of the front passenger door and run off between houses and out of sight.
- [5] A resident in the area observed Mr. Schirmer hop over a fence into his neighbour's yard where he ducked into a bush. He was carrying a satchel. When Mr. Schirmer emerged from the bush he no longer had the satchel. The resident then saw Mr. Schirmer emerge from the yard onto a busy street. He last saw Mr. Schirmer running towards a bicycle shop. Shortly thereafter, police located Mr. Schirmer hiding in a storage room at the rear of the bicycle shop and arrested him.
- [6] The satchel, which was later located and seized by police, contained a large quantity of drugs in different bags and drug trafficking paraphernalia:
 - 1) 561 grams of pressed powdered cocaine in three pieces, the largest one a brick with some pieces missing;
 - 2) 28 grams of heroin, fentanyl and cocaine ;
 - 3) 2 grams of heroin and caffeine;
 - 4) 2 bags of cocaine, each weighing 84 grams;
 - 5) 30.3 grams of heroin, fentanyl and caffeine;
 - 6) 160 grams of cocaine;

- 7) 3 bags of cocaine weighing 14 grams, 14 grams and 7 grams;
 - 8) 26 grams of methamphetamine crystals;
 - 9) 36 grams of cannabis;
 - 10) empty baggies;
 - 11) at least 100 new unused small Ziploc bags with skulls on them and several used Ziploc skull bags;
 - 12) a scale;
 - 13) brass knuckles;
 - 14) a pill bottle labelled "Clomid" with pills in it; and
 - 15) scoresheets.
- [7] In the van in which Mr. Schirmer was travelling police located a Gatorade bottle that was two-thirds full of gamma hydroxybutyrate ("GHB") and a small bag containing cocaine residue in a grocery bag on the floor of the front passenger seat. They also found an optometrist prescription in the accused's name in the front passenger door pocket.
- [8] In Mr. Schirmer's wallet which was seized from him on arrest was found \$3,500 in cash of various denominations bundled with elastic bands in packs of \$1,000, scoresheets and a recipe for GHB.

The Circumstances of the Accused

- [9] Mr. Schirmer is 48 years old. The pre-sentence report ("PSR") and psychological report indicate that Mr. Schirmer had a difficult upbringing. Mr. Schirmer reports being abandoned by both parents at different times throughout his childhood, although he reports that he lived with his father and periodically with his grandmother from the age of seven until he moved out. Mr. Schirmer reports to the writer of the PSR that he moved out at the age of 15 and was of no fixed address. To Dr. Dugbartey the psychologist who authored the psychological report he reported that he left home to live on his own when he was just under the age of 17. In any event, it appears that Mr. Schirmer's relationship with his father was not a healthy one. He told the psychologist that he "hated" his dad and that he ran away from home, in his words "all the time". Mr. Schirmer moved to Victoria to live with his grandmother at age 19.
- [10] Mr. Schirmer is single and has had few steady, long-term relationships. He reports that he has fathered two children but according to the reports, he has played no part in their lives. He reports to the writer of the PSR that he has limited family supports. Both of his parents and his grandmother have passed away and he has no siblings. Prior to the onset of his custodial sentence he had been in contact with several aunts and uncles, but he says they are no longer answering their phones. He also has an aunt and cousin who live nearby, but

he reports that they were, in his words, "actively involved in a drug lifestyle" and he does not associate with them. His only familial contact appears to be a cousin who Mr. Schirmer states struggles with alcoholism.

