

CANADA / JUDGMENT

R. v. Wilkinson

2021 BCSC 896

COURT

Supreme Court of British Columbia

DECIDED

1 April 2021

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

2021 BCSC 896 R. v. Wilkinson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Wilkinson,

2021 BCSC 896

Date: 20210401

Docket: 179263-3

Registry: Victoria

Docket: 42009-2

Registry: Duncan

Regina

v.

James Christopher Wilkinson

Before: The Honourable Mr. Justice Steeves

Oral Reasons for Sentence

Counsel for the Provincial Crown:

P. Cheeseman

Counsel for the Federal Crown:

B. Lansdowne

Counsel for the Accused:

C. Hodson

Place and Date of Trial/Hearing:

Victoria, B.C.

March 29, 2021

Place and Date of Judgment:

Victoria, B.C.

April 1, 2021

- [1] THE COURT: This is a decision on the sentencing of the accused, Mr. James Christopher Wilkinson, for two matters. The first, Court File 42009, where Mr. Wilkinson was charged with two counts under s. 5(2) of the Controlled Drugs and Substances Act and one count under s. 4(1) of the same statute. The substances involved were fentanyl, cocaine, and methamphetamine. On November 26, 2020, I found Mr. Wilkinson guilty on all three counts. The second matter, Court File 179263, involved six counts under ss. 95(1), 355, 129(d), 92(1), 94(1), and 178.01(1) of the Criminal Code. They involved an incident on July 20, 2019, when Mr. Wilkinson was found in a parked vehicle with a prohibited firearm and he attempted to resist or obstruct a peace officer in the execution of his or her duty. Mr. Wilkinson has pled guilty to Count 1, possession of a prohibited firearm contrary to s. 95(1) of the Criminal Code.
- [2] With respect to the federal drug matter, the Federal Crown seeks a sentence of five years. For the weapons offence, the Provincial Crown seeks a sentence of 5.5. to 6.5 years. Both attorneys say the two sentences should run consecutively. According to Mr. Wilkinson, appropriate sentences are 30 months for the drug offences and 42 months for the weapons offence. These will also be consecutive for a total of six years. There is significant time in custody since Mr. Wilkinson has been in custody since July 20, 2019, and that is agreed within one day to be 929 or 930 days using a 1.5 factor multiplier. Mr. Wilkinson says that this dead time and the totality principle should result in a sentence of two years less one day so that he can serve his time in a provincial jail on Vancouver Island.
- [3] The background for the drug offences is that two police officers were travelling in the Duncan area on July 13, 2019, in an unmarked police car. It was dark, late at night, and they passed two males walking on the sidewalk, one with a backpack. After the police officers passed, they noticed that the two males on the sidewalk were running away into a vacant lot. The police officers gave chase and ultimately apprehended one of the males, but without a backpack. That was Mr. Wilkinson. A search of the path taken by him revealed the backpack. In it, there was cash of \$1,035 in an envelope and loose cash of \$1,330; 97.3 grams of a heroin/fentanyl mix; 1.6 grams of crack cocaine; 7.7 grams of powder cocaine; 3.3 grams crack cocaine; 0.5 grams methamphetamine; as well as plastic bags and tinfoil. Mr. Wilkinson was arrested and charged with possession for the purpose of trafficking. He pled

not guilty and elected to be tried by a jury. However, after the jury was empanelled, he chose judge alone.

