
CANADA / JUDGMENT

R. v. Toth

2017 BCSC 501

COURT

Supreme Court of British Columbia

DECIDED

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2017 BCSC 501 R. v. Toth

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Toth,

2017 BCSC 501

Date: 20170118

Docket: 29646

Registry: Fort St. John

Regina

v.

Alexis Dawn Chin

Joshua Ivan Toth

Before: The Honourable Madam Justice Ker

Oral Reasons for Sentence

(Re Accused Joshua Ivan Toth)

Counsel for the Crown:

D. Peltier

Counsel for the Accused Chin:

R. Nielsen

Counsel for the Accused Toth:

P.C. Armour

Place and Date of Trial/Hearing:

Fort St. John, B.C.

January 17 and 18, 2017

Place and Date of Judgment:

Fort St. John, B.C.

January 18, 2017

Introduction

- [1] THE COURT: Joshua Ivan Toth is before the Court today to be sentenced. Mr. Toth has pleaded guilty to possession for the purpose of trafficking of three controlled substances, namely cocaine, fentanyl and heroin, contrary to s. 5(2) of the Controlled Drugs and Substances Act, (the "CDSA").
- [2] All three substances are listed as Schedule I substances under the CDSA. The statutory maximum sentence available for this offence is life imprisonment, reflecting the very serious nature of this offence.

Circumstances of the offence

- [3] I begin with the circumstances of the offence. On June 30, 2015, as a result of a complaint by Mr. Toth's landlord about seeing Mr. Toth shooting a handgun, members of the Fort St. John RCMP obtained a search warrant to search for the handgun in Mr. Toth's residence, a mobile home located on a property on 230th Road in Taylor, B.C.
- [4] Upon the RCMP's arrival at the property, Ms. Chin, Mr. Toth's partner, attempted to run into the woods, but stopped and complied with the directions of the officers. Ms. Chin was arrested without incident.
- [5] Mr. Toth was not at the residence when the RCMP arrived to execute the search warrant. However, his then 12-year-old son was at the property, on the deck of the mobile home.
- [6] While the RCMP were searching the residence Mr. Toth returned to the property. He too was arrested without incident.
- [7] A search of the pickup truck Mr. Toth was driving resulted in the RCMP locating two bundles of cash, primarily in \$20 bills (depicted in Ex. #1, at photograph number 30, and itemized in photographs 6 and 7 of Ex. #3). The total amount of cash seized from the centre console of the truck was \$2,480.

- [8] The search of Mr. Toth's residence produced a significant number of items which were later seized. The items included: a Remington 12 gauge double-barrelled shotgun, for which there was no valid licence or registration, located in a hutch in the kitchen area; shotgun shells in the drawers in the kitchen, as well as on the bedside table in the master bedroom; and a small Ziploc baggy containing approximately four grams of dried marihuana in the living room.
- [9] Further items seized included a black shaving kit or toiletry bag in the bedroom. It contained crack and powder cocaine in small baggies, and a bundle of cash, with a note saying, "Gina, \$1,400". A large blue Rubbermaid storage container was also found in the bedroom and held a round pizza baking tray, which had what appeared to be a line of cocaine on it, cards to move the cocaine around, and a rolled up tube of Canadian Tire money, likely to facilitate snorting the cocaine. Also inside the Rubbermaid container was a shoebox holding six bundles of cash. A second Rubbermaid storage container located in the bedroom was found to contain scissors, baggies, and a scale -- all accoutrements of the drug trade.
- [10] In the walk-in closet adjacent to the bedroom, the police located a large Ziploc baggy that contained approximately 14 bundles of cash that was hidden amongst pairs of jeans on a cupboard shelf. Also located in the walk-in closet, on the floor, was a small digital safe. When the safe was opened at the RCMP detachment, the officers located a copy of the rental agreement, as well as a purple toiletry bag holding two Ziploc baggies which each contained smaller baggies of between 20 and 25 green pills. In total, 1,098 pills were found in the two baggies in the purple toiletry bag in the safe. A sample of the pills was analyzed and found to contain fentanyl and heroin.
- [11] The total estimated street value of the fentanyl heroin pills, if sold at the street level for between \$30 and \$60 a tablet, would have been between \$32,940 and \$65,880. If sold at wholesale rates of \$5 to \$10 a tablet, the tablets would have an estimated value of between \$5,490 and \$10,980.
- [12] The crack cocaine seized weighed approximately 70.2 grams, and was packaged in roughly one ounce packages. The total value of the crack cocaine seized, if sold at the ounce level, was between \$5,220 and \$7,200.
- [13] The powdered cocaine found in the black toiletry bag was packed into three separate bags, each containing an eight-ball, or an eighth of an ounce of cocaine. The total value of the powdered cocaine was between \$480 and \$650.
- [14] The bundles of cash seized from the residence and Mr. Toth's truck totalled \$48,535.
- [15] In addition to the firearm, drugs, and the bundles of cash seized from Mr. Toth's residence, the police also seized two notebooks, one at the foot of the bed, and one on a box near one of the Rubbermaid containers. These two notebooks contained "score sheets", one starting on June 8th and the other on April 25th - no year is indicated. Interestingly, entries in both