- [11] Mr. Schirmer reports that he dropped out of school in grade 10. He reports that at some point he obtained his GED (he does not recall when he did this or where) and that he subsequently completed a certified nursing assistant program at a college in Seattle. Mr. Schirmer tells the writer of the PSR that he used his training in nursing to assist his father in his medical practice. For the past two decades, Mr. Schirmer says that he has worked as an auto mechanic and prior to that, as a baker.
- [12] Mr. Schirmer's drug use history is unclear. To the writer of the PSR he reports that he became involved with illicit drugs at the age of 15. At that time, he says he began associating with people who were heavily involved in the drug subculture and his substance use continually increased. He reports that he has struggled with substance abuse for over 40 years and that he was actively using cocaine, crystal methamphetamine and GHB at the time of his offending. But to Dr. Dugbartey, who noted that he had difficulty getting a clear picture of Mr. Schirmer's drug use history, Mr. Schirmer says that he first used cannabis at age 18 and cocaine at age 19. While he has experimented with many drugs, Mr. Schirmer tells both the psychologist and the PSR writer that cocaine is his drug of choice.
- [13] Mr. Schirmer's criminal record shows that he has been involved in drug trafficking for decades. I will return to this.
- [14] It appears from his history that Mr. Schirmer has few pro-social influences, if any, in his life, and that he has continued to associate with people involved with illicit substances. At the time of this offence, Mr. Schirmer reports that he was residing in a rental house in Esquimalt. He rented out the rooms, with at least two people to a room, and allowed additional transient tenants to "crash" on the couch in the living room. He reports that there was illicit drug use at the house.
- [15] Mr. Schirmer has been in custody since August 2, 2017 when he was arrested for the offences before this court. He has reportedly taken the substance abuse management program four times while incarcerated.

The Position of Crown and Defence

- [16] The Crown seeks a total sentence of 16 years taking into account the sentences imposed by Ehrcke, J. and Matthews, J. The Crown takes the position that the most serious offence is the PPT of fentanyl. For that count the Crown seeks a sentence of eight years. For the other PPT charges, counts 1, 2 and 4, the Crown seeks a sentence of six years on each count to be served concurrent to the eight years. On the possession charges, counts 5 and 7, the Crown seeks sentences of seven days and on count 6, possession of brass knuckles, six months- all concurrent to the eight years. In order to get to the sentence of 16 years the Crown submits that this Court should discount the sentences to account for the principle of totality and

sentence Mr. Schirmer to five years consecutive to the sentences he is currently serving.

- [17] In support of this position the Crown relies on *R. v. Leach*, 2019 BCCA 451; *R. v. Smith*, 2017 BCCA 112 [Smith]; *R. v. Lloyd*, 2019 BCCA 128 [Lloyd]; *R. v. Perkins*, 2018 BCSC 1055; *R. v. Oswald*, 2019 BCSC 1861; *R. v. White*, 2020 NSCA 33; *R. v. Petrowski*, 2020 MBCA 78; *R. v. Robertson*, 2020 BCCA 65; and *R. v. Herd*, 2014 BCSC 1146. The Crown also relies on two Ontario decisions. In their submission, *R. v. Disher*, 2020 ONCA 710 [Disher] is factually analogous to the case at bar and *R. v. Schramek*, 2021 ONSC 436 [Schramek] is instructive with respect to the sentences imposed across Canadian jurisdictions for the PPT of fentanyl.
- [18] The defence argues that an aggregate sentence of 16 years would offend the totality principle. The defence submits that a sentence of 14 years would not. The defence relies on *R. v. Mann*, 2018 BCCA 265 [Mann]; *R. v. White*, 2019 BCCA 461 [White]; *R. v. Davies*, 2019 BCCA 359 [Davies]; and *R. v. Toth*, 2017 BCSC 501 [Toth].

Principles of Sentencing

- [19] The duty of a sentencing judge is to fashion a just and appropriate punishment that addresses the principles of sentencing and is proportionate to the moral blameworthiness of the offender.
- [20] Section 718 of the Criminal Code, R.S.C. 1985 c. C-46, sets out the fundamental principles of sentencing as follows:
- 718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
 - (b) to deter the offender and other persons from committing offences;
 - (c) to separate offenders from society, where necessary;
 - (d) to assist in rehabilitating offenders;
 - (e) to provide reparations for harm done to victims or to the community; and
 - (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.
- [21] Section 718.1 states that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
- [22] Section 718.2 sets out a number of other sentencing principles including the following which are pertinent to this sentencing:

- a) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances: s. 718.2(b);
- b) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances: s. 718.2(d); and
- c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh: s. 718.2(c). The principle known as the totality principle provides that a consecutive sentence must not exceed the overall culpability of the offender. Where there is a series of convictions and sentences, the last sentencing court that imposes a consecutive sentence is the one whose decision on totality will be the most impactful. That is certainly the case here.