- [4] On September 25, 2020, I allowed Mr. Wilkinson's application under s. 9 of the Charter that the police officers did not have reasonable suspicion for the purposes of an investigative detention. I denied his applications under ss. 9 and 10 of the Charter. Then, on November 6, 2020, under s. 24(2) of the Charter, I admitted the evidence at issue, primarily the contents of the backpack. At that point, Mr. Wilkinson invited a conviction on the trafficking offences. Finally, on November 26, 2020, I found him guilty on all three counts under the Controlled Drugs and Substances Act described in the indictment.
- [5] Turning to the background of the weapons offence, this occurred on July 20, 2019. Two police officers were investigating a male, that turned out to be Mr. Wilkinson, who was asleep in a parked car. The car had been reported as stolen, but it was ultimately determined that it was not stolen. The key was in the ignition. The doors were locked. A video taken from a police vehicle captured the entire incident. The police attempted to open the vehicle while Mr. Wilkinson was asleep by reaching into the sunroof. However, he woke up. He was told he was under arrest because of the vehicle being reported as stolen and he was to exit the vehicle. He refused and ultimately one police officer unlocked the car through the sunroof while the other distracted Mr. Wilkinson. Mr. Wilkinson fought back against the police as they tried to apprehend him. He escaped and ran down a road behind the stolen car. While he was running, a Walther nine millimetre handgun dropped out of his pants. Eventually, other PCs arrived and Mr. Wilkinson was captured and handcuffed. Mr. Wilkinson did not have a permit for the gun and, in fact, he was prohibited from having one. The handgun had one round in the chamber and it had five rounds in the magazine. The magazine itself was illegal because it was capable of holding more than 10 rounds.
- [6] Turning to the circumstances of Mr. Wilkinson, he is 34 years old. He comes from a large family in Ontario, but also a very troubled one. A summary is contained in the March 22, 2021, presentence report at page 12. Mr. Wilkinson has experienced significant trauma both as a child and adult. In childhood, he has suffered the effects of parental neglect due to substance abuse, sexual abuse, poverty, familial separation, abuse in foster care and youth custody. As an adult, he has experienced the loss of his parents, child, and two siblings, drug addiction, homelessness, incarceration, and being the perpetrator and victim of violence.
- [7] In the presentence report, Mr. Wilkinson acknowledged his guilt for the offence. In his statement to the court, as part of the sentencing proceeding, Mr. Wilkinson described his criminal behaviour as rooted in his addictions and the traumas throughout his life. The presentence report described his most immediate needs as treatment for substance abuse and psychological trauma and, in his address to the court, Mr. Wilkinson stated that he understood the seriousness of his actions.

- [8] He has a significant criminal record with 26 convictions between 2014 and 2017. The most serious and recent conviction was in August 2016, disposition was January 2017, when he received 260 days for possession for the purposes of trafficking. Since then, he has had eight convictions for possession of body armour without a permit, dangerous operation of a vehicle, flight from police, mischief, failure to appear, and breach of a probation order. His last conviction was a failure to appear in September 2017.
- [9] During his time in custody awaiting trial since July 2019, Mr. Wilkinson has undertaken and completed a number of courses for things like substance abuse management, healthy relationships, living without violence, money management, ladder safety, and other subjects. He has also received letters of support for programs he attended. In an email dated June 3, 2020, his participation in the Report Living Community, or RLC, is described and it records him as being motivated to receive help and learn skills to de-escalate his behaviour when he is frustrated.
- [10] Unfortunately, as noted in the PSR, he was removed from the RLC program on July 9, 2020, for breaking the rules. He was in possession of contraband including another person's identification, some pills, smoking paraphernalia, pornography, and some razors. Another letter of support is dated May 21, 2020, and is from BC Mental Health. It describes Mr. Wilkinson as an integral and valuable member of the RLC, but as above, he was removed from the program about two months later for breaking the rules. Other comments, such as Mr. Wilkinson being on a new path, must be considered in light of the later developments at RLC. Mr. Wilkinson is currently attending regular appointments with a psychiatrist about once a month.
- [11] The principles of sentencing and its purpose are set out in s. 718 of the Criminal Code. It is well recognized that denunciation and general deterrence are of primary importance in cases involving illegal firearms (*R. v. Frohock*, 2008 BCSC 735, at paras. 87 to 94). With respect to possession for the purposes of trafficking, it is also well established that the same principles apply (*R. v. Smith*, 2017 BCCA 112, at para. 42, citing *R. v. Fyfe*, 2017 SKQB 5, paras. 157 to 163). I am urged by counsel for Mr. Wilkinson to consider that he has considerable potential for rehabilitation, another sentencing principle.
- [12] As a more general issue, I note that s. 718.1 of the Criminal Code states that a fundamental principle of sentencing is that:

