
CANADA / JUDGMENT

R. v. Tomczyk

2019 BCSC 1313

COURT

Supreme Court of British Columbia

DECIDED

16 July 2019

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2019 BCSC 1313 R. v. Tomczyk

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Tomczyk,

2019 BCSC 1313

Date: 20190716

Docket: 82717

Registry: Nanaimo

Regina

v.

Christopher Aaron Tomczyk

Before: The Honourable Mr. Justice Voith

Oral Reasons for Sentence

Counsel for the Crown:

James E. Farenholtz

Counsel for the Accused:

A. Peter Hertzberg

Place and Dates of Hearing:

Nanaimo, B.C.

May 21 and July 15, 2019

Place and Date of Sentencing:

Nanaimo, B.C.

July 16, 2019

- [1] THE COURT: On December 15, 2016, the accused, Mr. Christopher Aaron Tomczyk, was arrested while in the possession of various controlled substances. He was thereafter charged with three counts of possession for the purposes of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA] for each of methamphetamine, carfentanil, and cannabis respectively. He was also charged with possession of psilocybin contrary to s. 4(1) of the CDSA.
- [2] In a voir dire conducted over four days from February 19 to February 22, 2019, Mr. Tomczyk challenged the lawfulness of his arrest. In reasons for judgment indexed at 2019 BCSC 637 (the "Arrest Reasons"), I upheld the lawfulness of the accused's arrest. Mr. Tomczyk thereafter, though he did not plead guilty, did not contest two of the four charges he faced. The Crown agreed to stay the remaining two charges. In the result, I convicted Mr. Tomczyk of the counts of possession for the purposes of trafficking in methamphetamine and carfentanil respectively.
- [3] Mr. Tomczyk's sentencing was then adjourned so that a pre-sentence report and other relevant materials could be assembled.

Position of the Parties

- [4] The Crown and counsel for Mr. Tomczyk agreed on the relevant legal framework, on the applicable range of sentences that is appropriate in this case, and on the relevant ancillary orders. Furthermore, they agree, within a relatively narrow range, on the sentence that would be appropriate for Mr. Tomczyk in all of the circumstances.
- [5] The Crown argues that a sentence of four to five years on Count 2, the charge of trafficking in carfentanil, and a sentence of 12 to 18 months on Count 1, the charge of trafficking in methamphetamine, both of which would be served concurrently, would be appropriate.
- [6] Counsel for Mr. Tomczyk accepts that a custodial sentence is necessary in this case and argues that the circumstances of the case warrant a sentence at the low end of what the Crown proposes. Specifically, counsel submitted that a sentence of 12 months for trafficking in methamphetamine and a sentence of four years for trafficking in carfentanil, both of which would be served concurrently, would be appropriate.

The Arrest Reasons

- [7] In the Arrest Reasons, I described what caused the police to suspect Mr. Tomczyk was selling drugs, the subsequent surveillance of his trailer and motor home from which it was suspected he ran his operations, and what gave rise to his arrest. For present purposes, it is relevant that the police covertly observed Mr. Tomczyk's motor home on three evenings. Over that time, several dozen individuals, a number of whom were known to be drug users, entered and then exited Mr. Tomczyk's motor home after brief periods of time.
- [8] When Mr. Tomczyk was arrested, he had a total of 3.16 grams of carfentanil and 8.05 grams of methamphetamine in his possession. Those drugs have a street value of \$310 and \$640 respectively, depending on how they are sold.

Mr. Tomczyk, his Circumstances and Background

- [9] Mr. Tomczyk is nearly 42 years old. His upbringing was difficult and turbulent. When he was a young boy, his father left the home and his mother was an alcoholic. He was placed in foster care for a period of time. He then lived with his aunt and uncle and his extended family off and on and throughout his childhood. He was sent to juvenile detention at the age of 14. He was again placed in foster care.
- [10] Notwithstanding these circumstances, Mr. Tomczyk is close to his mother, to two of his three siblings, and to his extended family.
- [11] Mr. Tomczyk has a Grade 6 education. There is some evidence that he has ADHD and he has been prescribed Ritalin for many years. He has no history of mental illness. He has a history of intermittent cocaine use but he has not used that drug in several years. In particular, there is no evidence or suggestion that Mr. Tomczyk suffered from any addiction at the time of the instant offences.
- [12] Mr. Tomczyk has an extensive criminal record. He has been convicted of numerous offences. His record is concisely summarized in his pre-sentence report:

