ONTARIO COURT OF JUSTICE

CITATION: *R. v. Mori,* 2020 ONCJ 620
DATE: 2020 12 30
COURT FILE No.: Niagara Region 998 17 S3352(02)

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

Paul Mori

Before Justice J. De Filippis
Heard on December 19, 2019; February 19, April 19, June 19, July 17, and October 15, 2020
Reasons for Judgment released on December 30, 2020

Mr. D. Anger and Ms. M. Colacarro .....counsel for the Crown
Mr. V.J. Singh ..... counsel for the accused

De Filippis, J.:

INTRODUCTION

[1] These reasons explain why I have decided the defendant will be subject to a conditional sentence order for possession of a scheduled drug for the purpose of trafficking. The defendant pleaded guilty to possession of a mixture of fentanyl and heroin. As I will explain, a conviction with respect to both is justified. However, the sentence reflects my finding that the defendant believed he had heroin, not fentanyl.

[2] I will begin by setting out the history of this matter as it is relevant to my decision. The defendant was arrested on September 6, 2017. Fifteen months later, his lawyer was appointed to the bench and present counsel took over the matter. One year after that, on December 2, 2019, the defendant pleaded guilty before me, on the date set for trial. A Gardiner Hearing was held several weeks later and a presentence report (PSR) ordered. On February 19, 2020 the case was further adjourned to April 19, 2020 so that Defence counsel could review the PSR with his client and address certain issues. On this date, and again on June 19, the case was not reached because of the pandemic. On July 17, the sentence hearing was adjourned, on consent of the Crown so the defendant could

complete a 60-day residential treatment program for substance abuse. With this done, I heard sentence submissions on October 15, 2020.

[3] The facts of this offence can be briefly stated: The police stopped a vehicle operated by the defendant after conducting surveillance on reasonable grounds to believe he was selling drugs. The police found 38.66 grams of a powder that contained both heroin and fentanyl, seven grams of crystal methamphetamine, and a small amount of cocaine. The powder was contained in several bags. Police also seized a bag with a few grams of a heroin/fentanyl mixture and another, with a few grams of pure fentanyl, in the purse of a passenger, Natasha Beam, his partner (i.e. common law spouse).

[4] It is acknowledged by both counsel that sentences for trafficking in heroin and fentanyl are generally severe, but more so in the case of fentanyl because it has proven to be more addictive and deadlier. The defendant's guilty plea was based on his statement that he believed the powder to be pure heroin. The Crown did not accept this qualification. A Gardiner Hearing was scheduled to determine the issue. Upon sentencing of the defendant, the Crown agrees to withdraw charges against Ms. Beam.

THE GARDINER HEARING

[5] Paul Mori 40 years old. He testified that he has been a heroin user since his early teens. He has taken fentanyl twice but he "did not like it". He described it as a blue or purple powder, in contrast to the brown powdered heroin he has always purchased. With respect to the powder found by police in his car, the defendant said he believed it to be pure heroin; if there was fentanyl in it, it had to be minimal as the powder was brown in colour. He added that he bought the product as heroin from his dealer in Toronto and that when he consumed a portion, "it tasted like heroin". He explained this by noting that fentanyl is "like a tranquilizer", whereas heroin "is more like a good feeling".

[6] In cross-examination, the defendant said that he has used the same supplier for two years and had asked him for heroin, crystal methamphetamine, and cocaine. He did not ask for fentanyl. He cannot explain why some of the bags seized by police contain a mixture of heroin and fentanyl and why Ms. Beam had one bag with several grams of pure fentanyl. He said he has sold heroin to fund his own addiction and does "not make money beyond that"; indeed, his accumulated debt to his supplier is $60,000. In this regard, the defendant suggested an explanation for the heroin/fentanyl mixture by noting that fentanyl is less expensive (and reduces the cost to his supplier).

[7] The Crown did not call evidence on the Gardiner Hearing. Moreover, apart from the defendant's testimony about the differences in colour for heroin and fentanyl, I do not have a qualitative analysis to inform me about the percentage of each drug in the seized bags. The Crown argued that it will always be easy for an accused to say he lacked knowledge of the drug that carries the greater penalty. I acknowledged this and provided oral reasons for my conclusion that the Crown had not proven that this defendant knew he was in possession of fentanyl. As such, I stated that he would be sentenced for possession for the purpose of trafficking in heroin.