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

- [13] As a first step in determining a fit sentence in this case, it is necessary to consider the fact of the two indictments. There are also multiple counts on each indictment. A two-stage process applies here. Stage 1 is to determine whether consecutive or concurrent sentences should be imposed. If there are to be consecutive sentences, then the second stage is to determine if the sentences taken together offend the totality principle (*R. v. Li*, 2009 BCCA 85, at para. 28). With regards to the first stage, the two indictments arise from different circumstances,

different dates, and different statutes. Put another way, they do not arise from the same incident and are not a linked series of events within a single endeavour (that is Li at para. 18). I conclude that consecutive sentences are required here. That is also the view of both Crowns and the defence.

- [14] Turning to the second stage, I will discuss what is a fit sentence for each incident. Beginning with the trafficking convictions, they relate to significant amounts of drugs, in particular, fentanyl in an amount of over 97 grams. There is also crack and powder cocaine and methamphetamine. Fentanyl is of particular concern. It is 20 to 50 times more potent than heroin and a mere two milligrams can be a lethal dose. A report by the BC Coroners Service describes an 107-percent increase in the numbers of illicit drug toxicity deaths from February 2020 to January 2021. The number of deaths per day in February 2021 was 5.5. Fentanyl was described as the most significant illicit drug responsible for 80 percent of deaths (R. v. Smith at paras. 16 and 48). The BC Coroners Report is "Illicit Drug Toxicity Deaths in B.C., March 24, 2021." I note from these documents that fentanyl has been described as a "scourge" in B.C. and the moral culpability of someone trafficking in fentanyl is high.
- [15] The leading judgment with respect to sentencing for cases of trafficking in fentanyl is Smith. The range set there is 18 months at the lower end. The upper end "might well exceed 36 months, especially when the offender has a substantial record" selling fentanyl or "otherwise demonstrates an indifference to the human lives he or she is putting at risk," (para. 45). As can be seen above, Mr. Wilkinson has a substantial record including a sentence of 260 days for possession for the purpose of trafficking in 2016. It seems to me that his situation requires a sentence above the 36-month level set out in Smith.
- [16] I next turn to some of the more specific cases discussed in argument. R. v. Mann, 2018 BCCA 265, was a case of two brothers convicted of trafficking in fentanyl, about 30 grams. One had an opioid addiction including fentanyl, but the finding was the trafficking was for profit. One was also convicted of possession for trafficking in carfentanil, an even more serious substance than fentanyl itself, and a firearm offence. Both received four-year sentences for the fentanyl. The carfentanil warranted a five-year concurrent sentence. The trafficking was street level and neither accused had a criminal record.
- [17] In R. v. Forsberg, B.C. Provincial Court, 167638-4-C, 167641-2, Victoria, the accused was convicted of possession for the purpose of trafficking of fentanyl and cocaine. He had a significant record and trafficking in fentanyl was considered a significant aggravating factor. Brass knuckles were also seized. He was of First Nations descent. A sentence of four years consecutive for the fentanyl was imposed.
- [18] In R. v. D'Allesandro, 2019 BCSC 1810, there were convictions on three counts of possession for the purpose of trafficking including 21.7 grams of a heroin/fentanyl mix. A sentence of four years was imposed for the fentanyl. Mr. D'Allesandro had a longstanding addiction to opioids and a lengthy record.