Mr. Tomczyk has been involved in the Criminal Justice System since his youth. His history includes numerous convictions for failing to comply with Probation Orders, failing to comply with Recognizances, and failing to appear in court. He has multiple convictions [including] the possession and trafficking of illicit substances including Possession of a Controlled Substance, Trafficking in Scheduled Substances, Possession of a Scheduled Substance for the Purpose of Trafficking, and Possession of Narcotics. In tandem with his drug related convictions, Mr. Tomczyk has two convictions for Possession of Property Obtained by Crime. His criminal history [includes] three offences violent in nature: assault, assault with a weapon, and uttering threats.

- [13] Mr. Tomczyk's prior convictions for drug trafficking are of particular relevance. One set of convictions, for three offences, occurred on December 19, 2002. He was sentenced to either one year or two years for each of these various offences, all of which were to be served concurrently. He was convicted of a separate offence of trafficking a day later on December 20, 2002 and was sentenced to one year for that offence. In May 2007, he was again convicted of trafficking in a controlled substance and he was sentenced to two years for that offence.
- [14] It is also relevant that Mr. Tomczyk admitted to continuing to sell drugs for a further year after he was arrested for the offences now before the court. Mr. Tomczyk says that he then stopped trafficking in drugs and has not done so for the past 18 months.
- [15] Finally, it is relevant that Mr. Tomczyk has worked at different times in his life, particularly in the construction industry, and that he has some work-related skills that are well regarded by his employer. I will return to this point momentarily.

Relevant Legal Framework

- [16] There are several distinct bodies of authority that are pertinent.
- (1) The general statutory framework in the Criminal Code, R.S.C. 1985, c. C-46
- [17] Sections 718, 718.1 and 718.2 establish the purposes and principles of sentencing. Section 718 expresses the importance of establishing just sanctions that achieve 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.
- [18] Section 718.1, under the heading "Fundamental principle", establishes that a sentence is to be "proportionate to the gravity of the offence and the degree of responsibility of the offender".
- [19] Finally, s. 718.2(a) requires that a court take into account various considerations when imposing a sentence, including the relevant aggravating and mitigating circumstances.
- (2) The CDSA

- [20] Section 10(2)(b) of the CDSA establishes that a previous conviction for a designated substance offence is a deemed aggravating factor.
- (3) The jurisprudence particularly as it relates to fentanyl and carfentanil
- [21] The rapid growth and widespread use of fentanyl and carfentanil as street drugs, as well as the potential consequences of using these drugs, created, for a short time, some issue or uncertainty on a number of sentencing considerations. That uncertainty has, by virtue of a trilogy of Court of Appeal cases, been largely resolved. Those three cases are *R. v. Smith*, 2017 BCCA 112; *R. v. Mann*, 2018 BCCA 265; and *R. v. Lloyd*, 2019 BCCA 128.
- [22] These cases addressed several legal issues including the appropriate sentencing range for trafficking in fentanyl and the extent to which, if at all, it is relevant that a drug trafficker may be unaware that he or she is selling either fentanyl or carfentanil. The cases also addressed, in the strongest terms possible, the pernicious pharmaceutical and societal effects of both drugs. I will start with that last issue first.
- (a) The evidence that prompted the court's response to trafficking in fentanyl and carfentanil
- [23] The reason the courts have responded as they have to trafficking in fentanyl and carfentanil is on account of the pharmacological properties of these drugs. The evidence and references in *Smith* and *Mann*, in particular, address the serious hazards associated with the use of these drugs.
- [24] Cpl. Scott, an expert called before me, gave similar evidence. I was also provided with the report of Dr. Kennedy, referenced in *Mann* at paras. 16 and 23, and the report of the Coroner Services that tracked illicit drug overdose deaths from January 1, 2007 to January 31, 2017, also referred to in *Mann* at para. 31.
- [25] Thus, in *Mann*, Justice Fitch explains:
- [18] Sgt. Boechler testified that fentanyl is a powerful synthetic opioid drug that is approximately 100 times more powerful than morphine. Fentanyl is intended for use by anesthesiologists in strictly controlled medical environments.
- [19] Fentanyl, fentanyl analogues and other synthetic opioids are now commonly used in the production of counterfeit heroin and oxycodone for sale in the illicit drug trade. Some drug users seek out fentanyl because it tends to produce a better "high" than heroin that is available for purchase on the street.
- [20] Fentanyl is addictive and causes dependence in a user. The pharmacological effects of fentanyl include pain relief, euphoria, sedation, respiratory depression, lowered blood pressure and lowered heart rate. The mechanism by which fentanyl causes death is almost always related to respiratory depression resulting in lethally low circulating oxygen levels.

