
CANADA / JUDGMENT

R. v. Voszler

2019 BCSC 2393

COURT

Supreme Court of British Columbia

DECIDED

24 October 2019

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2019 BCSC 2393 R. v. Voszler

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Voszler,

2019 BCSC 2393

Date: 20191024

Docket: 80618-2

Registry: New Westminster

Regina

v.

Richard Stephen Voszler

Before: The Honourable Mr. Justice Schultes

Oral Reasons for Sentence

Counsel for the Crown:

S.F. Paulson

Counsel for the Accused:

A. Willox

(as Agent for K. Westell)

Place and Date of Hearing:

New Westminster, B.C.

September 13, 2019

Place and Date of Judgment:

New Westminster, B.C.

October 24, 2019

Introduction

- [1] Mr. Voszler has entered guilty pleas to (1) simple possession of fentanyl and heroin; (2) possession of methamphetamine and cocaine for the purposes of trafficking; (3) possession of a loaded restricted firearm without a licence and registration; and (4) possession of an unloaded restricted firearm with accessible ammunition. These offences were committed on February 15, 2017, in Surrey.
- [2] His guilty pleas came after a focused voir dire in which I ruled that the search warrant that led to the police finding these items had been validly authorized.

Circumstances of the Offences

- [3] The location of the offence was a large house in a rural area of Surrey. The investigators believed that it was a site of significant ongoing drug sales and they obtained the search warrant after conducting two weeks of surveillance of the comings and goings of apparent purchasers.
- [4] The house had three floors and several bedrooms. Mr. Voszler's former co-accused, Mr. Posavac and Mr. Adams, were home when the warrant was executed, but Mr. Voszler was out. Nevertheless, there is no issue that bedroom number 5, as the police labelled it, was his, or that he possessed the relevant items that the police located in it for the purposes alleged. This conclusion was based on documents and prescription bottles in his name that were found in the room, and the evidence of the landlord, with whom he was the contact person to rent the house.
- [5] Found in dresser drawers in the bedroom were the drugs that are the subject of the simple possession count - 13 fentanyl pills, 24.7 grams of heroin, as well as caffeine. Found on the top of the dresser and in its drawers was a total of 211 grams of cocaine and 911 grams of methamphetamine, packaged in a variety of different amounts and manners suitable for individual sales. Conservative estimates of the value of these drugs if they were sold by the ounce (which is a larger amount than the individual packages that had been prepared), would be \$8,400 for the cocaine and just under \$17,000 for the methamphetamine.
- [6] The bedroom also contained the typical accompaniments of drug trafficking, such as a large amount of cash in bills and coins, a money counter, cellphones, scoresheets, pricing lists, and other kinds of drugs.

- [7] A loaded .45 calibre Colt semiautomatic handgun was found in a dresser drawer and a .22 calibre Ruger semiautomatic handgun was found in the entrance to the ensuite bathroom, with three magazines containing a total of 33 rounds of suitable ammunition nearby.
- [8] Not the subject of charges, but admitted as part of the overall circumstances, there were four rifles in the bedroom, and a large amount of ammunition of various calibres in the entrance to the ensuite bathroom.
- [9] The rest of the house contained more weapons and ammunition and other types and quantities of drugs.

Mr. Voszler's Circumstances

- [10] Although the search warrant was executed in February of 2017, Mr. Voszler was not charged until the end of April and not arrested on those charges until May 11.
- [11] However, shortly after the execution of the search warrant, someone using his phone conducted searches of Court Services Online and the Provincial Court website. The day after the execution it conducted Google searches for news articles relating to the police raid, the arresting officer's name, and houses to rent on Craigslist.
- [12] In April, a message was sent from that phone to the landlord, apologizing for not having cleaned up and moved out properly.
- [13] From March 6 onwards, Mr. Voszler's phone sent and received messages relating to drug sales, referring to the prices of the drugs on each particular date. In succeeding weeks, it sent messages relating to such topics as a less expensive variety of methamphetamine and its price, and the production of crack cocaine. The user also sent a message on April 9 that "the house" had been "raided", but he was now "back to work".
- [14] The drugs that Mr. Voszler had in his possession when he was arrested on May 11 led to him being charged with three counts of possession for the purposes of trafficking of those substances. They were fentanyl, methamphetamine, and cocaine, which were found in a backpack he was carrying.
- [15] He entered guilty pleas to those charges in February of 2018. In the absence of presentence custody, the sentence would have been 30 months, but he was credited with 14-and-a-half months of presentence custody.
- [16] The sentence on those convictions expired on June 3 of this year. As of the sentencing hearing in this matter on September 13, it was agreed that Mr. Voszler had spent 103 days in custody that are solely referable to this matter. He has since served 40 additional days, so he will receive credit for 143 days at the prescribed rate of one-and-a-half days for each day served. Rounding up the resulting .5 of a day, that leads to the allocation of 215 days of presentence credit in this matter.