- [19] In *R. v. Desbiens*, 2020 BCSC 884, a four-year sentence for possession for the purpose of trafficking in fentanyl in an amount of 119 grams was imposed. There were other convictions which resulted in 11 years' total sentence. When applied consecutively, this was reduced to eight years on the totality principle.
- [20] As can be seen, the courts treat the trafficking of fentanyl as a very serious offence requiring a serious sentence.
- [21] As well, bearing in mind every case is different from every other case, there is some consistency in the authorities in applying a sentence of four years for trafficking in fentanyl in circumstances similar to Mr. Wilkinson. It is submitted on his behalf that whether a person is guilty of trafficking or simple possession is really a matter of luck. That is, a trafficker can have sold out his product and have a small amount, but a day before, he could have had a larger amount. I accept that is so, but someone trafficking in any drug takes the risk of being caught before his inventory is sold.
- [22] Looking at the mitigating factors with respect to the trafficking offences, I note that Mr. Wilkinson invited a conviction. This was after losing his Charter application and it was after he elected judge alone after a jury had been empanelled. He has expressed some remorse to the parole officer as well as in his elocution in court. He has certainly had a harsh personal life throughout. He has addiction problems. He says he takes seven grams of fentanyl a day and it is submitted he has rehabilitation potential.
- [23] The aggravating factors are Mr. Wilkinson's significant record, there are multiple substances involved here, he was trafficking in the small community of Duncan, and he was trafficking in large amounts of fentanyl, a very lethal substance. The expert evidence is that his trafficking was consistent or more than the street level for trafficking. Finally, an aggravating factor is that it cannot be said to have been a momentary lapse on Mr. Wilkinson's part to have in his possession 97 grams of fentanyl.
- [24] With the above in mind, it seems to me that the following sentences with respect to the counts under the Controlled Drugs and Substances Act are appropriate. Under Count 1, possession for the purpose of trafficking in fentanyl, considering the circumstances, the amount, and Mr. Wilkinson's record, the sentence is four years. Under Count 2, possession for the purpose of trafficking in cocaine, the sentence is 15 months. Count 3, possession for the purpose of trafficking of methamphetamine, the sentence is 14 days. The latter two sentences on Count 2 and 3 are essentially agreed. The sentence on all three counts will be served concurrently.
- [25] I next turn to the firearms conviction under s. 95 of the Criminal Code. The authorities demonstrate that the bottom range for a first conviction under s. 95 is 30 months (*R. v. Holt*, 2015 BCCA 302, at para. 19; also, *R. v. Padda*, 2019 BCCA 351, at para. 34). Further, a case involving driving a vehicle with a loaded gun has been described as a "truly criminal act" because its only purpose can be to threaten or cause serious harm or death. That justifies a sentence of 36 months (*R. v. Kachuol*, 2017 BCCA 292, at para. 29). Another case with similar

facts imposed a sentence of 42 months (*R. v. Schmidt*, 2019 BCPC 312, at para. 23). The policy behind these decisions is an obvious one, that guns are dangerous, they are used to shoot people, handguns are particularly dangerous, and loaded concealed weapons are even more dangerous (*R. v. Bacon*, 2010 BCPC 325, at para. 75).