...

[27] Carfentanil is about 100 times more potent than fentanyl and 10,000 times more potent than morphine. Due to its extreme toxicity, carfentanil has no safe or beneficial human use, even within the medical community in highly controlled environments. Its sole use appears to be as a large animal tranquilizing agent. Sgt. Boechler said there is "no way to effectively and safely try to mix [carfentanil] for any sort of street-level distribution". A user of carfentanil will likely go into immediate overdose and require the administration of naloxone. While Sgt. Boechler was not aware of any case in which a drug user specifically requested carfentanil, he noted that there would be no way for a user to determine whether the product they were purchasing contained carfentanil. He testified that the introduction of carfentanil into illicit substances sold on the street has significantly increased overdose deaths in British Columbia.

[28] Sgt. Boechler testified that Health Canada can detect carfentanil when it represents at least .05 percent of a substance. He testified that at its threshold detection point, it would represent two-and-a-half times the median lethal dose.

...

[31] The Coroners Service report on illicit drug overdose deaths in British Columbia records that in 2007 there were 202 illicit drug overdose deaths in British Columbia. By 2016, the number had increased to 978. In the first seven months of 2017, there were 876 illicit drug overdose . . . in British Columbia. Preliminary data available at the time of the report suggested that the proportion of illicit drug overdose deaths for which fentanyl was detected, either alone or in combination with other drugs, was 67% in 2016 and 81% between January and July 2017.

See also Smith at para. 16 for similar statistics.

[26] It is these harsh realities that have driven our courts to respond. In Smith, Justice Harris said:

[49] In my opinion, these facts warrant recognizing a sentencing range for street-level dealing in fentanyl which is materially higher than the sentencing range applicable to other . . . drugs such as heroin. The range for street-level dealing in those drugs seems to start in British Columbia at six-months' imprisonment. As matters stand today, other dangerous drugs do not kill as frequently, accidentally, or as unpredictably as fentanyl, but the risks posed by those drugs should not be minimized even by comparison with fentanyl. Heroin, crystal meth and cocaine can have devastating consequences. They may not kill as often as fentanyl, but very large numbers of accidental deaths are associated with their consumption (indeed the majority of accidental overdose fatalities [include] a mixture of illicit drugs) and they destroy lives and wreak social havoc. The existing sentencing range for them is intended to reflect, amongst others, the sentencing principles of deterrence and denunciation. Recognizing a different and markedly higher sentencing range for street-level dealing in fentanyl turns on the enhanced risks associated with that activity and the individual responsibility of dealers given those risks and public knowledge of them.