books make reference to a Gina, the same name referred to in the note attached to the bundle of cash found inside the black toiletry bag. One notebook also contains what was described as a set of rules, including instructions on rotation of "shifts," being taxed for "no shows," and other taxable offences.

- [16] Based on the evidence, especially the amount of drugs and cash, and the score sheet notebooks, I conclude that Mr. Toth was actively engaged in the trafficking of cocaine, fentanyl and heroin. In fact, the score sheets and the amount of cash seized establish that he was not a street-level trafficker but a mid-level trafficker, supplying street-level traffickers. This increases his moral blameworthiness for this offence.
- [17] It is also apparent from the evidence that Mr. Toth was pursuing this enterprise for some time - at least two months, based on the score sheets, but I suspect much longer than that, as drug trafficking is a business built upon one establishing trust and reliability within the field, and then working one's way up to higher positions, like Mr. Toth's.

Circumstances of Mr. Toth

- [18] I turn now to the circumstances of Mr. Toth. He is 34 years old. He was born in Kamloops, B.C., but his family moved to Tofino, B.C. on Vancouver Island. Mr. Toth has a younger sister and brother. His father left the family when Mr. Toth was three. Ms. Taylor, Mr. Toth's mother, raised her three children with the assistance of her mother.
- [19] Mr. Toth and his family are of indigenous ancestry, and are specifically members of the Nuuchah-Nulth Nation, formerly known as the Nootka. Mr. Toth has a very strong relationship with his family, as evidenced by the presence of his mother, brother, sister, brother-in-law, and ailing grandmother at both days of this hearing on sentencing, and by their moving letters of support.
- [20] I have read those letters. They indicate that Mr. Toth is a loving and gentle soul, who does most anything and everything to help his family and friends. According to his mother, he started working at the age of 12 selling Dickie Dee ice cream from a bicycle to help support his mother, and he has helped support his mother whenever he could ever since, either financially or by babysitting, so that she could pursue a degree in social work.
- [21] Further, his sister, Randy, writes movingly that Mr. Toth is not an evil man, but a man who can make wrong decisions. His ailing grandmother has attended these proceedings to support her grandson. Mr. Toth is fortunate to have such a strong, supportive and forgiving family. Their letters and presence demonstrate that support. They do not, however, condone this behaviour.
- [22] Mr. Toth started working in the oil fields on oil rigs when he was about 18 years old. It provided him with a good life and income. But with the recent downturn in the market, Mr. Toth lost his job, leading him into financial difficulties, substance abuse issues, and ultimately involvement in the drug trade.

