

ONTARIO COURT OF JUSTICE

CITATION: *R. v. Yzerman*, 2020 ONCJ 224

DATE: 2020 04 30

COURT FILE No.: Niagara Region 998 19 SR4428

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

Hunter Yzerman

Before Justice J. De Filippis

Heard on April 27, 2020

Reasons for Sentence released on April 30, 2020

Mr. D. Anger **counsel for the Crown**

Mr. V.J. Singh **counsel for the defendant**

De Filippis, J.:

[1] The defendant was found guilty, after trial, of four offences: possession for the purpose of trafficking in fentanyl and cocaine, possession of the proceeds of crime, and failure to comply with a probation order. The defendant's background, as summarized below, is taken from a pre-sentence report and medical evidence.

[2] As I noted in my reasons for the verdict, the following facts are not controversial: The police received information from two confidential sources that the defendant was selling fentanyl and cocaine from a rooming house at 37 Niagara Street in St. Catharines. These informants also reported that the defendant carries his drugs in a backpack. The defendant is known to the police as being involved in the drug subculture. The building at 37 Niagara Street is notorious as a drug house in which the authorities regularly respond to calls about drug overdoses. On the day in question, the police followed the defendant as he walked to this address from an apartment building almost four kilometres away. He had a backpack with him. Before arrival at the house, and while in a parking lot common to another residence (43 Niagara Street), the police moved in. He was arrested and found in possession of these items in his backpack; 9.3 g carfentanyl, 31.2 g cocaine, a syringe with a mixture of cocaine and fentanyl ready for use, a digital scale, cell phone, and \$2,948. The defendant was on probation at the time, with terms that included the statutory one to keep the peace and be of good behaviour.

[3] The Defence claimed the police violated his rights pursuant to sections 8 and 9 of the *Charter of Rights and Freedoms*. Moreover, the defendant testified that the drugs in his possession was for personal use. I dismissed the *Charter* motions and rejected the defendant's explanation for the items found in his possession.

[4] The defendant has been in custody since his arrest on May 3, 2019. While so detained, he was taken to hospital because of a drug overdose. He was found in possession of 9 grams of fentanyl (in his rectum) and charged accordingly. On the day of sentencing, I found him guilty of this offence as well.

[5] The defendant is 33 years old. He was adopted at the age of two, through the Children's Aid Society. His biological mother was a drug addict. His biological father was a "biker". His adoptive parents provided the defendant with a loving upbringing. However, he was a difficult child. He was diagnosed with ADD and ADHD. He began drinking alcohol at the age of 10 and, soon after, started using illicit drugs. The defendant did not finish high school and employment has always been sporadic. He has been addicted to opioids for many years and is on the methadone program.

[6] It will come as no surprise to anyone who has read the preceding paragraph that the defendant has a criminal record. Over the past 20 years he has racked up 51 convictions. Most are for failure to comply with court orders. There are also crimes of violence and property offences. Yet, he has never served a sentence longer than one year.

[7] The defendant suffers from HIV, hepatitis C, and asthma. The original date for sentencing was adjourned until June, 2020 as a result of Court guidelines issued in response to the current pandemic. Defence counsel brought a motion for bail pending sentence but abandoned it as he could not present an adequate release plan. Instead, he proposed, and I agreed, that the sentence hearing be brought forward. It was held by teleconference. I sat, with the clerk and court reporter, in an empty courtroom and the lawyers and defendant participated by telephone.

[8] The Crown argues for a sentence of 6 years; that is, 5.5 years for the offences of possession for the purpose of trafficking in cocaine and fentanyl and six months consecutive for the crime of possession of fentanyl (while in jail). The Defence seeks a total sentence of 3.5 years. It is understood that the pre-sentence custody, at 18 months, after the appropriate credit, is to be deducted from these figures.

[9] In this case, the defendant testified that he was mixing cocaine and fentanyl for his personal use. I rejected the latter point, but I accept that he was mixing the drugs – this is consistent with what was found in the backpack – some of it was mixed and ready to be used. This is really a case of possession for the purpose of trafficking in the mixture. In this regard, I must sentence him for the most dangerous of the drugs – and that, clearly, is the fentanyl.

[10] In *R v Loor*, 2017 ONCA 696, it was held that:

[50] Few fentanyl trafficking cases have reached this court. It is thus perhaps too early in our jurisprudence to establish a range. But I think it fair to say that generally,

offenders – even first offenders – who traffic significant amounts of fentanyl should expect to receive significant penitentiary sentences.

