

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v.* [REDACTED]
2019 BCCA 461

Date: 20191204
Docket: CA45973

Between:

Regina

Respondent

And

[REDACTED]

Appellant

Before: The Honourable Madam Justice Dickson
The Honourable Madam Justice Griffin
The Honourable Mr. Justice Abrioux

On appeal from: Orders of the Supreme Court of British Columbia, dated
December 14, 2018 (conviction) and February 25, 2019 (sentence)
(*R. v.* [REDACTED] 2018 BCSC 2391 (conviction) and 2019 BCSC 381
(sentence), Victoria Docket 169433-2).

Oral Reasons for Judgment

Counsel for the Appellant: R.L. Neary

Counsel for the Respondent: R. Leong

Place and Date of Hearing: Victoria, British Columbia
December 4, 2019

Place and Date of Judgment: Victoria, British Columbia
December 4, 2019

Summary:

The appellant, with the Crown's consent, appeals his conviction and sentence for possession of fentanyl for the purpose of trafficking. At trial, the Crown conceded that the fentanyl possessed by the appellant on his person was not for the purpose of trafficking. Both parties submit that the trial judge's disregard of this concession, without notice to the parties, caused unfairness to the appellant and is a reversible error. Held: Appeal allowed, in part. The conviction appeal is dismissed, but with a substituted verdict of guilt for the lesser and included offence of simple possession of fentanyl. The sentence appeal is allowed to the extent that the two-year prison sentence imposed by the trial judge is substituted with a 90-day prison sentence for the lesser offence of simple possession, with credit for time served.

ABRIOUX J.A.:**Overview**

[1] This unusual appeal is brought with the consent of the Crown and the appellant, [REDACTED] with respect to both the appellant's conviction on one count of the indictment in question, his sentence in relation to that count and credit for time spent in custody while awaiting trial and sentencing.

[2] The appellant was charged with seven offences in connection with a vehicle stop and the subsequent search of:

- (1) his person,
- (2) the vehicle in which he was a passenger, and
- (3) a hotel room that was occupied by him at the material time.

[3] Following a four-day trial, the appellant was convicted of two drug offences: possession of fentanyl for the purpose of trafficking and possession of GHB. He was also convicted of two firearms offences: possession of a restricted firearm and occupying a vehicle knowing there was a restricted firearm in the vehicle. He was then sentenced to a global prison term of five years, which included two years for possession of fentanyl for the purposes of trafficking, before credit was applied for time spent in custody awaiting trial and sentencing.

[4] In his amended notice of appeal and application for leave to appeal sentence, the appellant asks the Court, in relation to Count 2, to substitute a conviction of the lesser and included offence of possession of fentanyl in place of the conviction for possession of fentanyl for the purpose of trafficking. He also seeks the substitution of a 90-day sentence of imprisonment for possession of fentanyl in place of the two-year prison sentence that was imposed for possession of fentanyl for the purpose of trafficking.

[5] The parties to the appeal agree that in the course of final submissions at trial, the Crown conceded that the fentanyl possessed by the appellant was not for the purpose of trafficking. In reasons for judgment indexed as 2018 BCSC 2391 (the “trial reasons”) the trial judge disregarded this concession. According to the parties, he did so without giving any notice or indication to them that he had concerns that the fentanyl possessed by the appellant was not simply for his personal consumption.

[6] The parties’ position in this Court is that the rejection of the Crown’s concession, and the lack of notice to them, caused unfairness to the appellant in that he had no opportunity to address the trial judge’s concerns. The Crown, in the circumstances of this appeal, concedes that unfairness resulted and is a reversible error. Its position is that the lesser and included offence of possession of fentanyl should be substituted for possession of fentanyl for the purpose of trafficking. The Crown also concedes that the prison sentence sought by the appellant on appeal is a fit sentence in light of the conviction on the lesser charge.