- [23] Mr. Toth does have a criminal record. It consists of 13 prior convictions for unrelated offences, mainly failure to comply with court orders (10 offences), but also uttering threats, assault causing bodily harm, obstructing a police officer, and a conviction for break and enter with intent.
- [24] His criminal record, along with this conviction, would suggest that Mr. Toth is becoming a "versatile offender"; that is, a person with a propensity to engage in multiple forms of criminal activity. Significantly, however, there is a gap between his last offence and this offence of three years and nine months.
- [25] Mr. Toth went as far as grade 10 in high school, and then went to work in the oil fields.
- [26] He has been detained in custody on these charges since his arrest on June 30, 2015. As of today's date, that is 569 days in custody. By virtue of s. 719(3.1) of the Criminal Code, and the Supreme Court of Canada's decision in *R. v. Summers*, 2014 SCC 26, and the companion decisions in *R. v. Carvery*, 2014 SCC 27 and *R. v. Clarke*, 2014 SCC 28, Mr. Toth is entitled to presentence credit of 1.5 days for every day served in custody. That works out to 853 days, or 28 and a half months of presentence custody, for which he will be credited.
- [27] Since his detention on these charges, Mr. Toth has made significant efforts at rehabilitation. While at Fraser Regional Correctional Centre in Delta, B.C., he has been on the 1 Delta Unit, working in the shop, and working towards his welding ticket. Also, he has finished 80 percent of the curriculum towards his grade 12 GED equivalency. He has one more two-week course set to start in February, and once he completes that and passes it, it will enable Mr. Toth to become a structural welder. He intends to carry on to Level B in welding, to become a journeyman pressure welder.
- [28] Mr. Toth's mother indicated in her letter that Mr. Toth's sister is also a welder and that Mr. Toth hopes to start a welding business with her.
- [29] I accept that Mr. Toth is a hardworking, caring individual, and that he has made poor choices; but he cannot afford to make any more poor choices. Engaging in this enterprise and this sort of offence, is an extremely poor choice, of the highest order. Moreover, it is an extremely dangerous decision, not only for Mr. Toth and his family, particularly his now 15-year-old son, because of the perils it places them in by engaging in the drug trade; it is also extremely dangerous for the unsuspecting purchasers, who may actually think they are buying oxycodone, perhaps not realizing the little green pills are laced with fentanyl, and likely nobody knowing the exact concentration of fentanyl in any one pill. All 1,098 pills seized from Mr. Toth could have been lethal.

- [30] The Crown described the purchaser side of the transaction as engaging in Russian roulette in the pills they buy that are supplied to the street-level traffickers, by mid-level traffickers such as Mr. Toth. And while Mr. Toth may not have fully understood the chemical compounds of the little green pills he was providing to others to sell on the street, he obviously knew it was a powerful, dangerous substance, that people were easily addicted to, and wanted, and needed more. It appears it was a lucrative enterprise as well.
- [31] Mr. Toth advised the Court that with the death of a friend from a fentanyl overdose, he has now started to realize just how dangerous this drug is, and what a significant health crisis this province, indeed this country, is now experiencing, as this pernicious, cheap, and lethal substance flows into our country and province and out into the streets, killing hundreds of people.

Impact on the community

- [32] I turn to the impact of this offence on the community. I was provided with a variety of reports outlining the extremely dangerous nature of fentanyl, and the grim statistics of the fentanyl crisis that grips this province and other provinces in Canada. The materials in Ex. #4 contain information from the B.C. Centre for Disease Control, in the form of the B.C. Drug Use and Alert Partnership Report, 2014; a CCENDU bulletin from 2015, about deaths involving fentanyl in Canada between 2009 and 2014; a brief email from Benoit Archambault of Health Canada, dated April 7, 2016; an article by McKee et al, entitled "Illicit Fentanyl: An Emerging Threat", B.C. Medical Journal 57:6 (July/August, 2015); the Fentanyl Urine Screening Study (FUSS) Community Report; a paper in the Harm Reduction Journal, (2015) 12:54, by Amlani et al, entitled "Why the FUSS (Fentanyl Urine Screening Study)? A cross-sectional survey to characterize an emerging threat to people who use drugs in British Columbia Canada"; a report from the B.C. Coroners Service "Illicit Drug Overdose Stats in B.C., January 1, 2007 to June 30, 2016"; a report from the B.C. Coroners Service "Fentanyl-Detected in Illicit Drug Overdose Deaths, January 1, 2012 to May 31, 2016"; and the Provincial Health Officer Notice and news release from April 14, 2016.
- [33] Perhaps one of the more shocking set of statistics is contained in an email from Benoit Archambault, dated April 7, 2016. He is the National Director of the Drug Analysis Services (DAS) of Health Canada, which is responsible for testing suspected controlled substances that are seized by law enforcement agencies and the Canada Border Services Agency.