[23] Finally, s. 10 of the Controlled Drugs and Substances Act, S.C. 1996, c.19 (CDSA), sets out the fundamental purpose of a sentence for drug offences, which reads in part:

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.

- (2) If a person is convicted of a designated substance offence for which the court is not required to impose a minimum punishment, the court imposing sentence on the person shall consider any relevant aggravating factors including that the person
 - (a) in relation to the commission of the offence,
 - (i) carried, used or threatened to use a weapon,
 - (b) was previously convicted of a designated substance offence

Range of Sentence

[24] I have also considered the authorities provided by the parties with respect to the appropriate sentencing range. However, as our Court of Appeal noted in Lloyd, "sentencing is a highly individualized process as the circumstances of the offence and the offender are vast and varied" and "[t]here is no 'cookie-cutter' application case to case": para. 44; see also R. v. Lacasse, 2015 SCC 54 at paras. 26-28. Similarly, in Smith at para. 35, the court noted that ranges are merely guidelines and are not hard and fast categories.

[25] In their respective sentencing judgments regarding Mr. Schirmer, Ehrcke and Matthews JJ. canvassed a number authorities raised by the parties before me with respect to the appropriate sentencing range. As such, I do not consider it necessary to discuss those authorities in detail. Rather I will highlight the cases that are most significant to this sentencing.

- [26] In Smith, the court held that the dangers of fentanyl warrant a materially higher sentence than that for other dangerous drugs such as heroin and cocaine which are themselves dangerous. The sentencing ranges for dangerous drugs reflect "denunciation and deterrence": para. 49. The court noted that one of the significant dangers associated with fentanyl when cut into other drugs is that it may not be recognized by the user. The court held that trafficking drugs containing fentanyl should attract a sentence that starts at 18 months and could exceed 36 months.
- [27] In Mann, our Court of Appeal indicated that "mid-level" trafficking of drugs containing fentanyl may well result in a sentence exceeding 36 months; that is, the court's decision in Smith does not impose a "cap" on the generally applicable range at 36 months' imprisonment: para. 87. The court upheld a global sentence of seven years for possession for the purpose of trafficking, firearms and uttering a threat for one of the offenders, and a five year sentence for possession for the purpose of trafficking for the other.
- [28] In terms of the remaining two authorities relied on by the defence, I find White to be distinguishable as it concerned a conviction for the possession of fentanyl as opposed to PPT.
- [29] Davies concerned a first-time offender who pleaded guilty, had no criminal history and had a stable and pro-social family life. The trial judge's sentence of 32 months' imprisonment was reduced to 16 months on the basis that the trial judge erred in failing to give effect to the relevant mitigating factors: para. 37. Mr. Schirmer's circumstances are not analogous.
- [30] Of the cases referred to me I find Disher closest factually to the circumstances before me. In Disher, the Ontario Court of Appeal substituted a sentence of eight years' imprisonment for the 12 year sentence (less 7.5 months for pre-trial custody) imposed by the trial judge on the grounds that the trial judge failed to consider the offender's rehabilitative potential: para. 27. The offender was convicted of, among other offences, trafficking in adulterated heroin containing fentanyl and carfentanil and of being in possession of brass knuckles despite being subject to a weapons prohibition at the time. At the time of his arrest, the offender had been on bail for only two weeks on other drug charges. He also had a "serious and related" criminal record spanning 15 years, which included numerous drug trafficking convictions: para. 28.
- [31] With these authorities in mind, I turn now to the aggravating and mitigating factors.

Aggravating and Mitigating Factors

- [32] There are many aggravating factors.
- [33] First, Mr. Schirmer has a criminal record which includes prior convictions for possession and trafficking-related offences.