THE SENTENCE HEARING

[8] Notwithstanding my ruling on the Gardiner Hearing, at the sentence hearing several months later, the Crown provided submissions with respect to trafficking in fentanyl and, in the alternative, heroin. In pressing the former, counsel relied upon *R v Stewart* 2020 ABCA 252.

[9] In *Stewart,* the defendant was stopped in a motor vehicle that was found to contain 80 pounds of marihuana and one kilogram of cocaine. The accused testified that she knowingly transported the marihuana but had no knowledge about the cocaine. The trial judge accepted her testimony, but convicted with respect to possession for the purpose of trafficking in both drugs. In so doing, the judge held that if a person knowingly possesses a scheduled drug, it does not matter if she thought it was another drug on the schedule. The defendant's appeal with respect to her conviction for possession for the purpose of trafficking in cocaine was dismissed.

[10] The ruling in *Stewart* is also the law in Ontario; see *R v Lewis* 2012 ONCA 338. However, it does not support the Crown's assertion in the present case that the defendant should be sentenced for possession for the purpose of trafficking in fentanyl. *Stewart* was a conviction appeal, with a sentence appeal yet to be heard. The Court was unanimous in dismissing the conviction appeal. However, two of the three judges added these comments:

> [50] That said, we wish to make a few additional remarks regarding the possible relevance of Ms Stewart's *mens rea* for purposes of sentencing, which in turn requires that we address the question of wilful blindness.
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> ……
>
> [52] A mistaken belief that one is transporting marijuana rather than cocaine, though irrelevant to conviction, can be highly relevant to the sentence imposed…..That is because "[t]here is a considerable difference in the moral blameworthiness of a person who believes he is importing marihuana... and one who knows he is importing cocaine"….. The same may be said of possession for purposes of trafficking.
>
> [53] The lack of actual knowledge is often found to be irrelevant in sentencing because it is not mitigating where the offender is nevertheless wilfully blind to the nature of the substance…..However, there will be rare instances where the offender is not wilfully blind, having held an honest belief as to the substance possessed but duped into transporting a more harmful one. In those cases, a mistaken belief or lack of knowledge has been said to be a significant mitigating or extenuating factor in sentencing…..
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> ……..
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> [60] The trial judge explicitly found that Ms Stewart lacked actual knowledge of the cocaine and was not wilfully blind to its presence. That finding remains undisturbed on appeal.

[11] In my respectful view, the additional comments in *Stewart* must be correct. How could I sentence the defendant to the higher penalty range for fentanyl, after finding that his knowledge of this drug has not been proven? As *Stewart* makes clear, the doctrine of wilful blindness means such a finding will be" rare", but that is my conclusion in this case. I repeat, I am sentencing defendant for possession for the purpose of trafficking in heroin, not fentanyl. Accordingly, I will not address the submissions and caselaw offered by the Crown with respect to the latter drug.

[12] The defendant has a criminal record. It begins in 1996 with a conviction for theft. In the years that follow, he accumulated another six property offences, a mischief and breach of probation. The record ends in 2012 with a conviction for possession of a controlled substance. The longest sentence he has served is 90 days in custody.

[13] The defendant has been on bail for more than three years. Two terms of release are significant with respect to sentencing. First, he was ordered to be under house arrest, unless in the company of his surety (his grandmother). This was varied about six months later to allow him to be out of the home with a person approved by his surety. Second, he was prohibited from having contact with his partner, Ms. Beam, with whom he has children. Ten months later this was varied to allow such contact for the purpose of child care, if he was in the presence of his surety. Another 18 months later, the non-contact term with Ms. Beam was deleted.

[14] The PSR prepared in this matter discloses the following facts: The defendant has two younger siblings and was raised by his mother and step-father. The latter divorced when the defendant was 13 years old. At the age of 16, he moved in with his grandparents. He began to get in trouble with the law at this time. He returned to his mother at the age of 19, when she remarried again. At the age of 30, the defendant met his biological father. The latter served a 10-year sentence for drug trafficking in California. For the past several years, the defendant has not had a good relationship with his siblings. During much of this time, he has been unemployed and financially supported by social assistance. The defendant began using marihuana in grade 8. Over time this progressed to the consumption of L.S.D., cocaine, and heroin. The latter has been his drug of choice for many years. He has been involved with the methadone program for 15 years. The defendant told the author of the PSR that the present offence was financially motivated, after his business failed, to fund his addiction after he had a relapse.