Background

[7] On October 25, 2016, the vehicle in which the appellant was a passenger was stopped and approached by a police officer in the parking lot of the Howard Johnson Hotel in Victoria. The appellant was seated in the backseat of the vehicle behind the driver. The police officer was investigating whether a person whom he suspected was suspended from driving was operating the vehicle. The vehicle was owned by

the appellant's co-accused, [REDACTED] [REDACTED] Mr. [REDACTED] driver's licence was suspended.

[8] Mr. [REDACTED] was not driving the vehicle. He was found in the front passenger seat. A third person, Jeremiah Hackland, was found in the driver's seat.

[9] As the police officer approached the stopped vehicle, the appellant opened the left rear passenger door and was stepping out. The officer saw a shiny object in the side pocket of the door next to the appellant. The police officer believed the shiny object to be a gun. Additional police officers were dispatched to the scene.

[10] All of the occupants of the vehicle were arrested and searched. In relation to the appellant, cash in the sum of \$2,510 was found on his person. Also found on his person was 0.4 grams of fentanyl contained in a plastic bag.

[11] The vehicle was searched after the arrest of the occupants. The following drugs were found in the vehicle: (i) cocaine in a backpack found on the backseat; (ii) fentanyl found in the backpack and in a MEC sunglass case near the front seat area; and (iii) a mixture of heroin/fentanyl/MDMA found in the backpack. In addition to the drugs, a loaded semi-automatic handgun was found in the pocket of the left rear door of the vehicle.

[12] Following the arrests and searches at the scene, a search warrant was obtained to search a hotel room believed to be occupied by the appellant. In the course of the search of the hotel room, a small quantity of GHB, along with a scale and a large sum of cash, were found.

The Charges on the Indictment

[13] The appellant was charged with the following seven counts:

- (1) Count 1: Unlawful possession of cocaine for the purpose of trafficking, contrary to subsection 5(2) of the *Controlled Drugs and Substances Act*.

- (2) Count 2: Unlawful possession of fentanyl for the purpose of trafficking, contrary to subsection 5(2) of the *Controlled Drugs and Substances Act*.
- (3) Count 3: Unlawful possession of GHB for the purpose of trafficking, contrary to subsection 5(2) of the *Controlled Drugs and Substances Act*.
- (4) Count 4: Unlawful possession of heroin, fentanyl and MDMA for the purpose of trafficking, contrary to subsection 5(2) of the *Controlled Drugs and Substances Act*.
- (5) Count 5: Occupying a vehicle knowing there was a prohibited firearm in the vehicle, contrary to subsection 94(1) of the *Criminal Code*.
- (6) Count 6: Possession of a loaded prohibited firearm, contrary to subsection 95(1) of the *Criminal Code*.
- (7) Count 7: Possession of property of a value exceeding \$5,000 knowing that the property was obtained by the commission in Canada of an offence punishable by indictment, contrary to subsection 355(b) of the *Criminal Code*.

[14] Mr. [REDACTED] and Mr. Hackland were also charged with the offences set out in Counts 1, 2 and 4 of the Indictment, as well as the two firearms counts, Counts 5 and 6. The appellant was charged alone with Count 3 of the Indictment, possession of GHB for the purpose of trafficking. All three individuals were charged with possession of the stolen property found in the vehicle, Count 7.

[15] The Crown stayed all charges against Mr. Hackland. On December 4, 2018, Mr. [REDACTED] entered a guilty plea to possession of cocaine, fentanyl, and heroin/fentanyl/MDMA for the purpose of trafficking, as set out in Counts 1, 2, 5 and 6 of the Indictment. Following his guilty plea, the Crown stayed the counts for

occupying a vehicle knowing there was a firearm in the vehicle (Count 5) and possession of stolen property (Count 7) against Mr. [REDACTED]

The Trial and Final Submissions of Counsel

[16] The appellant proceeded to trial alone. At the outset of trial, the Crown stayed the count for possession of stolen property (Count 7). In respect of Count 3, the count relating to the GHB found in the hotel room, the Crown amended the charge and proceeded only with simple possession and not possession for the purpose of trafficking.