(b) The relevant range of sentence

- [27] In *Smith*, a case that dealt with trafficking in fentanyl, the majority considered the public and street awareness of the potential consequences of fentanyl use had not, at the time of the accused's offence, escalated to the degree it had by the time he was sentenced nearly two years later. This consideration, Justice Harris reasoned, affected "the circumstances of the offence at the time it was committed": para. 53. The majority agreed, however, with the portion of the dissenting judgment of Justice Newbury where she said:
- [45] I agree with the many judges who have stated that denunciation and deterrence must generally be given primacy in sentencing in cases involving Fentanyl. To this end, I would suggest a normal range beginning at 18 months' imprisonment, as the Crown suggests. I would place Mr. Smith's offences at the bottom of this range, in light of the mitigating factors [described] by the court below. I do not believe it is necessary for us to specify the top of the range, although I would suggest it might well exceed 36 months, especially where the offender has a substantial record involving the sale of Fentanyl or otherwise demonstrates an indifference to the human lives he or she is putting at risk. This is a matter that can be worked out in future cases. Obviously, the 'range' may also increase beyond 36 months, or a different range will apply, where the offender is higher up the chain of sale or distribution.
- [28] Justice Newbury, after referring to a number of cases, considered the range of sentence was warranted because the danger caused by fentanyl informed the moral culpability of persons who sell it on the street: para. 44.
- [29] In *Lloyd*, the accused was convicted of a number of offences, including possession of heroin and fentanyl for the purposes of trafficking. He received a six-year sentence for this offence. Justice Stromberg-Stein, for the court, upheld the sentencing judge's reasons and said:
- [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.
- [30] Finally, in *Mann*, two brothers pleaded guilty to being involved in a dial-a-dope operation trafficking in fentanyl and its analogues, and to other offences. One of the two brothers pleaded guilty to trafficking in carfentanil and to possessing carfentanil for the purposes of trafficking. This brother argued, for various reasons, that the trial judge erred in principle by imposing a longer sentence for trafficking in carfentanil than the sentence he had received for trafficking in fentanyl. To be specific, both brothers received concurrent four-year sentences for all counts relating to trafficking in fentanyl or possessing fentanyl for the purposes of trafficking. The one brother had received five year concurrent sentences for three counts that related to trafficking in carfentanil, and possessing carfentanil for the purpose of trafficking.

[31] Justice Fitch said:

[73] First, as the appellants' counsel acknowledged in oral argument, the offence of trafficking in carfentanil is even more serious than the offence of trafficking in fentanyl. The fundamental principle of proportionality requires courts to craft sentences reflecting both the gravity of the offence committed and the moral blameworthiness of the offender [and there is reference to Ipeelee] . . . The proportionality principle, said in Ipeelee to be the sine qua non of a just sanction, finds statutory expression in s. 718.1 of the Code:

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

As the proportionality principle takes its meaning, in part, from the gravity of the offence, it is not surprising that the more serious of the offences committed by Sarabjit attracted a harsher penalty. I see no error in principle in the judge's decision to distinguish, for sentencing purposes, between the offences involving carfentanil and those involving fentanyl.

[32] Justice Fitch ultimately concluded, however, that it was "premature to identify a range... to a case of this kind. The range will develop over time, guided by judicial experience and the need for public protection".

(c) Knowledge by an offender who sells fentanyl or carfentanil

[33] Each of Smith at paras. 30 and 46, Mann at paras. 75 to 79, and Lloyd at paras. 27 and 28 establish that it is not a mitigating factor that an accused is unaware or genuinely mistaken about the true identity of the drug he or she is selling. Ignorance is not a mitigating factor in such circumstances.

Relevant Aggravating and Mitigating Circumstances

[34] Mr. Tomczyk's record and, in particular, his earlier trafficking convictions, though somewhat dated, are an aggravating circumstance, both under the case law and the CDSA.

[35] The fact that Mr. Tomczyk did not plead guilty is not an aggravating circumstance. His admission that he continued to sell drugs for a year after his arrest, however, call into question his remorse for his actions. This concern is highlighted by his comments to the author of the pre-sentence report I received. In that report, Mr. Tomczyk is reported as having said that he sold drugs to "help people out", that "it was no big deal", and that he "is not a bad dealer". Such comments suggest a striking lack of insight. Mr. Tomczyk was not an addict. He sold drugs, as he admitted, to make money. He preyed on the sick and he peddled what is near poison.

[36] Mr. Tomczyk also says that he did not know the drugs he sold contained carfentanil. He says that he actually could have obtained fentanyl but he chose not to do so. The Crown and Mr. Tomczyk's counsel accept, based on the authorities I have referred to, that Mr. Tomczyk's belief he was selling heroin rather than carfentanil is not a mitigating circumstance.