[11] What is the impact of COVID-19 on sentence? In answering that question, I am persuaded by these comments in *R. v. Hearn*, 2020 ONSC 2365;

[15] Clearly, the pandemic does not do away with the well-established statutory and common law principles. However, the pandemic may impact on the application of those principles. It may soften the requirement of parity with precedent. The current circumstances are without precedent. Until recently, courts were not concerned with the potential spread of a deadly pathogen in custodial institutions.

[16] COVID-19 also affects our conception of the fitness of sentence. Fitness is similar to proportionality, but not co-extensive with it. Proportionality dictates that the sentence should be no more than is necessary to reflect the gravity of the crime and the moral blameworthiness of the offender. Fitness looks at a broader host of factors. A sentence may be fit even if it is not perfectly proportionate. Fitness looks, not only at the length of a sentence, but the conditions under which it is served. As a result of the current health crisis, jails have become harsher environments, either because of the risk of infection or, because of restrictive lock down conditions aimed at preventing infection. Punishment is increased, not only by the physical risk of contracting the virus, but by the psychological effects of being in a high-risk environment with little ability to control exposure.

[17] Consideration of these circumstances might justify a departure from the usual range of sentence, such as that contemplated in *R. v. Lacasse*, 2015 SCC 64 at para 58.....

[21] I offer two caveats to this analysis.

[22] First, I am not suggesting that the offender receive more than the statutory credit for pre-sentence custody. The accused is entitled to credit on a 1.5 to 1 basis and that is what he will receive. I am not at liberty to assign credit beyond that prescribed in the Code. The question is not whether, looking backwards, the offender is entitled to more credit. The question is whether, looking forward, the pandemic warrants reduction of the sentence *yet to be served*. The question is whether the sentence already served, calculated with 1.5 to 1 credit, is a sufficient penalty. Given the pandemic, it may be that a sentence of shorter duration is not only tolerable, but appropriate, in the interests of personal and public safety.

[23] Second, I am not suggesting that the pandemic has generated a “get out of jail free” card. The consequences of a penalty – be they direct or collateral – cannot justify a sentence that is disproportionately lenient, or drastically outside of the sentencing range. It cannot turn an inappropriate sentence into an

appropriate one or justify dispositions that would place the public at risk.... It is ultimately a question of balance....

[24] That balance is best informed by our collective approach to these issues. During these challenging times, people are being asked to call upon their sense of community, decency and humanity. That humanity must obviously extend to all individuals, including those incarcerated due to criminal charges or convictions. There will be cases where release from custody is not a viable option. There must be consideration of the safety of the community and the need for a proportionate sentence. Where, however, a period of time served can address sentencing principles, *even imperfectly*, our sense of humanity tells us that release from prison is a fit and appropriate response.

[12] I accept that COVID-19 presents a greater risk to the defendant because he has HIV; see *R. v. Cahill*, 2020 ONSC 2171. His ability to recover is adversely affected by his medical condition. Even if he is not infected, this potential risk causes him great concern. I accept the sincerity of his comments on this point.

[13] It may be that, without the pandemic – and its specific impact on this offender – the sentence urged upon me by the Crown position is closer to the mark than that pressed by the Defence. However, I hasten to add, that although the Court of Appeal for Ontario, in *Loor*, made it clear that harsh penalties await those who traffic in fentanyl, the court also said that it had not yet had the opportunity to consider a range. Absent this guidance, and given the impact of the pandemic on his personal circumstances, I accept the Defence argument. The fact is that the heightened anxiety caused by defendant's medical condition means his incarceration will be harder to endure. It is right that I take that into account. It is, as noted in *Hearns*, a question of balance.

[14] I impose the following sentence:

- For the two offences of possession for the purpose of trafficking in fentanyl and cocaine; 3 years in custody, less the 18 months in pre-sentence custody, to be served concurrently;
- For the offences of possession of the proceeds of crime and breach of probation, 3 months in custody, both concurrent to one another and to the preceding sentence;
- For the offence of possession fentanyl (while in jail), 6 months in custody, consecutive to the preceding sentences.

[15] The total sentence, therefore, is 2 years in custody, in addition to the 18 months pre-sentence custody. This will be followed by a period of probation for two years. In addition to the statutory terms, the defendant will report to a probation officer within two days of his release, and thereafter as required, reside where directed and take counselling as directed, in particular for substance abuse. The defendant is bound by an order, pursuant to section 109 of the *Criminal Code*, for life. The drugs and drug paraphernalia seized from him are ordered forfeited.

Released: April 30, 2020

Signed: Justice J. De Filippis