- [17] Leaving aside the sentences that were imposed for the offences that followed these ones, Mr. Voszler's previous adult criminal convictions have not resulted in lengthy periods of imprisonment - the longest being 61 days for a breach of recognizance in 2014. They have mainly resulted in fines and periods of probation.
- [18] He has convictions for possession of stolen property and fraud; two for impaired driving; five for failing to comply with probation orders or conditions of sentences. One could perhaps also include his four provincial convictions for driving while prohibited in the category of noncompliance with court orders. Most relevant, he has two convictions for possession of controlled substances, and one for possession for the purpose of trafficking, although the PPT conviction is now somewhat dated (1997).
- [19] The combination of a thorough presentence report and his counsel's helpful submissions provided quite a complete portrait of Mr. Voszler's background.
- [20] He is now 43 years old. He had a difficult upbringing. His father "drank alcohol all day", as he described it in the PSR, and was emotionally abusive to him on an ongoing basis. Although he had a loving relationship with his mother, he felt that overall he did not receive proper supervision and guidance during his youth. He had ongoing disciplinary problems in school, culminating in his final expulsion in grade eight. As frequently occurs with young people in that situation, he began to connect with friends who were using drugs and committing crimes. This transitioned into the severe and longstanding addiction problem that he has experienced as an adult, and the criminal convictions that arose from it.
- [21] His counsel explains that despite the fraught aspects of their relationship, the death of his father in 1999 was the catalyst for Mr. Voszler's use of more serious drugs. The end in 2007 of a seven-year committed relationship, which was due in part to his substance use, further aggravated the severity of his problem. His counsel explains that in the depths of that addiction, which was ongoing at the time of the present offences, he was spending \$400 to \$500 a day on drugs for himself, and his drug sales were carried out to support that habit. Although the PSR indicates that he completed a substance abuse program while he was in custody in 2013, and that he was able to abstain from drug use for as long as 30 days at his mother's request, he has never actually been involved in a residential drug rehabilitation program.
- [22] He was able to obtain his grade 12 equivalency as a young adult and also took some training in sheet metal work. He maintained employment in the meat department of a supermarket for four years, but he has not had any steady non-criminal employment since 2007.

- [23] His health is very poor. In addition to type 2 diabetes, he suffers from severe sleep apnea and his teeth are in poor shape as a result of his methamphetamine use. A troubling unresolved question that was raised in the PSR is whether a head injury he suffered in a car accident as a young child has had any effect on his functioning. He has not had any mental health assessments or treatment to address the potential neurological or psychological underpinnings of his addiction.
- [24] Although it is possible to get hold of drugs on remand and while serving provincial sentences, he advises his counsel he has not done so since being in custody. He told the author of the PSR that at times he spends up to 20 hours a day sleeping in his cell because of the sleep apnea. He explained that he needs methamphetamine "to function", by which I took him to mean to provide sufficient stimulation to allow him to overcome the effects of not sleeping properly. I infer that that has not been a constant situation because he has also completed the Essential Skills to Success and Foodsafe programs while in custody, as well as the Introduction to Welding program, and has provided a supportive letter from the metal shop instructor at Fraser Regional Correctional Centre indicating that he worked regularly in that shop.
- [25] His counsel says it is questionable whether Mr. Voszler has the capacity to be employed in his current health situation, but if he is able to receive disability support while he undergoes drug treatment there are several jobs that he is qualified to do and the physical demands of which he could cope with.
- [26] Despite his troubled life, he was well supported by attendees at the sentencing hearing, which his counsel accurately observes is not that common for people in his situation. His mother and one of his close friends provided letters which emphasize that, despite his challenging history of addiction, his recent imprisonment has given him the insight and motivation needed to embrace rehabilitation and be a more productive participant in society. That is a process in which they are willing to support him.
- [27] Building on that theme, his counsel explains that Mr. Voszler has come to recognize during his time in custody that his life has hit rock bottom, and he no longer wants to contribute to the cycle of harm and misery that drug trafficking facilitates. He is experiencing what his counsel described as an extreme amount of remorse about the cost of his past actions. This insight and remorse have strongly motivated him to engage with whatever drug rehabilitation programs will assist him, including residential treatment.