[17] Mr. [REDACTED] testified at trial as the sole witness for the defence.

Mr. [REDACTED] testified that the drugs found in the backpack and “MEC” sunglass case, and the gun found in the vehicle, were his. There was no serious dispute that the appellant was in possession of the 0.4 grams of fentanyl found on his person.

[18] The appellant proceeded first with final submissions. At the outset of his submissions, the trial judge inquired as to the appellant’s position concerning the drugs found on his person. The following sets out the commencement of the appellant’s final submissions, along with the early exchange between his counsel and the trial judge:

MR. HICKFORD: This case, My Lord, is a case of circumstantial evidence with respect to the allegations set out in the indictment. And of course where there is a situation that exists here, and it’s based on circumstantial evidence, there is the long hallowed principle that the evidence must cause you to conclude that the only reasonable inference would be that Mr. [REDACTED] is guilty of the offences as set out in the indictment, and I say at the outset that there is an abundance of evidence that has been led in the course of these proceedings to establish a very strong reasonable doubt. In my submission, this case cries out for a finding of not guilty with respect to all of the counts contained in the indictment.

There are three sort of areas, if I can call them that, with respect to items that are subject of the notion of who was in possession of them.

Those are -- one, of course, is the firearm, the pistol that’s in the door. The second is all of the drugs that were contained in Mr. [REDACTED] vehicle, and the third is -- I think there was - is the GHB. There was a bottle of GHB that was found in room number 351 of the Howard Johnson Hotel.

THE COURT: Wasn't there drugs found on your client's person?

MR. HICKFORD: Well, yes, there was .4 grams found on his person, which I suppose would be -- he's not charged with simple possession. But I suppose it could be extruded as a lesser included offence.

THE COURT: Yeah, I think so. Yeah.

[Emphasis added.]

[19] The parties say that from this exchange, it appeared that the appellant's counsel was proceeding on the basis that there was no issue that the 0.4 grams of fentanyl found on the appellant's person was the subject matter of simple possession, and not possession for the purpose of trafficking. It also appeared that the trial judge confirmed this to be the case when he responded by saying: "Yeah, I think so. Yeah."

[20] Again, according to the parties, the basis for how matters were to proceed was further confirmed by the Crown in a concession it made in the course of its final submissions. When questioned by the trial judge as to the Crown's position concerning the drugs found on the appellant's person, the Crown conceded that the 0.4 grams of fentanyl was not possessed for the purpose of trafficking, and only a conviction for simple possession should be entered. The following exchange took place between the trial judge and the Crown:

THE COURT: Just on the joint possession of drugs, do you say that would apply to the drugs found on his possession?

MR. CORSI: The -- the half a gram or point --

THE COURT: Yeah. I think --

MR. CORSI: -- four gram of fentanyl?

THE COURT: Yeah. Aren't there two categories of drugs? One's -- well, three. Drugs found on his person, drugs found in that vehicle, and then drugs found in the hotel room.

MR. CORSI: Yes. I would not be suggesting that the drugs found on his person, the half a gram, or point four gram of fentanyl, would be possessed for the purpose of trafficking.

THE COURT: But it is possession.

MR. CORSI: Just in possession.

THE COURT: Yeah.

MR. CORSI: Similarly, and I should have mentioned this earlier, there is a count on the indictment, My Lord, possession for the purpose of trafficking the GHB.

THE COURT: Yeah.

MR. CORSI: That was in the suite. In suite --

THE COURT: Yeah.

MR. CORSI: -- 351. I'm not proceeding on that count as a possession for the purpose of trafficking pursuant to s. 5(2).

THE COURT: Hang on. That's count what?

MR. CORSI: That is -- should be count 3, My Lord, on the indictment. Yes, count 3.