- [34] The statistics he outlines are as follows:

Number of sample submitted by law enforcement agencies and analysed by DAS from January 1st to Dec 31st containing Fentanyl.

2010: 50 samples

2011: 90 samples

2012: 231 samples

2013: 455 samples

2014: 894 samples

2015: 1739 samples

- [35] Further, according to the email, more fentanyl samples from 2015 came from British Columbia than any other province (603), followed by Alberta (589) and Ontario (450).
- [36] One can only surmise, based on the barrage of news stories about the growing fentanyl crisis in recent months, that the numbers will be even higher for 2016.
- [37] On April 14, 2016, the Provincial Health Officer, Dr. Perry Kendall, took the unprecedented step of exercising the emergency powers available under the Public Health Act, declaring a public health emergency because of the significant increase in drug-related overdoses and deaths in our province.
- [38] Significantly, the press release on that declaration includes the following point: "At the current rate in 2016, without additional steps to combat overdoses, B.C. could see 600 to 800 overdose deaths this year."
- [39] Based on numerous media reports in evidence, the tragic reality is that by the end of November, 2016 there were 755 fentanyl-related deaths in B.C. alone.
- [40] As my colleague, Kent J., recently ruled in *R. v. Smith*, 2016 BCSC 2148:
- [23] The B.C. Coroners Service has issued public warnings about the extreme risks involved in consuming substances which may contain fentanyl, yet the proportion of deaths in which fentanyl was detected either alone or in combination with other drugs has markedly increased year over year. The most recent figures from the B.C. Coroners Service show there have been on average two deaths a day in B.C. in 2016 from illegal drug overdosing. Over 600 people have died from such overdoses in the first 10 months of 2016 compared to 397 such deaths in the same period in 2015. Fentanyl was detected in at least 60% of these deaths, triple the number for the same period in 2015.
- [24] Fentanyl is 20 to 50 times more potent than heroin. A mere 2 milligrams is a lethal dose. This is as small as a grain of salt. Overdoses frequently occur in individuals who thought they were using heroin, oxycodone, cocaine or other similar substances but who unknowingly consumed fentanyl. When fentanyl is labelled and sold as other street drugs, such as heroin [or oxycodone, I would add], users may not know what they are taking and may not understand the heightened degree of risk. The risk of death is thus heightened exponentially among users who do not reduce their dosage.

- [441] Mr. Toth indicated, through his counsel, that the green pills seized from his residence were labelled oxycodone; and he claims he was unaware he was selling fentanyl. If he was unaware he was selling fentanyl, then in all likelihood the street-level consumers may have been unaware they were buying fentanyl, or certainly unaware of the amount of fentanyl in any one pill, which makes the Crown's analogy of the drugs users engaging in Russian roulette when taking the unknown substances particularly apt.
- [442] Mr. Toth was in possession of 1,098 pills, which could have amounted to 1,098 lethal doses depending on the concentration of fentanyl.
- [443] But in addition to the overdose deaths caused by fentanyl, tragic as they are, there is the further tragedy and misery felt by the family and friends of the deceased.
- [444] Indeed, the risk of overdose for users is not the only danger presented by this extremely hazardous substance; first responders, healthcare workers, citizens wielding naloxone kits and more are put in harm's way through the risk of contamination with this substance. That is not to mention the heavy collateral toll on a strapped healthcare system struggling to respond to this epidemic.
- [445] As Judge Van Harten so aptly noted in *R. v. Aujla*, 2016 ABPC 272:
- [1] Once an insidious killer of opioid users, the drug fentanyl has emerged to become a notorious Grim Reaper stalking the streets of Canada's cities and towns. Anyone reading or watching the news understands that fentanyl use has become a serious public health crisis to which governments and law enforcement agencies are attempting to respond.

