

CANADA / JUDGMENT

R. v. West

2020 BCSC 1928

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1928 R. v. West

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. West,

2020 BCSC 1928

Date: 20201124

Docket: 16260-1

Registry: Powell River

Regina

v.

John Darcy West

Before: The Honourable Madam Justice Iyer

(Appearance via videoconference)

Oral Reasons for Sentence

Counsel for the Crown:

D.A.S. Peltier

Counsel for the Accused

appearing by teleconference:

C.L. Hodson

Place and Date of Trial:

Powell River, B.C.

August 17-21, 2020

November 5, 2020

Place and Date of Judgment:

Powell River, B.C.

November 24, 2020

Introduction

- [1] Mr. West is before me for sentencing on one count of possession of cocaine for the purposes of trafficking and one count each of simple possession of fentanyl and of methamphetamine.

The Circumstances of the Offences

- [2] On December 20, 2018, the Powell River RCMP arrested Mr. West on outstanding warrants. In subsequent searches of Mr. West's person at the scene and at the RCMP detachment, the police found 1.72 grams of fentanyl, 6.57 grams of methamphetamine, 4.32 grams of crack cocaine and 2.97 grams of powder cocaine on Mr. West along with two segregated quantities of cash of \$1,500 and of \$650. Mr. West was charged with possession of each of the drugs for purposes of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA].
- [3] Mr. West testified at trial. He admitted possession of all three drugs. He said he had bought them in Courtenay the previous day with money he had won at the casino. The amounts were larger than he usually purchases because he had won a lot that day and because he wanted to avoid having to come back to Courtenay to buy more drugs over the Christmas break. Mr. West said that the fentanyl was exclusively for his personal use. He said the methamphetamine and cocaine were also mostly for his personal use, but that he shares them with others on occasion. Mr. West admitted that he gave some of the cocaine to the friend who had driven with him to Courtenay to thank her for the ride. I found that the Crown had not proved that Mr. West intended to sell any of the three drugs. I found that the evidence about his intentions for the fentanyl and methamphetamine did not constitute trafficking as defined in s. 2 of the CDSA. However, I found that Mr. West's admission that he gave some of the cocaine to his friend did.

Circumstances of the Accused

- [4] Mr. West is 42 years old and has struggled with drug addiction since he was 12. His parents were drug involved. Mr. West has used hard drugs since his teens. His drugs of choice are heroin and/or fentanyl, methamphetamine, and cocaine. He described himself as a functioning addict with a stable daily routine of taking a maintenance quantity of fentanyl or

heroin, using methamphetamine throughout the day, and using the crack in the evenings or social occasions to get high. Prior to his arrest in December 2018, Mr. West was living in Powell River with his then spouse and her two daughters. They operated a small gardening and landscaping business on a cash basis.

- [5] Mr. West has 53 convictions on his criminal record. He has four prior trafficking convictions, but these occurred in Ontario in 2000 and 2005. Mr. West has five other convictions for possession, one of which postdates the present offences. Many of his convictions arise from breaches of probation or bail terms. He says that his criminal conduct is intertwined with his deeply entrenched drug addiction. Four of Mr. West's convictions postdate the offences in issue here. In addition to the possession conviction, one was for breach of an undertaking or recognizance and two were for driving while disqualified.

Sentencing Principles.

- [6] Section 10 of the CDSA articulates the purpose of sentencing as follows:

to contribute to the respect for the law and the maintenance of a just, peaceful and safe society while encouraging rehabilitation, and treatment in appropriate circumstances, of offenders and acknowledging the harm done to victims and to the community.

- [7] Where, as here, there is no mandatory minimum sentence, the court must consider aggravating factors. Section 718 of the Criminal Code also addresses sentencing principles:

The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

- [8] Section 718.1 of the Code requires that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender. In relevant part, s. 718.2 requires the court to consider aggravating and mitigating factors, the parity principle that similar sentences should be imposed on similar offenders for similar offences committed in similar circumstances; and the totality principle, the total sentence should not be unduly harsh. The court should consider less restrictive sanctions than imprisonment that are reasonable in

the circumstances.