[15] I have reviewed two letters from the defendant, one from Ms. Heidi Mori, his step-grandmother, and a fourth from Ms. Jane McGuigan, a family friend. These were received in evidence, on consent. The defendant and Ms. Mori also testified at the sentence hearing.

The Defendant's Evidence

[16] The defendant provided a detailed statement, supported by trial testimony, about a tumultuous life marked by feelings of detachment and poor coping skills. As a child, he never felt comfortable with himself or his family. He testified that the relationship with his mother was not always close as "she had her own life". He added that there were "many arguments" in the home and that his mother married "four or five times". This dynamic affected the relationship with his siblings. The defendant "never fit in". This was

aggravated because, as a teenager, the defendant inadvertently caused his younger brother to suffer a serious head injury while the two of them set up a tent in the backyard. He said that after this he went to live with his grandparents and one night his intoxicated father came to that home, “pounding on the basement window to tell me he was not my father and he was happy I was not his child”. Soon after, he was sent to the Robert Land Academy, a military school.

[17] The defendant described the military school as “horrible”. A fellow student committed suicide. The defendant started using hard drugs, “to numb the pain”, and he soon ran away. Within one year, at the age of 17, he told his mother he had begun to use heroin. He testified that she did not seem to care; in any event, assistance was not offered to him. At the age of 19, the defendant fathered a child. At this time, he committed a break and enter into the home of his mother’s newest husband. He said he did so at the instigation of her previous vengeful husband. The defendant was sentenced to 90 days in jail.

[18] Upon his release from jail, the defendant and his partner managed to stay clean for a few years. The defendant worked as a cook at a Niagara Falls restaurant. His partner became pregnant with his second child. Later, the defendant became a welder and found a good job. However, one of his relatives told his employer about his previous heroin use. After this, the defendant’s hours of work were reduced and his employer scrutinized him carefully. The defendant quit and, by the summer of 2009, had relapsed with the result, this time, that he lost his house and access to his children.

[19] The defendant found a job as a superintendent at an apartment building. With the help of his employer, Tony and Susan Vendetti, he became “clean again for three years”. With the encouragement of the Vendetti’s he opened a landscaping company. The defendant enjoyed success in this business. However, it depended on having access to a pick-up truck. The defendant reports that his mother had this truck taken away from him because of a dispute with his brother. The defendant relapsed again and found a dealer in Toronto who was willing to provide him with heroin on credit. This is the dealer referred to in the testimony at the Gardiner Hearing. Around this time, a friend died from a fentanyl overdose. As such, the defendant was relieved by the Toronto dealer’s assurance that his product was heroin. Within one year, the defendant was arrested on the present charges.

[20] The defendant and his partner of 28 years will soon be married. The latter has returned to school. With the support of his step-grandmother, they are living in a home with their three children. This is the first time they have been together as a family. The defendant is also grateful that his step-grandmother paid for the cost of a residential treatment program. The defendant has never had such counselling. He successfully completed the program in September 2020. This is to be followed by weekly meetings with a psychotherapist. He plans to return to school to study horticulture [the family business] or work in landscaping again.

[21] The defendant’s hopes for the future will, of course, come to nothing if he returns to his old ways. In this regard, he stated;

> I want to work hard to succeed and feel better about me. I want to succeed to never use drugs again. I still need help and think I will not be afraid to ask for assistance. I know how hard addiction is to beat but me and Tasha are determined to succeed.

Heidi Mori's Evidence

[22] Ms. Heidi Mori married the defendant's grandfather in 2000. Like him, she has a horticulture business. At this time, the defendant was 20 years old and part of a large extended family. Ms. Mori was soon warned by certain members of the family that the defendant is a drug addict and not to be trusted. She came to realize that the defendant was seen as a lost cause and the support he obviously needed was not being provided. Indeed, she was told that her (initial) effort to assist him was a waste of time. Notwithstanding this, Ms. Mori and her husband have helped the defendant reunite with his children. As already noted, Ms. Mori also recently funded his residential treatment program and purchased a home that is rented to the defendant, spouse, and children. It is her hope that the defendant and his partner will "re-establish their lives and family".

[23] Ms. Mori has seen a great change in the defendant. She reports that "Paul and Tasha are actively looking for work and tending to medical and counselling issues that were on the back burner….". This change is confirmed by Ms. McGuigan, a woman who has known the defendant since he was a child.