Positions of the parties

- [446] The Crown argues that the range of sentence for this case is between three and five years' imprisonment. Given that Mr. Toth has pleaded guilty, the Crown suggests that a three-year term of imprisonment is the appropriate sentence to impose. From that amount the Crown acknowledges that Mr. Toth's presentence custody must be deducted. I have already indicated that with the 1.5 times multiplier mandated by the jurisprudence, that calculates out to 28.5 months, or 28 months and 15 days to be deducted. That would result in a net sentence of seven months and 15 days' imprisonment.
- [447] In addition, the Crown seeks a mandatory 10-year firearm prohibition order, pursuant to s. 109 of the Criminal Code; a DNA order, pursuant to s. 487.051(3)(b) of the Code; and a forfeiture order for the 12 gauge shotgun and the \$48,535 in cash seized from Mr. Toth's residence.

- [48] The defence concedes that a penitentiary sentence is appropriate, but submits that the sentence should fall in the range of 30 to 36 months. Mr. Toth urges that given his personal circumstances, including his grandmother's failing health, a sentence at the lower end of the range is warranted. The net sentence, once the presentence custody credit of 28.5 months is deducted, would be between 1.5 and 7.5 months.
- [49] Mr. Toth does not oppose any of the ancillary orders sought by the Crown.

Principles of sentence

- [50] The statutory principles and considerations that inform the determination of the sentence to be imposed are found in s.10 of the CDSA and ss. 718 through 718.2 of the Criminal Code. Both statutes set out the purpose and principles of sentencing. The fundamental purpose is to contribute to respect for the law, and maintenance of a just, peaceful and safe society; to impose just sanctions to denounce unlawful conduct; to deter the offender and others from committing offences; to separate offenders from society where that is necessary; to assist in the offender's rehabilitation to provide reparations; and, to promote a sense of responsibility and acknowledgment of harm done.
- [51] There are additional principles set out in ss. 718 through 718.2 of the Code. Particularly, the sentence imposed must be proportionate to the gravity of the offence and the offender's moral culpability. The Court must also take into account both mitigating and aggravating factors. Moreover, the sentence should be rationally related to other sentences for similar offences and similar offenders. And, the Court must be restrained in the application of sentences of imprisonment, applying such sanctions only where the circumstances make that necessary.
- [52] Additionally, given Mr. Toth's indigenous heritage, I must, and do bear in mind the principles contained in s. 718.2(e) of the Criminal Code, which requires particular attention to be paid to the circumstances of Aboriginal offenders.
- [53] Further sentencing principles applicable to Aboriginal offenders are set out in numerous decisions, including *R. v. Gladue*, [1999] 1 S.C.R. 688, *R. v. Ipeelee*, 2012 SCC 13, and *R. v. Elliott*, 2015 BCCA 295, at paras. 8 to 18.
- [54] I must also be guided by the decisions of other courts in similar cases. In that regard, both counsel have provided me with a number of authorities from the trial courts. There do not appear to be any appellate decisions, as of yet, perhaps due to the relatively novel nature of fentanyl-related offences. Counsel have taken me through the authorities in their submissions. I have also read and considered each of the cases provided.
- [55] For reference purposes, the Crown provided the following cases:

- R. v. Friedel, 2016 BCSC 1469, where the offender was sentenced to a global sentence of 28 months' imprisonment for 490 counterfeit oxycodone pills that contained fentanyl, as well as 386 grams of cocaine;

- R. v. Smith, 2016 BCSC 2148, where the offender was sentenced to six months' imprisonment for possession for the purposes of trafficking 2.6 grams of fentanyl, 4.2 grams of powdered cocaine, and 3.2 grams of crack cocaine.

[56] The Crown provided four further cases from Ontario, where the fentanyl was in patch form:

- R. v. Gatfield, 2015 ONCJ 526, where the offender received a 30-month sentence of imprisonment for trafficking in one and three-quarter fentanyl patches;

- R. v. Rak, 2015 ONCJ 543, where the offender received a global sentence of 21.75 months, but effectively time served, for one fentanyl patch;

- R. v. Klammer, 2016 ONSC 4038, where the offender received a 33- month sentence for trafficking and possession for the purpose of trafficking six patches of fentanyl, each 100 micrograms; and

- R. v. McArthur, 2016 ONCJ 244, where the offender received a global two-year sentence of imprisonment, followed by a three-year probation order for uttering forged documents (prescriptions), theft of prescription forms, and possession of hydromorphone for the purpose of trafficking.