Positions

- [28] The Crown seeks an overall sentence of seven years' imprisonment for Mr. Voszler, less the credit for presentence custody. The proposed sentence would be comprised of three years for the drug offence counts and four years consecutive to them for the firearms offences.

- [29] While recognizing that Mr. Voszler has been sentenced for the subsequent possession for the purpose of trafficking offences, the Crown submits that it is still aggravating that the activity that led to the current charges resumed at its same level shortly after this search warrant was executed, and continued uninterrupted by any steps on his part until he was arrested. Further, distribution of drugs at this scale must be sanctioned severely, in the Crown's submission, all the more so with the dangerous presence of loaded firearms in a home that had so many occupants and transitory visitors. The presence of those firearms as protection against theft of the drugs raises the real possibility of a dangerous situation developing involving them actually being used.
- [30] For the drug offences, the Crown provided a range of cases in which sentences of two to four years were either upheld by the Court of Appeal or imposed by judges of this Court, for possession of methamphetamine for the purpose of trafficking, in some cases in conjunction with possession of other serious drugs.
- [31] Lower sentences than the three years being sought here resulted where the offenders had no previous criminal records, or very limited records, and displayed some combination of unfortunate personal circumstances, good compliance with bail conditions, and positive rehabilitation efforts: *R. v. Francis*, 2008 BCCA 309; *R. v. Wong*, 2009 BCPC 127; and *R. v. Chamberlain*, 2016 BCSC 379.
- [32] The sentencing judge in the Chamberlain decision identified the range of sentence in trafficking cases of this kind as being between two and six years when the circumstances reveal serious, sustained, and relatively sophisticated trafficking operations. In that particular case, the judge was prepared to sentence at the low end of the identified range due to that offender's notable steps toward rehabilitation.
- [33] I took the Crown's point in referring these cases to be that Mr. Voszler's previous criminal history and absence of meaningful rehabilitative efforts thus far in his life militate in favour of a higher sentence than was imposed in them. Of particular relevance here, the Court of Appeal in *Francis* emphasized the harmful effects of methamphetamine in the community and the resulting need for denunciation and deterrence of trafficking in it, even though it was not yet a Schedule I drug under the Controlled Drugs and Substances Act at that point. Those concerns were echoed in the *Wong* decision.
- [34] Leading to a similar implication about Mr. Voszler meriting a higher sentence, *R. v. Harris*, 2017 BCSC 1552, involved possession of significant amounts of packaged cocaine, heroin, and methamphetamine at a production facility. The 33 months of offence-free behaviour since it was committed and the offender's lack of criminal history justified the three year sentence that was imposed.
- [35] Another potentially apt comparator in the Crown's submission is *R. v. McGrath*, 2017 BCSC 2434, in which a severely addicted offender with a lengthy criminal record received a four year sentence, on a joint submission, for possession of a comparable amount of methamphetamine, as well as heroin and GHB. Balancing the aggravating circumstances

were that offender's strong commitment to rehabilitation while in custody, including his voluntary use of Suboxone, which restricts the user's ability to experience the effects of opioids.