- [34] 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.
- [35] 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 for which he received a sentence of 72 months' imprisonment. I pause to note that to the writer of the PSR, Mr. Schirmer denied having a criminal history in the USA. Mr. Schirmer raised no objection to that conviction at the sentencing hearing. I am satisfied on all of the evidence filed by the Crown on this sentencing hearing that Mr. Schirmer was in fact convicted in the United States.
- [36] Mr. Schirmer was convicted in 2015 for failing to appear in court, and in May 2018 for breach of a recognizance.
- [37] In 2019 he was convicted of possession of cocaine, heroin, heroin, fentanyl, MDMA and methamphetamine for the purpose of trafficking and was sentenced to a total effective sentence of six years ("the Ehrcke sentence"). Those offences occurred in February 2017.
- [38] Most recently, on December 4, 2020, a jury convicted Mr. Schirmer on all counts of a 5-count indictment of unlawful possession of cocaine, heroin/fentanyl, MDMA, GHB and fentanyl for the purpose of trafficking on May 4, 2017. On April 12, 2021 Matthews, J. sentenced him to five years' imprisonment to be served consecutive to the Ehrcke sentence ("the Matthews sentence").
- [39] I pause to note that I do not consider the last two convictions to be "prior convictions" as per s. 10(1) CDSA for the purpose of sentencing.
- [40] Second, Mr. Schirmer was on bail for PPT at the time of this offence. The conditions were stringent and included the following which he was breaching at the time of this offence: not to possess any controlled substance; not to possess a cell phone; not to be in a vehicle or house in which drugs are present; house arrest save for between 10 a.m. and noon; and not to possess any weapons. Clearly Mr. Schirmer was not restrained in the least by that court order.
- [41] Third, in May 2017, a residence that Mr. Schirmer was at was searched and his drugs were seized. While Mr. Schirmer was not charged until later, it should have been clear to him that police were interested him. That did not deter Mr. Schirmer; he continued trafficking.
- [42] Fourth, the fact that Mr. Schirmer fled from police both in the van and on foot is not only aggravating, it further illustrates his lack of regard for the law.
- [43] Fifth, the amount and the variety of drugs is aggravating. Not only was there a significant quantity of drugs found in Mr. Schirmer's satchel, but all of the drugs, save the cannabis, would be characterized as hard drugs. From the quantity of drugs, I accept that Mr. Schirmer is a mid-level drug dealer.

- [44] Sixth, the fact that he had fentanyl is a significant aggravating fact. As has been made clear by our Court of Appeal in Lloyd, the presence of any amount of fentanyl mixed with heroin is an aggravating factor:
- [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 . . .
- [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.
- [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.
- [45] 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.
- [46] Seventh, while I accept that Mr. Schirmer struggles with drug use, from the amount of drugs and cash it is clear that he traffics in illicit drugs for profit.
- [47] Eighth, Dr. Dugbartey found Mr. Schirmer to be a risk to re-offend.
- [48] Finally, that Mr. Schirmer had a weapon in the satchel alongside the drugs is an aggravating factor. Drug trafficking and violence often go hand in hand.
- [49] A mitigating factor is that Mr. Schirmer has taken substance management courses while in custody. Although he told Dr. Dugbartey that he does not think it is enough, it is a first step.
- [50] I also note that in the PSR, Mr. Schirmer mentions that he was unsure as to whether his mother was of Métis descent but he is not interested in pursuing the matter. As did Ehrcke J. in his sentencing of Mr. Schirmer in 2019, I take into account the fact that Mr. Schirmer had a difficult childhood.

Discussion

- [51] Mr. Schirmer has been convicted of very serious offences. So serious that for PPT heroin/fentanyl, he is liable to imprisonment for life: s. 5(3) CDSA.