[57] Finally, at the higher end of the Canadian range, there is the decision in R. v. Aujla, where the offender received a global sentence of seven years, reduced to 5.5 years for presentence custody, on the charge of possession for the purpose of trafficking fentanyl. There the offender was in possession of 454 fentanyl pills, \$31,000 cash, 187 grams of cocaine, 769 grams of heroin, and other items, including a firearm.

[58] In R. v. Aujla, Judge Van Harten referred to R. v. Castro, 2016 NWTSC 8, a decision by Madam Justice Charbonneau. In that case the accused received a six-year sentence, reduced to five years for presentence custody, for possession for the purpose of trafficking 503 fentanyl tablets.

[59] Counsel for Mr. Toth relied upon R. v. Chamberlain, 2016 BCSC 379, a case where an offender was sentenced on three possession for the purpose of trafficking counts, involving three different substances, namely cocaine, methamphetamine and heroin. In that case the offender appeared to be highly involved in running a sophisticated drug trafficking enterprise, although it did not involve fentanyl. Notwithstanding glowing letters of support and demonstrated efforts to rehabilitate herself, the offender received a sentence of two years' imprisonment.

[60] The defence also relied upon *R. v. Derycke*, 2016 BCPC 291, where the offender received a sentence of 12 months' imprisonment less 189 days credit for presentence custody, for possession for the purpose of trafficking 23 grams of cocaine and 9.31 grams of heroin laced with fentanyl. These amounts of drugs are far less than in the present case.

[61] Counsel for Mr. Toth submits that of the Crown's cases, the closest in facts is *R. v. Friedel*.

[62] Overall the cases provided demonstrate a range of 12 months to seven years. As noted in the Rak decision:

... the law with respect to sentencing for fentanyl offences is still evolving. Offenders appearing before the court in the future for sentencing on fentanyl offences may find themselves in a different sentencing position than did Mr. Rak.

[63] I have been provided with no appellate decisions on this issue, mostly likely because they have not made it to the Court of Appeal at this nascent stage of the evolution of the jurisprudence.

[64] As the Supreme Court of Canada observed in *R. v. Lacasse*, 2015 SCC 64, at paras. 1-4 and 6:

Sentencing remains one of the most delicate stages of the criminal justice process in Canada. Although this task is governed by ss. 718 et seq. of the Criminal Code, R.S.C. 1985, c. C-46, and although the objectives set out in those sections guide the courts and are clearly defined, it nonetheless involves, by definition, the exercise of a broad discretion by the courts in balancing all the relevant factors in order to meet the objectives being pursued in sentencing.

For this purpose, the courts have developed tools over the years to ensure that similar sentences are imposed on similar offenders for similar offences committed in similar circumstances -- the principle of parity of sentences -- and that sentences are proportionate by guiding the exercise of that discretion, and to prevent any substantial and marked disparities in the sentences imposed on offenders for similar crimes committed in similar circumstances. For example, in Quebec and other provinces, the courts have adopted a system of sentencing ranges and categories designed to achieve these objectives.

The credibility of the criminal justice system in the eyes of the public depends on the fitness of sentences imposed on offenders. A sentence that is unfit, whether because it is too harsh or too lenient, could cause the public to question the credibility of the system in light of its objectives.

One of the main objectives of Canadian criminal law is the rehabilitation of offenders. Rehabilitation is one of the fundamental moral values that distinguish Canadian society from the societies of many other nations in the world, and it helps the courts impose sentences that are just and appropriate.

While it is normal for trial judges to consider sentences other than imprisonment in appropriate cases, in the instant case, as in all cases in which general or specific deterrence and denunciation must be emphasized, the courts have very few options other than imprisonment for meeting these objectives, which are essential to the maintenance of a just, peaceful and law-abiding society.