THE COURT: The GHB?

MR. CORSI: That's right.

THE COURT: So you're -- you're proceeding as a -- or a lesser offence of possession?

MR. CORSI: That's right.

THE COURT: Okay.

[Emphasis added.]

[21] During the parties' final submissions, the trial judge did not indicate to either counsel that he considered the 0.4 grams of fentanyl found on the appellant's person to be possessed for the purpose of trafficking. Counsel for the appellant did not make any detailed submissions, nor did he review the evidence, concerning the 0.4 grams of fentanyl found on the appellant's person. Nor did counsel for the appellant argue against a finding that the 0.4 grams of fentanyl was possessed for the purpose of trafficking.

The Trial Judge's Findings and Judgment

[22] Following final submissions by counsel, the trial judge reserved judgment, with the trial reasons delivered on December 14, 2018.

[23] Concerning the drugs found in the backpack located on the rear seat of the vehicle, the trial judge found that there was no evidence that the appellant had knowledge of these drugs or that he had control of them. The trial judge made a similar finding with respect to the fentanyl concealed in the MEC sunglass case. In light of these findings, the trial judge acquitted the appellant of possession of cocaine for the purpose of trafficking (Count 1) and possession of heroin/fentanyl/MDMA for the purpose of trafficking (Count 4).

[24] As to the GHB found in the hotel room, the trial judge concluded that the evidence established that the appellant was, at least, a resident of the hotel room. Accordingly, the judge concluded that the GHB was possessed by the appellant

either for his use or for the use of another person. The appellant was convicted of simple possession of GHB (Count 3).

[25] In terms of Count 2 and the 0.4 grams of fentanyl found on the appellant's person, at paras. 43–47 of the trial reasons, the trial judge found that the fentanyl was possessed for the purpose of trafficking:

[43] I next turn to the drugs found on Mr. [REDACTED] person. There was 0.4 grams of fentanyl in a baggie. Possession cannot be seriously disputed about this substance. Also found on Mr. [REDACTED] was \$2,510 in cash and some rubber bands. As noted in *Fisher*, unexplained cash is particularly cogent.

[44] It is true that the amount of fentanyl found on Mr. [REDACTED] was small. The expert evidence is that it would be about two days' personal use and users would generally carry drugs for one day's use. In any event, I consider the \$2,510 to be telling. As the expert explained, quantity of drugs is not always indicative of trafficking. A dealer can be supply heavy and cash low at the beginning of a day, and supply low and cash heavy at the end of a day of dealing.

[45] In my view, those facts leave little doubt that Mr. [REDACTED] was trafficking in fentanyl.

[46] There is also the evidence from the hotel room, Room 351. It is submitted that there is no connection between what was found in that room and Mr. [REDACTED] I disagree. He had a note with the same hotel brand on his person, albeit without a guest room or room number. It is true there is no evidence of who the registered guest was of Room 351, but in the room were found a number of personal documents of Mr. [REDACTED] These included a business licence in his name and a number of prescription receipts, also in his name. I conclude that Mr. [REDACTED] at least resided in the room. He also told Constable LeQuesne that he was staying at the hotel and he was being dropped off in order to enter the hotel.

[47] In the room were scales commonly used for weighing drugs. The residue was not tested and \$6,430 cash was found hidden in a false coffee can. This evidence supports the conclusion that Mr. [REDACTED] was in the business of trafficking.

[26] The trial judge did not address the Crown's concession that the fentanyl found on the appellant's person was not possessed for the purpose of trafficking and that the appellant should be convicted of the lesser and included offence of simple possession.

[27] The trial judge also convicted the appellant of the two firearms offences (Counts 5 and 6). The strength of the DNA evidence found on the gun and

ammunition, and the trial judge's rejection of Mr. [REDACTED] evidence as "not believable" played prominently in the trial judge's conviction of the appellant of the two firearms charges.