- [26] With respect to the offence of possessing a firearm contrary to a prohibition order, the sentence range is six to 12 months and it is generally applied consecutively to any possession conviction (*R. v. Ball*, 2014 BCCA 120, at para. 24).
- [27] Looking at the aggravating circumstances in Mr. Wilkinson's case for the weapons conviction, he fought and then escaped from the police and, while running away, a nine millimetre Walther handgun fell from his pants. It was plainly available to him at the time. It had one round in the firing chamber, five rounds in the magazine, and the magazine itself was illegal. The firearm was not only unauthorized, but Mr. Wilkinson had previously been prohibited two times from being in possession of one and he was a driver in the driver's seat of a vehicle with a weapon before his escape. Another aggravating factor here is Mr. Wilkinson's record. It includes convictions for violence, body armour violations, and others. All of these aggravating factors require a more severe penalty than the sentences in the above authorities.
- [28] Mr. Wilkinson relies on his plea of guilty to the s. 95 offence as a mitigating factor. I agree that is worthy of some weight, however, I also note that the guilty plea was made after two seven-day jury trials had been scheduled. They obviously required a significant amount of court time and resources. In addition, the s. 95 incident was captured on video taken a very short distance from where Mr. Wilkinson was found asleep in the car. Except for a very brief time when he ran out of sight, the entire event was captured on good quality film. No criminal prosecution is perfect, but the situation here provided strong grounds for a conviction and a strong reason to plead guilty.
- [29] I note cases relied on by the defence are not greatly dissimilar than the cases relied on by the Crown. The cases relied on by the defence are *R. v. Graham*, 2018 ONSC 6817, and *R. v. Mills*, 2021 BCCA 86.
- [30] Taking the circumstances of Mr. Wilkinson together with the above legal principles, I conclude that a fit sentence for his conviction under s. 95 of the Criminal Code is four years. That is for Count 1 of the indictment.
- [31] As can be seen, the total consecutive sentence for the two matters under the Controlled Drugs and Substances Act and s. 95 of the Criminal Code is eight years. At this stage, I am also required to apply the totality principle. This is codified in s. 718.2(c) of the Criminal Code which requires a consecutive and combined sentence to "not be unduly harsh." I am to consider whether the global sentence is unreasonable or unfairly reflects the moral culpability of, in this case, Mr. Wilkinson (*R. v. Berry*, 2014 BCCA 7, at para. 55).

- [32] I am urged by Mr. Wilkinson's counsel to consider his rehabilitation potential here. I am referred to the number of certificates he has obtained after taking courses in custody. Offsetting these are the problems he had at RLC with contraband, including pills, razors, and another's ID. This resulted in him being removed from the program. I am also asked by Mr. Wilkinson to fashion a sentence of less than two years using the totality principle so he can stay on Vancouver Island. I accept that is his wish, but I am unable to compromise the sentences required to reflect the moral culpability of trafficking in fentanyl and his possession of a prohibited weapon in dangerous circumstances.
- [33] Mr. Wilkinson, sir, would you please stand up.
- [34] Sir, you have heard my discussion of the evidence and the law here. Taking all of that together, I accept that some reduction is appropriate on the basis of the totality principle. On that principle, I reduce your sentence to six years for all counts on the two indictments. You can sit down, sir.
- [35] For the purposes of Corrections, the sentence is 1,590 days. The time in custody is essentially agreed at 629 days. That is on the basis of a multiplier of 1.5. The result is that there are 961 days for Mr. Wilkinson to serve the remainder of his sentence. For the purposes of the dead time, I assess the dead time at 329 days under Count 1 of the s. 95 conviction, 200 days under Count 1 of the drug trafficking indictment, 50 days under Count 2 of the drug indictment, and 50 days under Count 3 of the drug indictment.
- [36] I also make a number of ancillary orders. There will be a firearms/weapons prohibition under s. 109(1)(c) of the Criminal Code.
- [37] There will be a DNA test under s. 487.051(3) of the Criminal Code.
- [38] There will be a forfeiture order pursuant to s. 16 of the Controlled Drugs and Substances Act of all the items seized and highlighted on the major exhibit flowchart, namely, items 1, 1A, 2, 3, and 11; and there will be forfeiture of the Walther handgun, serial number FAM6822.
- [39] Mr. Cheeseman, I have signed your order here, and I think you have something to say about remaining counts on the indictment?
- [40] CNSL P. CHEESEMAN: I do, My Lord, and just to clarify, so the forfeiture order also applies to the ammunition and to the cartridge --
- [41] THE COURT: Yes.
- [42] CNSL P. CHEESEMAN: -- just for the draft order? Thank you.
- [43] Yes, Crown will be directing a stay of Counts 2 through 5 on the Victoria File 179263.