Analysis

- [65] I will commence with an examination of the aggravating and mitigating circumstances in this case.
- [66] The first aggravating factor is the nature of the drugs involved. The substances seized from Mr. Toth's residence, cocaine, heroin and fentanyl, are Schedule I drugs. Cocaine and heroin have been notoriously dangerous and destructive for some time. Of that, there is no issue. But in approximately the past three years, fentanyl has far eclipsed those other two substances. I agree with the Crown that fentanyl-related offences are now among the most, if not the most, serious drug-related offences -- at the pinnacle of the hierarchy of seriousness of hard drug offences.
- [67] Indeed, both Judge Van Harten in *R. v. Aujla* and Madam Justice Charbonneau in *R. v. Castro*, placed fentanyl at the apex of dangerousness in terms of hard drugs at this time. The reason for this was succinctly summarized in *R. v. Aujla*:
- [2] ...fentanyl is a potent opioid analgesic. It is 100 times more potent than morphine. It is 25 to 50 times more potent than pharmaceutical grade heroin. As little as 2 micrograms can constitute a fatal dose of fentanyl. Fentanyl is a useful medical drug when used under carefully controlled circumstances. But illicit use is extremely risky because the quality of the drug when found on the street is unknown and the margin of error for an abuser to avoid overdosing is extremely small. That is especially so because opioid abusers develop a tolerance and need to increase their dosages to maintain the drug's effect. Therefore, not only is fentanyl highly potent, it has a very high "abuse potential."
- [68] Again, I agree completely with the Crown's analogy of Russian roulette for the purchasers of this substance.
- [69] The harm, grief, and misery associated with addiction to these drugs are immense. Indeed, families and communities are devastated by the path of destruction wrought by the flow of these drugs, especially fentanyl into the communities across Canada.
- [70] I believe that Mr. Toth now understands this tragic reality, given his very emotional plea to the Court and the fact that he too has lost friends to fentanyl overdoses.
- [71] Mr. Toth, like the offender in *R. v. Smith*, claims to be unaware he was selling fentanyl. However, as Kent J., noted in *R. v. Smith*:

[27] ... [the] Court of Appeal has observed that the seller of illegal drugs must be assumed to recognize the inherent risk that the composition of the drugs may be unknown [see] (R. v. Herrell, 2014 BCCA 114 at para. 19)

Following this logic, and given the number of pills involved in this case, I am not inclined to find that Mr. Toth's professed ignorance lessens his moral blameworthiness in this instance. Indeed, locking the pills in a safe could support an inference of knowledge of the dangerous nature of the substance.

[72] The second aggravating fact is the nature and sophistication of Mr. Toth's enterprise. It was an ongoing business, set up to supply significant quantities of drugs to his community. As I have noted, Mr. Toth is not a street-level dealer; he is a mid-level operator, supplying street dealers. The amount of drugs involved, the score sheets, and the bundles of cash all clearly establish this fact.

[73] Third, this was a profitable enterprise. Mr. Toth had \$48,535 stashed in his home and his vehicle.

[74] Fourth, there was an improperly stored firearm in the residence with a significant amount of ammunition.

[75] Fifth, Mr. Toth's 12-year-old son was in the residence. Although the fentanyl was securely stored in the safe, the firearm and the cocaine were not.

[76] Regarding mitigating factors, although Mr. Toth has a criminal record, there are no drug offences.

[77] Second, there is almost a four-year gap between his last offence and this offence.

[78] Third, Mr. Toth has made considerable efforts to rehabilitate himself while in custody.

[79] Fourth, Mr. Toth has pleaded guilty, and by doing has shown a measure of remorse. Further, in his own words and actions in court yesterday, Mr. Toth demonstrated his remorse, which I accept was genuine and sincere.

[80] I have summarized the authorities to which I have been referred. I do not intend to review them further, but I do consider the principles to be distilled from them that should inform my decision.

[81] Obviously deterrence and denunciation are the primary principles of sentencing that should inform this analysis. However, rehabilitation remains an important consideration in this case too, as does Mr. Toth's indigenous heritage.

[82] I agree with Williams J. in R. v. Chamberlain at paras. 42 to 43 that the critical consideration here is the scope and sophistication of the enterprise at issue. In the realm of drug offences, and in the cases I have been provided, there is a broad spectrum of such activities, ranging from the less sophisticated and isolated, to persistent, sophisticated and serious.