SUBMISSIONS

[24] The Crown submits that the appropriate sentence is one of four to five years in jail. I need not dwell on the caselaw offered in support of this position; the Court of Appeal for Ontario has long established that those who deal in heroin, even a first offender, can expect to go to the penitentiary, absent exceptional circumstances. The Crown acknowledges that the same court recently held that a conditional sentence order is available for this offence but argues that it remains the case that it should only be granted in rare circumstances. These do not exist here.

[25] The Defence seeks a conditional sentence. Counsel points out that the defendant is now 40 and has been addict for most of his life. This is due to personal circumstances that diminish his moral responsibility. For the first time, there is a viable plan, with appropriate support, to leave his past behind and move forward in a different direction. The Defence submits that a jail sentence will undermine the genuine prospect of rehabilitation.

ANALYSIS

[26] Section 5 of the *Controlled Drugs and Substances Act* provides for up to life in prison for this offence. In imposing sentence, I am guided by Part XXIII of the Criminal Code. The following provisions are particularly important:

> 718 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.

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

[27] Proportionality means that the severity of a sentence will depend on the seriousness of the offence as well as the moral blameworthiness of the offender; see *R v Lacasse* 2015 SCC 64 (CanLII). Personal circumstances are relevant in determining proportionality in light of the seriousness of the offence, but they do not alter the seriousness of the offence: see *R v Schofield* [2019] B.C.J. No. 22 (BCCA). The seriousness of the offence in the present case is defined by the fact that the defendant possessed a mixture of heroin and fentanyl. However, his moral blameworthiness reflects my finding that he did not know about the fentanyl.

[28] In 2012 Parliament amended the *Code* by virtue of the *Safe Streets and Communities Act*, with the effect that a conditional sentence would no longer be available for anyone convicted of an offence that carries a maximum sentence of 10 years or more. In *R v Sharma* 2020 ONCA 478, an aboriginal offender challenged this restriction on the availability of conditional sentences on the basis that it violates sections 7 and 15 of the *Charter of Rights and Freedoms*. In a split decision, a majority of the Court agreed. Although the case was argued with respect to aboriginal sentencing issues, the Crown did not ask the Court to limit its judgment to such offenders and the Court did not do so. I understand the Crown will seek to appeal *Sharma* to the Supreme Court of Canada but currently it is the law in Ontario. Accordingly, a conditional sentence is now available to Mr. Mori and I must consider that option.

[29] Drug addiction, especially to “hard drugs” is a pressing social problem. It causes misery to the addict, suffering by those who love the addict, much secondary crime, and significant social costs to deter and rehabilitate the addicts. This is why penalties have been severe for those who traffic in drugs, even addict traffickers. Where the drug is heroin, this almost always means a penitentiary sentence. However, in the present case, I am persuaded that a reformatory sentence is appropriate.

[30] In coming to this conclusion, I consider the defendant's guilty plea, as an expression of remorse, and several unique factors. The defendant has been on bail for more than three years with significant and gradually reduced restrictions, including house arrest and an inability to see his partner and children. His unsupported efforts in the past failed to overcome his addiction. He has now completed a residential treatment program for substance abuse with outpatient counselling going forward. For the first time in his life, he has his family with him and a home to share with them. The defendant has realistic and achievable plans for study and/or work. His hopes for a better life rest on the firm foundation provided by his step-grandmother. His risk of re-offending is much reduced. In these unique circumstances, I would have imposed a sentence of two years less one day.

[31] Having decided that a penitentiary sentence is not required in this case, *Sharma* means I can consider whether the period of incarceration can be served in the community under terms of house arrest. Section 742.1 of the *Code* lists four criteria that a court must consider before deciding to impose a conditional sentence: (1) the offender must be convicted of an offence that is not punishable by a minimum term of imprisonment; (2) the court must impose a term of imprisonment of less than two years; (3) the safety of the community would not be endangered by the offender serving the sentence in the community; and (4) a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2.

[32] The first two criteria are met in this case. As I have noted, the defendant has been provided with the structure and resources to move forward to a healthy and productive life. These personal circumstances mean community safety should not be endangered by the imposition of a conditional sentence. The difficult question is whether such a disposition meets the fourth criterion set out in the legislation.