- [52] The primary considerations on this sentencing are protection of the public, deterrence, both specific and general, and denunciation. It is clear from the principles of sentencing outlined above that this court must consider not just the circumstances of the individual offender but also the circumstances of the community in determining a fit sentence.
- [53] While rehabilitation is always a consideration on sentencing, in this instance I am satisfied that it is reduced for a number of reasons:
- i. First, after four decades of addiction I am advised that Mr. Schirmer never indicated an interest in counselling until he was being sentenced by Ehrcke, J.;
 - ii. Second, he was less than forthright in his interview with Dr. Dugbartey, to the point that the psychologist was not able to rely on his answers;
 - iii. Third, while Mr. Schirmer states that he wants to change his life, he remains firmly entrenched in the criminal drug subculture. His associates are all involved with drugs. He lives with people that use drugs.
 - iv. Finally, Mr. Schirmer takes no responsibility for the offences for which he was convicted. He claimed that the drugs belonged to someone else. At trial he called Corey Jackson, a fellow inmate to testify to that. I not only rejected Mr. Jackson's evidence, I found that Mr. Schirmer coached him to give it. Mr. Schirmer has also claimed that police planted the drugs. As Dr. Dugbartey noted "He (Mr. Schirmer) appears quick to blame others and external events for much of his woes. In terms of risk mitigation, I believe this man's attributional style would be a significant impediment to his personal rehabilitation."
- [54] While I do not take these to be aggravating factors on sentencing, they do not bode well for rehabilitation.
- [55] The impact of drug trafficking on communities across Canada is well known.
- [56] Drug dealing is at the heart of the drug overdose medical emergency plaguing our country.
- [57] The courts have a responsibility to respond to the issues facing our communities. The only way we can do that is through sentences that act as a deterrent to Mr. Schirmer and others like him that are involved in the drug trade. The message must be clear: courts will not condone drug trafficking. If you traffic, you will face a lengthy period of incarceration. This sentence must be a significant one. It cannot be viewed by people like Mr. Schirmer as the cost of doing business.
- [58] Having considered all of the evidence, including the fact that Mr. Schirmer has been a persistent drug trafficker over a lengthy period of time, the law and submissions of counsel I am persuaded that the appropriate sentence is eight years. While I am of the view that the sentence should be consecutive as it is a separate event from the February and May offences, I am concerned that when combined with the sentences he is serving, the effective sentence of 19 years is overly harsh. Accordingly, having regard to the principle of totality, I exercise my discretion to order that it be served consecutive to the Ehrcke sentence but

concurrent to the Matthews sentence. That makes the effective sentence 14 years.

[59] Stand up Mr. Schirmer.

[60] Mr. Schirmer, what is surprising to me is that while you constantly bemoan the difficulties your drug addiction has caused you, by trafficking drugs you are introducing new people to addiction and condemning them to the same fate as you. All for your personal monetary gain. Without concern about what you are doing to them.

[61] I sentence you to eight years.

[62] That sentence is broken down by counts as follows:

Count 1- PPT cocaine - six years;

Count 2- PPT heroin - six years;

Count 3- PPT fentanyl - eight years;

Count 4- PPT methamphetamine - six years;

Count 5- Possession of GHB - seven days;

Count 6- Possession of a prohibited weapon - six months;

Count 7- Possession of cannabis - seven days.

[63] These sentences are concurrent one with another for a total sentence of eight years. The eight year sentence is to be served consecutive to the Ehrcke sentence of six years and concurrent to the Matthews sentence of five years.

[64] In addition I make the following ancillary orders:

- a) Section 109- pursuant to s. 109 of the Criminal Code, you are prohibited from possessing:
 - 1) any firearm, other than a prohibited firearm or restricted firearm, and any cross-bow, restricted weapon, ammunition and explosive substance for a period of 15 years, and
 - 2) any prohibited firearm or restricted firearm, prohibited weapon, prohibited device and prohibited ammunition for life;
- b) DNA order- pursuant to s. 487.051(1) of the Criminal Code, I authorize the taking of samples of bodily substances from you; and finally
- c) Forfeiture of goods seized pursuant to s. 16 of the CDSA as drafted by the Crown and consented to by the defence.

[65] I want to thank counsel for their assistance throughout this challenging trial.

"The Honourable Madam Justice Murray"

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