- [83] Where a particular case is situated on that spectrum will quite substantially impact how the Court will decide the appropriate sentence - ranges that emerge from the cases show that to be so. More substantial, frequent, and sophisticated operations will attract a longer sentence with greater emphasis on denunciation and deterrence.
- [84] In terms of range, to the extent that concept is useful, the authorities provided by the Crown lead me to conclude that for a serious, sustained, and relatively sophisticated mid-level operation, i.e. a supplier to street-level dealers, sentences are between 28 months and seven years imprisonment when the cases from Alberta and Northwest Territories are considered. Where any specific offender may fall on that scale will of course be impacted by the individual's particular circumstances.
- [85] This offence is not at the lower street-level of dealers; nor is it like dial-a-dope operations or lower-level players in the drug trade. Notwithstanding that, I must not discount Mr. Toth's efforts at rehabilitation, and the strong support he has from his family, as evidenced by their four letters of support. The letters are powerful and eloquent in their support of Mr. Toth; and when considered with the efforts he has made at rehabilitation while in custody, I am satisfied that Mr. Toth has made real and positive changes in his life, including having taken significant steps to becoming a productive member of the community.
- [86] So where on the spectrum does Mr. Toth fall? After careful consideration of counsels' submissions, the authorities provided, and the totality of the circumstances, I conclude that a fit and proper sentence is three years imprisonment, and I would impose that sentence.
- [87] As I alluded to earlier, Mr. Toth is entitled to a credit or deduction of 28.5 months from that sentence for his 569 days in presentence custody multiplied by one and a half. Accordingly, the net sentence that I am imposing is 7.5 months, which is seven months and 15 days.
- [88] I recommend to the custodial authorities, and indeed urge them, that Mr. Toth remain at the Fraser Regional Correctional Centre, in order to allow him to complete his upgrading and welding programs. I wish to be clear. In my view, a sentence of substantially greater magnitude would be entirely justified and appropriate in this case. I have imposed what I believe to be the least onerous sentence possible, based upon the very effective submissions made by counsel, the demonstrated remorse and rehabilitation of Mr. Toth, the very strong support of his family, and the failing health of his grandmother.
- [89] Mr. Toth, I have reached the conclusion that you are well on the way to rehabilitation and becoming a productive member of your community again. I truly hope my belief is on solid footing.
- [90] Mr. Toth, I will repeat my earlier warning that dealing in drugs of this magnitude is a very deadly enterprise for you, your family and friends, and the unsuspecting purchasers of your wares. If you find yourself before the Court again for similar offences, I doubt very much any sentence would be at the lower end of the range.

- [91] I turn to the unopposed ancillary orders sought by the Crown.
- [92] The first is the weapons prohibition under s. 109 of the Criminal Code. The weapons prohibition is mandatory, and I make a 10-year order in that regard.
- [93] Secondly, the Crown seeks a DNA order pursuant to s. 487.051(3)(b) of the Criminal Code. This offence is deemed a secondary designated offence. The order in the case of a secondary designated offence is discretionary. Where an application is made, as here, the Court is obliged to consider a number of factors and give reasons for its decision.
- [94] In *R. v. Awasis*, 2009 BCCA 134, the Court of Appeal examined the issue in detail. Two principles emerged from that discussion. First is that the actual purposes served by taking the sample are multi-faceted: *Awasis* at paras. 40 and 52. The second is that an offender post-conviction has a lesser expectation of privacy: *Awasis*, at paras. 42 to 43.
- [95] With that authority in mind and in view of the circumstances of this case, including Mr. Toth's lack of opposition to the order, I have concluded that it is appropriate to order the provision of samples, and I do so order that Mr. Toth provide a DNA sample.
- [96] Third, the Crown seeks an order of forfeiture of the Remington 12-gauge shotgun and the \$48,535 in cash seized from the residence. There will be an order of forfeiture for those items.
- [97] Finally, there is the issue of the victim fine surcharge. It is mandatory, pursuant to s. 737 of the Criminal Code. I therefore order that there will be a victim fine surcharge in the amount of \$200 to be paid forthwith, and in the event of default of payment, Mr. Toth will serve a sentence of one day incarceration concurrent with the sentence I have imposed.

"Ker J."

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