- [9] As the Supreme Court of Canada has commented, sentencing involves the exercise of broad discretion in balancing numerous factors to achieve a fit sentence in each case, *R. v. Lacasse*, 2015 SCC 64, at para. 1. The provision by appellate courts of sentencing ranges is helpful, but these are guidelines only. The trial court must determine whether a sentence within the range is appropriate in a particular case, *R. v. Friesen*, 2020 SCC 9, at paras. 36 to 39.

Positions of Crown and Defence

- [10] The Crown seeks concurrent sentences of eight to 10 months for possession for cocaine for the purposes of trafficking, four to five months for the possession of fentanyl, and 90 days for possession of methamphetamine less time served. The defence submits that concurrent sentences of four to six months for possession of cocaine for the purposes of trafficking and 90 days for possession of each of methamphetamine and of fentanyl are appropriate, again, less time served. The Crown also seeks a DNA order and a lifetime firearms prohibition with which the defence does not take issue. The Crown does not seek forfeiture of the cash found on Mr. West.

Aggravating and Mitigating Factors

- [11] It is clear from their respective positions that the Crown and defence have differing views about the seriousness of Mr. West's possession of cocaine for the purposes of trafficking and his possession of fentanyl. In part, these arise from their assessment of the aggravating and mitigating factors that apply to both offences. The Crown emphasizes Mr. West's lengthy criminal record and the fact that he was under a conditional sentence order and knew he was wanted on outstanding warrants at the time he committed the present offences. It underscores the well-known dangers associated with each of the three drugs and points to the fact that Mr. West has continued his criminal conduct, including by possessing the fentanyl and breaching a condition not to be in Powell River, in the two years since he committed these offences. The Crown acknowledges Mr. West's entrenched drug addiction as a mitigating factor, but says that his prospects for rehabilitation are dim.
- [12] The defence submits that Mr. West's criminal record is a product of his drug addiction which has shaped his whole life. It notes that his previous trafficking convictions are 15 to 20 years old. Mr. West has been in custody during the whole of the COVID-19 crisis which means that he has not had the benefit of the programs and services that would otherwise have been available to him. He has not had any outside visits and has been in lockdown at times. Prior to the pandemic, Mr. West completed programs in Substance Abuse Management, Respectful Relationships, and Communication Skills. He has a letter of support from his addiction counsellor who says that he is genuinely working on change and recognizes the enormity of that challenge. The defence acknowledges that Mr. West does not do well on bail, but cautions that he has already been punished for breaching bail conditions.

- [13] The Crown and defence also differ over the significance of the absence of a profit motive in Mr. West's dealings with cocaine and they disagree about how the current opioid crisis should be considered in relation to a person who possesses fentanyl for personal use. The defence submits that these are important mitigating factors.

Discussion

- [14] None of the authorities with which I was provided on a sentencing range for possession for the purposes of trafficking is particularly applicable to the circumstances of this case. The Crown relies on *R. v. Lloyd*, 2014 BCCA 224, which establishes a sentencing range of 12 to 18 months for street-level drug dealers with relevant prior convictions who have sold to support their addictions. The defence relies on *R. v. Voong*, 2015 BCCA 285, which establishes a sentencing range of six to 18 months for dial-a-dope drug sellers who have a minor or no criminal record. It also relies on *R. v. Galye*, 2016 BCSC 1154, in which a sentence of 45 days was imposed on Mr. Galye for possessing heroin, not to sell it, but for the purpose of sharing it with his girlfriend based on a joint sentencing submission by Crown and defence.
- [15] Mr. West's circumstances differ from these cases. He has a lengthy criminal record that is connected to his long history of addiction. There is no joint submission with respect to the sentence for the cocaine and fentanyl convictions. Most importantly, in my view, is the fact that Mr. West's trafficking conviction is based on sharing the cocaine, not on selling it. Applying the reasoning in *Beek* at paras. 61 to 63 in a sentencing context, I consider that selling a prohibited drug, even if only to support the individual's addiction, is a greater social harm than sharing it. In *Galye*, Kent J. considered the fact that Mr. Galye's conviction was not for commercial trafficking to be significant, at para. 23:

Rather, he was convicted for his intent to share drugs with his girlfriend, who is also an addict. While this amounts to trafficking as a matter of law, it is at the so-called low end of the spectrum and warrants a sentence significantly less in the range usually suggested for commercial trafficking.