- [36] With respect to the firearms offences, and in particular their relationship to sentences for possession for the purpose of trafficking arising as part of the same circumstances, the Crown cited *R. v. Borecky*, 2013 BCCA 163, for certain essential principles.
- [37] The first of these is that the range of sentence for prohibited and restricted weapon possession cases is between 18 months to seven-and-a-half years. (Although the decision in *R. v. Nur*, [2015] 1 S.C.R. 773, struck down the three year minimum sentences that were enacted for these offences, our Court of Appeal has made it clear that for so-called true crimes involving knowing possession of such weapons, a sentence close to three years should be imposed even for first-time offenders: *R. v. Holt*, 2015 BCCA 302, paragraphs 19 and 20.)
- [38] The second essential principle from *Borecky* is that while it is a matter of discretion whether consecutive or concurrent sentences should be imposed for drug possession and firearms, the toxic combination that these two kinds of offences represent in terms of public safety must always be reflected in the overall sentences that are imposed. In particular, the principles of denunciation and deterrence must be given proper emphasis in order for the sentences to be fit. In *Borecky*, the sentencing judge was found to have erred by placing unwarranted confidence in the offender's prospects for rehabilitation, and by failing to treat the firearms possession as an aggravating feature of the concurrent sentences that were imposed.
- [39] A further note of caution from the Court of Appeal, in *R. v. Townsend*, 2015 BCCA 209, at paragraph 23, is that exercising the discretion to make sentences concurrent should not result in eliminating the consequences for some of the serious offences that are included in the aggregate sentence. Such an approach would make such offences, as described in *R. v. Maliki*, 2005 BCCA 495, at paragraph 24, "cheaper by the dozen."
- [40] *Borecky* and the other representative "guns and drugs" cases cited by the Crown - *R. v. Lee*, 2018 BCCA 428 and *R. v. Edwardsen*, 2018 BCSC 1013 - resulted in total effective sentences (focusing specifically on the possession for the purpose of trafficking and firearms in conjunction with each other) of seven years, seven years, and eight years, respectively.
- [41] *Borecky* featured what was described as "a small arsenal" of eight different firearms, some of them semiautomatic, along with possession of substantial amounts of methamphetamine, heroin, and cocaine by a 44-year-old offender with a lengthy record that included multiple drug-related convictions.
- [42] *Lee* was a case of possession of a handgun with ammunition and substantial amounts of methamphetamine, a heroin and fentanyl mixture, cocaine, and GHB, by a 27-year-old addicted offender with a relatively lengthy and related record.

- [43] In *Edwardsen*, a search warrant discovered marihuana, \$146,000 worth of cocaine, about \$50,000 in cash, a handgun and shotgun, both loaded, under the offender's bed, as well as another shotgun and a rifle elsewhere in the house, numerous other rifles, and more than 3,000 rounds of ammunition of various calibres available. The 55-year-old offender was found to be the directing mind of a substantial trafficking operation that was carried out at two separate locations and had a significant record including multiple assault and controlled substance possession convictions, although his record ended about nine years before the current offences.
- [44] Mr. Voszler's counsel submits that an appropriate range overall in these particular circumstances is something in the area of three-and-a-half to four-and-a-half years and that, ultimately, a sentence of four to four-and-a-half years would address all of the applicable sentencing principles and represent a sufficient increase from anything Mr. Voszler has received previously.
- [45] His counsel notes the strong connection between the locations of the substances and the firearms in question here, which makes concurrent sentences appropriate for consideration. He also emphasizes that the firearms were possessed solely for protection against being robbed and were never brandished by Mr. Voszler or otherwise used. As a result, there is no basis on which to consider their possession to be aggravated beyond the starting point range for firearms offences of this type, of something close to three years.
- [46] His counsel also refers to cases involving possession of controlled substances and firearms together that yielded markedly more moderate sentences than the cases relied on by the Crown, from 14 months to four years. In each case, a single firearm had been possessed by the offender together with the drugs, and aspects of the offender's background were treated as meaningful mitigating factors:
- *R. v. Purewal*, 2019 BCSC 656: lack of a previous record and what were found to be exceptional prospects for rehabilitation;
 - *R. v. Woodward*, 2015 BCSC 2227: lack of a previous record and the traumatic effects of the death of a parent at a young age;
 - *R. v. Bissat*, 2019 BCSC 432: long-term addiction and a chronic debilitating illness;
 - *R. v. Creuzot*, 2017 BCSC 1075: lack of a criminal record despite having reached advanced middle age, a positive work history, and a severe addiction that had developed from genuine emotional trauma; and
 - *R. v. Riera*, 2019 BCPC 36: lack of a criminal record, long history of gainful employment, and an addiction that developed at a relatively advanced age due to health issues and loss of a relationship.