- [44] My Lord, I just wonder if, for reference purposes, we can clarify the amount of time for each count. I think I heard Your Lordship say you were attributing 50 days of dead time to Count 3, but then you also imposed a sentence of 14 days on Count 3 for the federal matters. I am not sure that that math works out. I will leave that into my friend's hands, but is it the intention that each -- that the gun charge you found that it would be a sentence of four years, but then reduce it to three years for totality, and the same thing on the federal file?
- [45] THE COURT: What I said was under the drug indictment, four years under Count 1 --
- [46] CNSL P. CHEESEMAM: Yes.
- [47] THE COURT: -- 15 months Count 2, 14 days under Count 3 as the sentence.
- [48] CNSL P. CHEESEMAM: And then reducing Count 1 from four years to three years for totality?
- [49] THE COURT: No, I applied the totality principle at the end to the total of the two indictment.
- [50] CNSL P. CHEESEMAM: Yes, but if my friends concur, I believe the appropriate way to do that is you -- is to determine the appropriate sentence on each information and then make any reduction, because otherwise we end up with the record showing a four-year sentence and a four-year sentence consecutively and then just sort of a statement of reduction.
- [51] THE COURT: All right, yes. All right. So, applying the totality principle to the two indictments, it would be three years on each indictment. So on the s. 95 indictment, it would be three years on Count 1 --
- [52] CNSL P. CHEESEMAM: Thank you, My Lord, yes.
- [53] THE COURT: -- and then I guess for Federal Crown, for the CDSA indictment, it would be 24 months on Count 1, six months on Count 2, and six months on Count 3.
- [54] CNSL B. LANSDOWNE: My Lord, I think that gets us below six years because the -- so the sentence on Count 3 is only 14 days, all of those to be served concurrently. So Count 1, I think it would work Count 1 three years; Count 2, 15 months concurrent; and then Count 3, for the simple possession, 14 days.
- [55] THE COURT: Yes.
- [56] CNSL C. HODSON: I think that makes sense with me, My Lord, and if I could just clarify for Mr. Wilkinson's sake, I believe Your Lordship said he was being credited with -- or he is to serve a remaining 961 days. Perhaps you could -- or --
- [57] THE COURT: That was my calculation --
- [58] CNSL C. HODSON: Yes.
- [59] THE COURT: -- yes.
- [60] CNSL C. HODSON: Thank you.

- [61] THE COURT: Counsel should do their own calculation. I did it a couple of times, but to be clear, that was taking six years at 1,590 days deducting 629 and, by my math, the remaining sentence is 961 days.
- [62] Mr. Hodson? Mr. Hodson? Mr. Hodson, your client wants to talk to you.
- [63] CNSL C. HODSON: Oh. My Lord, my apologies, the deduction, as I understood it, was 600 and -- sorry, 900 and --
- [64] THE COURT: Yes.
- [65] CNSL C. HODSON: -- Mr. Wilkinson is concerned that he is not being credited --
- [66] THE COURT: Yes, with a 1.5 multiplier.
- [67] CNSL C. HODSON: Yes.
- [68] THE COURT: Yes, yes.
- [69] CNSL P. CHEESEMAN: My Lord -- My Lord, excuse me, my calculation is six years, 365 days, would be 2,190 days, and then we subtract the 961 days, and that gives a total new time of 1,229 days.
- [70] THE COURT: So six times 365 is what?
- [71] CNSL P. CHEESEMAN: Six times 365 is 2,190. So that would be the total sentence imposed --
- [72] THE COURT: Yes.
- [73] CNSL P. CHEESEMAN: -- and then we subtract, I believe it was, 961 days' credit?
- [74] THE COURT: Yes.
- [75] CNSL P. CHEESEMAN: So that leaves us with new time of 1,229 days.
- [76] THE COURT: All right. Those are the new numbers. Thank you.

"J. J. Steeves, J."

The Honourable Mr. Justice Steeves

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/21/08/2021BCSC0896.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-wilkinson-2021>

Prepared on 27 October 2026 · Esheria