- [37] I was provided with three letters of reference for Mr. Tomczyk: two were from individuals he has known for several years and the other was from a recent employer who thought well of Mr. Tomczyk and his work-related skills. These letters tie into Mr. Tomczyk's comments when he addressed the court. Mr. Tomczyk expressed regret for his actions. He said that he has been working steadily for 18 months and that he has been enjoying his work. He said he has more work than he can do and he sometimes hires others. He said he did not like who he had become while he was dealing in drugs and he was determined to change. He believed being sent to jail would be counterproductive.
- [38] The former set of comments are to Mr. Tomczyk's credit and create some hope for his future. The latter comments, however, again reflect some lack of recognition on the part of Mr. Tomczyk of how serious his offences are, both in relation to others and for himself.

Sentencing Guidelines from other Cases

- [39] The role of the court is to fashion a sentence based on the principles I have described that is appropriate to the circumstances of the offender and the offence. These latter considerations rarely align with precision to the circumstances in other cases.
- [40] In both *Smith* at paras. 38 and 39 and *Mann* at paras. 96 and 97, the court referred to numerous authorities of assistance. *Smith* itself was a case of a first-time offender who had pleaded guilty. *Mann* was a case of two comparatively youthful first-time offenders who had pleaded guilty and who had expressed remorse. One was himself an addict. The court, however, considered that a sentence that was higher than the range in *Smith* was appropriate because, among other things, the brothers were more than street-level dealers and their conduct displayed an indifference to human life: paras. 56 and 99.
- [41] The six-year sentence in *Lloyd* was upheld because of the offender's record, the fact the offender was trafficking fentanyl, the fact that the subject offences occurred five months after he had served two years for related offences, and because the volume of drugs he had were indicative of a business enterprise for personal profit: paras. 20 and 45.
- [42] Recently, in *R. v. Rauner*, 2019 BCSC 268, the offender was sentenced to 28 months in prison for selling 0.2 grams of heroin mixed with carfentanil and a further 10 months to be served concurrently for trafficking 0.2 grams and 0.1 grams of methamphetamine to an undercover officer. Mr. Rauner had pleaded guilty. He was 43 years old with a lengthy record, an extremely difficult upbringing, and a history of drug addiction. At the time of his arrest, he was homeless and a drug addict, and was trafficking to support his own addictions. The court was impressed with the sincerity of his efforts to turn his life around since his last arrest.

ANALYSIS AND CONCLUSIONS

- [43] The dominant sentencing objectives in such cases are denunciation and deterrence: Smith at paras. 22 and 45 and R. v. Godbout, 2015 BCCA 168 at paras. 8 and 16.
- [44] The object of rehabilitation often assumes less importance, particularly with offenders such as Mr. Tomczyk who are in their forties and who have a lengthy criminal record. In the case of Mr. Tomczyk, however, there appears to be real hope that he can turn his life around and become productive through his work.
- [45] Mr. Tomczyk, please stand.
- [46] I sentence you to 12 months' incarceration on Count 1, that being possession of methamphetamine for the purposes of trafficking. I sentence you to four years on Count 2, that being possession of carfentanil for the purposes of trafficking. The two sentences are to be served concurrently.
- [47] These sentences are consistent with the severity of the offences, the mitigating and aggravating circumstances that are present, the sentencing principles I have described, and the authorities I have reviewed. In particular, I am satisfied that the sentences properly balance denunciation and deterrence, and the prospect for rehabilitation that is present in this case.
- [48] The following ancillary orders are relevant:
- a) The Crown seeks a DNA order pursuant to s. 487.051(3)(b) of the Criminal Code. These offences are deemed a secondary designated offence. The order in the case of a secondary designated offence is discretionary. I am satisfied that such an order is in the best interests of the administration of justice, having regard to all relevant factors including the serious nature of the offence and the offender's record, and I order the taking of the number of bodily substances reasonably required for forensic DNA analysis.
 - b) I impose a lifetime prohibition on the possession by Mr. Tomczyk of any firearm, crossbow, restricted weapon, or ammunition, or other items enumerated under s. 109(3) of the Criminal Code.

"VOITH J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/19/13/2019BCSC1313.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-tomczyk-2019>

Prepared on 29 October 2026 · Esheria