These sentences were imposed, Mr. Voszler's counsel points out, despite significant aggravating features such as the presence of fentanyl in some cases, and in Riera the commission of a further trafficking offence while on bail for the initial offence.

Discussion

- [47] The main mitigating factor in this case is Mr. Voszler's guilty plea, which I find is still entitled to meaningful weight as a demonstration of remorse, despite the relatively late stage of the proceedings that it was entered. His counsel conducted a highly focused voir dire on a narrow and arguable issue in the search warrant. The trial itself, had it proceeded, would have done so on the basis of extensive admitted facts. While early pleas will always be given the greatest weight, there is no principled reason not to allocate credit for an acceptance of responsibility once a viable route to acquittal has been foreclosed through a court ruling. A sincere acceptance of criminal responsibility must always be given its due.
- [48] Other mitigating factors are that Mr. Voszler continues to have support from his mother and a loyal friend. This is despite his years of addiction, which in the case of many offenders will have completely alienated any supporters. He acknowledges through his counsel the harmfulness of this kind of activity and recognizes the necessity of embracing comprehensive addiction treatment.
- [49] I also accept that his poor health is a mitigating factor, in that it will make the sentence of incarceration that he must inevitably receive more difficult to serve than it would be for a healthy offender.
- [50] All of that acknowledged, I must balance these considerations with the realization that the emotional support that was available to him and his precarious health did not prevent these offences from occurring, and that however sincere his intentions towards rehabilitation are (and I accept that they are sincere), his actual rehabilitation is still only at a nascent stage.
- [51] The aggravating factors are quite self-evident. The first is the fairly large scale of the trafficking enterprise that he was engaged in, both in terms of the amounts of drugs he has been convicted of possessing and his involvement in making large quantities of those drugs available to attending purchasers. In this respect, I can find no meaningful distinction between the harm caused by this method of drug delivery and the dial-a-dope operations that have been the subject of such adverse judicial comments.
- [52] However, I find that the weight to be attached to the commercial nature of his activities must be moderated to some extent by the motivation to engage in it that was provided by his own severe and chronic drug addiction. In my opinion, courts must avoid reflexively forcing trafficking activity into binary categories of addiction-funding behaviour versus pure commercial endeavour. As this case demonstrates, both motivations can be present in the same offender. The harm caused by trafficking as a commercial enterprise aggravates the seriousness of the offence and must be addressed, but an addicted offender nonetheless lacks the calculating degree of involvement for pure profit that would be still more

aggravating.

- [53] Similarly, the fact that Mr. Voszler has a considerable criminal record must be moderated by his lack of similarly serious previous offences or any substantial periods of imprisonment. While it is definitely informative of the entrenched nature of his offending behaviour, as well as the resulting caution with which one must assess the prospects of his rehabilitation, I think that his repetition of the same conduct after having been the subject of a search warrant of this drug house must inevitably have formed part of the aggravating circumstances on the sentencing for those convictions. As a result, they should not be used to increase his current sentence.
- [54] Of course, the dangerous presence of loaded guns in the setting of drug trafficking is always a factor that will be reflected in the sentences for those offences, whether concurrent or consecutive.
- [55] Consideration of comparable sentences ensures that the sentencing principle of sentencing like offenders and offences in a like manner is met. Parity of sentences is also an aspect of the requirement of proportionality. That said, sentences must still reflect the circumstances of the particular offence and offender and the sentencing principles that require the greatest emphasis in light of them.
- [56] The Crown's trafficking cases involve greater amounts and/or dollar values of drugs possessed, although the quantity of methamphetamine possessed in the Wong case is not that much higher than what Mr. Voszler himself possessed. However, I accept that all of the offenders in those cases had mitigating factors or prospects for rehabilitation that Mr. Voszler does not possess (either a lack of criminal background and meaningful presentence efforts towards rehabilitation), and yet none of them received a sentence lower than two years. They tend as a result to support that aspect of the Crown's position.
- [57] I would say, however, that the cases cited involving combination of firearms and drugs feature either a greater number of firearms than the subject of the convictions here (as opposed to just being part of the background circumstances), the presence of a firearm in a vehicle posing a heightened risk to members of the public, or more serious criminal records on the part of the offenders. Put more simply, the circumstances of offences or offenders that they present are in one way or another meaningfully more aggravated than Mr. Voszler's circumstances.
- [58] The converse is true of Mr. Voszler's firearms cases. Each of those offenders can lay claim to at least one significant mitigating factor that he lacks, limiting their value as comparators.
- [59] I would therefore say that the cases involving possession of controlled substances and firearms provided by the Crown and defence tend overall to bookend the range of comparable offences and offenders, and that Mr. Voszler's offences and background fall somewhere between them.