[33] Denunciation and deterrence can be reflected through a conditional sentence, even in the most serious offences. The Court of Appeal for Ontario made this clear in *R. v. Kutsukake* [2006] O.J. 3771, a case involving criminal negligence causing death. The Court of Appeal considered the leading case of *R. v. Proulx* 140 C.C.C. (3d) 449 (SCC) and stated as follows:

> The Supreme Court of Canada held, at para. 114, that even in the presence of aggravating factors which might indicate the need for denunciation and deterrence, "a conditional sentence may provide sufficient denunciation and deterrence, even in cases in which restorative objectives are of diminished importance." Writing for the court, Lamer C.J.C. added at para. 100: A conditional sentence can achieve both punitive and restorative objectives. To the extent that both punitive and restorative objectives can be achieved in a given case, a conditional sentence is likely a better sanction than incarceration. Where the need for punishment is particularly pressing, and there is little opportunity to achieve any restorative objectives, incarceration will likely be the more attractive sanction. However, even where restorative objectives cannot be readily satisfied, a conditional sentence will be preferable to incarceration in cases where a conditional sentence can achieve the objectives of denunciation and deterrence as effectively as incarceration. This

follows from the principle of restraint in s. 718.2(d) and (e), which militates in favour of alternatives to incarceration where appropriate in the circumstances.

[34] House arrest, with appropriate exceptions, is not jail. It is, however, a significant restriction on liberty. Moreover, unlike jail, there is no remission. The house arrest in this case will be for the maximum term allowable, without reduction. It is also worth mentioning, as a general matter, that I rarely impose a conditional sentence without the electronic supervision program. The defendant has been approved for that program. That means he cannot cheat. If he violates the house arrest term, the authorities will know. As such, the sentence is meaningful and effective. In this unusual case, I am of the opinion that the maximum allowable conditional sentence serves to properly denounce and deter. Importantly, this will enhance, rather than undermine the substantial prospect of rehabilitation.

[35] Paul Mori stands at the cross-roads. His life has been one of addiction and unhappiness, interspersed with periods of hope and success. Now, he can look forward to a life of joy and productivity. This journey is possible because the efforts of his step-grandmother significantly reinforces his commitment to remain drug free. In this regard, I note that so many other addict traffickers appear before me without such stability and support. Protection of the public means it is difficult to extend to them the more lenient sentence given to the defendant. He should know he is not likely to get this chance again.

RESULT

[36] The defendant will serve a conditional sentence for a period of two years, less one day, in accordance with the electronic supervision program and subject to these terms:

1) Report to a supervisor of conditional sentence orders within two days, and thereafter, as required;

2) Attend and actively participate in all assessments, counselling, and rehabilitative programs as directed by the supervisor, including substance abuse;

3) Agree to the release of any medical or other information necessary to monitor compliance with this order;

4) Remain in his home, including the front and back yard, except as follows;

   i) Medical emergencies;

   ii) To go directly, to and from, and be at, religious observance, employment, and education;

   iii) To go directly, to and from, and be at, medical, dental, or legal appointments, and at assessment, counselling, or rehabilitative programs for himself or his children;

   iv) For personal shopping for a four-hour period per week;

v) Except for medical emergencies, he must provide the dates and times for the forgoing exceptions to the supervisor, in advance of such activities.

vi) For any other purpose that may be approved of by the supervisor.

vii) Carry his conditional sentence order on his person whenever he is outside the home.

[37] Following the conditional sentence, the defendant will be on probation for three years

1) Report to a probation officer as required;

2) Attend and actively participate in all assessments, counselling, and rehabilitative programs as directed by the probation officer, including substance abuse;

3) Agree to the release of any medical or other information necessary to monitor compliance with this order;

[38] I also impose the following ancillary orders; the defendant will provide a sample of his DNA and will be subject to a section 109 order for ten years. He will pay a victim fine surcharge in the amount of $200, within six months, or serve two days in jail in default.

FINAL NOTE

[39] I agree with the Crown that the door opened by *Sharma* must be restricted to the exceptional case. Otherwise, *Sharma* would overrule decades of established law in Ontario about the penalties for trafficking in hard drugs. I do not read *Sharma* to say that – and one would expect express language if that was the intent. Moreover, it is not for me to open that door more widely; such further direction must come from the Court of Appeal.

[40] My conclusion that this is an exceptional case is grounded in evidence. The promising prospect for rehabilitation is not based on a wish or a prayer. It does not come to me by the untested statements of the defendant presented through the submissions of his lawyer. The structure and resources available to the defendant and the future plan was detailed in written statements filed on consent. Moreover, the two main authors of those statements also testified and offered themselves for cross-examination. I consider the last point to be important. Unless a fact is abundantly plain or agreed by the parties, exceptional circumstances should require proof by evidence.

Released: December 30, 2020

Signed: Justice J. De Filippis