I agree. As the basis for Mr. West's conviction of possession of cocaine for the purposes of trafficking is unrelated to profit, a sentencing range lower than for commercial trafficking is appropriate. This is a very significant mitigating factor in relation to the possession for the purposes of trafficking conviction.

- [16] The other major point of disagreement between the Crown and defence is the seriousness of a conviction for possession of fentanyl. The Crown refers to *R. v. White*, 2019 BCCA 461, in which the Court of Appeal approved a sentence of 90 days for possession of fentanyl based on a joint submission by Crown and defence. Mr. White was found to have had fentanyl and GHB in his possession along with a prohibited firearm. The Crown says Mr. West's circumstances are more egregious justifying a sentence of four to five months. I do not find *White* helpful as the facts and the joint sentencing submission make that case entirely distinguishable.

- [17] Fentanyl is an extremely dangerous substance. However, the biggest and most immediate risk it poses is to Mr. West himself. In his evidence, he described the care that he takes to ensure that no one else including his stepdaughters could come into contact with it. I agree with the defence that Mr. West is more the victim than the perpetrator in this situation. While anyone purchasing the drug contributes in some way to the illegal market in it for which society bears a terrible cost, I do not consider that this warrants a markedly different sentence for possession of fentanyl as compared to that for possession of methamphetamine.
- [18] The mitigating factors I have discussed must be balanced against the aggravating factors including Mr. West's long, albeit drug-related, criminal record; the fact that he committed these offences while serving a non-custodial sentence and had outstanding warrants; and that he continued to commit crimes after committing these offences. Mr. West's addiction and associated practices have consistently brought him into conflict with the law. The principles of denunciation and deterrence require condemnation of this conduct. With respect to the principle of rehabilitation, I agree that Mr. West has an enormous challenge before him. However, he has taken some positive steps while in custody. His counsellor's letter indicates that Mr. West has a realistic appreciation of his situation and I think rehabilitation is still possible.
- [19] For these reasons, I conclude that a sentence of six months' imprisonment on possession for the purposes of trafficking is appropriate. While there may be cases where possession of fentanyl attracts a longer sentence than possession of a less dangerous drug, this is not one them. The circumstances surrounding Mr. West's use and possession of fentanyl warrant a sentence of 90 days. The Crown and defence agree that a sentence of 90 days for the conviction for possession of methamphetamine is appropriate. That sentence is not contrary to the public interest, unreasonable, or unfit and it would not bring the administration of justice into disrepute.
- [20] Mr. West, you are hereby sentenced to six months' imprisonment for possession of cocaine for the purposes of trafficking, to 90 days' imprisonment for possession of fentanyl, and to 90 days' imprisonment for possession of methamphetamine. These sentences are to be served concurrently. You are credited for time already served on a one-to-1.5 ratio, which, in this case, results in a credit of 324 days. As your time already served exceeds the length of your sentence, you are sentenced to time served.
- [21] I make the following ancillary orders:
- (a) Pursuant to s. 487.051 of the Code, having regard to the fact that the defence takes no position, I am satisfied that the seriousness of the offences warrant ordering Mr. West to provide a sample of a bodily substance that is reasonably required for the purposes of a forensic DNA analysis and I so order.

(b) Pursuant to s. 109(3) of the Code, I order that Mr. West is prohibited from possessing any firearm, restricted weapon, prohibited weapon, prohibited device, or prohibited ammunition for life.

[22] In conclusion, Mr. West, I believe that you have an opportunity at this point to take meaningful steps towards rehabilitation and, while appreciating that that is going to be extremely difficult, I strongly encourage you to do so.

[23] That concludes my reasons.

"Iyer J."

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