- [60] The seriousness of these offences needs almost no elaboration. The cases make it clear that in themselves the commercial distribution of harmful drugs and the possession of prohibited firearms each pose a significant risk to public safety. In combination, their capacity to endanger the public is potentiated.
- [61] Mr. Voszler's moral blameworthiness in terms of his intentional risk taking and the normative quality of his conduct is quite high, although, as I have said, it is moderated by the underlying motivation of his chronic severe drug addiction.
- [62] It is also self-evident that denunciation and deterrence need the great emphasis here. However much society's recognition of the medical context of addiction increases, it still needs to express its collective condemnation of the commercial aspect of preying on the addicted by selling drugs and creating volatile situations by the possession of guns. Like-minded offenders must be deterred from this conduct and, even though I accept the sincerity of Mr. Voszler's desire for change, he must receive the message that this is not an avenue that he can pursue again in the future.
- [63] Those considerations are still moderated by the possibility of his rehabilitation, which has certainly not been extinguished, but I cannot give it as much weight as if he had managed some further steps along that path on his own by now.
- [64] Balancing these relevant factors and giving the weight they deserve, I conclude that concurrent sentences are an appropriate reflection of the manner in which these two prohibited sets of items were jointly possessed as a linked series of acts within a single endeavour (the overall trafficking operation and the possession of firearms for protection within it). Their combined presence aggravates the overall circumstances, leading to the imposition of higher sentences for each than might otherwise be appropriate for each individual sentence.
- [65] In the absence of presentence custody, I would have sentenced Mr. Voszler to the following: Count 1, imprisonment for one year; Count 2, imprisonment for five years; Count 5, imprisonment for five years; Count 6, imprisonment for five years, all to be served concurrently with each other for an aggregate sentence of five years.
- [66] Applying the 215 days of presentence custody, I sentence him as follows: Count 1, imprisonment for 150 days; Count 2, imprisonment for four years and 150 days; Count 5, imprisonment for four years and 150 days; Count 6, imprisonment for four years and 150 days, all to be served concurrent with each other for an aggregate sentence of four years and 150 days.
- [67] This is a secondary designated offence and I consider the factors weighing in favour of a DNA databank order that were identified in *R. v. Awasis*, 2009 BCCA 134, to be present here. Therefore, pursuant to s. 487.051(3), Mr. Voszler will provide the number of bodily samples as are reasonably required for the purposes of forensic DNA analysis.

- [68] Pursuant to s. 109(2) of the Criminal Code, he will be prohibited from possessing any of the items set out in ss (a) for 10 years following his release from custody, and the items set out in ss (b) for life.
- [69] Pursuant to s. 16 of the CDSA, there will be an order of forfeiture of the items seized by the police in a form to be drafted by the Crown.
- [70] I recommend (1) that Mr. Voszler be classified to the facility that is best able to accommodate his medical problems and (2) that the admissions process include a full investigation of the extent of those problems and the necessary supports for them while he is in custody, including CPAP therapy for his sleep apnea.

"Schultes J."

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Prepared on 26 October 2026 · Esheria