The Sentence Imposed

[28] At sentencing, the Crown sought a five-year prison sentence for possession of fentanyl for the purpose of trafficking (Count 2) and a concurrent 30-day prison sentence for possession of GHB (Count 3). In relation to the two firearms offences, the Crown sought a four-year prison sentence for possession of a loaded prohibited firearm (Count 6) and a concurrent 18-month prison sentence for occupying a vehicle knowing there was a prohibited firearm in the vehicle (Count 5). The Crown took the position that the prison sentence for possession of a restricted firearm (Count 6) should run consecutive to the drug offence for possession of fentanyl for the purpose of trafficking (Count 2). The global prison sentence sought by the Crown was nine years.

[29] The appellant submitted that a six-month prison sentence for the two drug offences and a 30-month prison sentence for the two firearms offences was the appropriate sentence. The appellant sought a global sentence of three years in prison for all counts for which he was convicted.

[30] In his reasons for sentence, which are indexed as 2019 BCSC 381, the trial judge imposed the following terms of imprisonment:

- (1) two years for possession of fentanyl for the purpose of trafficking (Count 2);
- (2) 30 days for simple possession of GHB (Count 3), concurrent with Count 2,
- (3) three years for possession of the restricted firearm (Count 6), and
- (4) 18 months for occupying a vehicle knowing there was a restricted firearm in the vehicle (Count 5), concurrent with Count 6.

[31] The trial judge concluded that the sentence for possession of a restricted firearm (Count 6) should run consecutive to the drug offence for possession of fentanyl for the purpose of trafficking (Count 2). The resultant global sentence imposed by the trial judge on the appellant was five years in prison.

[32] The appellant was in custody for 214 days awaiting trial and sentencing. The trial judge gave the appellant credit for the time in custody at the rate of 1.5:1, resulting in a total credit of 321 days. Of the 321 days, the trial judge allocated 150 days credit to Count 2 (possession of fentanyl for the purpose of trafficking) and 171 days to Count 6 (possession of a restricted firearm).

Issues On Appeal

[33] The parties frame the issues as whether:

- (1) the verdict for possession of fentanyl for the purpose of trafficking should be set aside and a conviction entered for the lesser and included offence of simple possession of fentanyl on the basis that the judge failed to give the parties an opportunity to make further submissions after rejecting the Crown's concession that the drugs found on the appellant's person was not possessed for the purpose of trafficking; and
- (2) a sentence of 90 days' imprisonment for simple possession of fentanyl should be substituted for the two-year prison sentence imposed by the judge for possession of fentanyl for the purpose of trafficking.

Discussion

Trial and Procedural Fairness

[34] The position of the Crown and the appellant is that the issues raised in this appeal concern trial fairness. In the trial reasons, the judge disregarded the Crown's concession in relation to Count 2 that the drugs found on the appellant's person were not possessed for the purpose of trafficking, as it was only seeking a conviction for the lesser and included offence of simple possession. They submit that the judge

did so without notice to the parties. The result is that the appellant did not have the opportunity to make submissions about whether the 0.4 grams of fentanyl found on his person was possessed for personal use or for the purpose of trafficking.

[35] I am in substantial agreement with the parties' submissions, as set out in their factums.

[36] While I accept that it was open to the judge to reject the Crown's concession and reach his own conclusions concerning whether the fentanyl was possessed for the purpose of trafficking regardless of the position taken by the Crown, in my view, if he was not prepared to accept the Crown's concession, he was obliged to advise counsel of this and give the defence an opportunity to address the point. A failure to do so may amount to a reversible error: *R. v. Whincup*, 2011 BCCA 520 at paras. 9–11; *R. v. Huon*, 2010 BCCA 143 at para. 6; *R. v. Poole*, 2014 BCSC 102 at para. 10.

[37] To state the test in slightly different terms, trial fairness requires that a full and fair opportunity be given to both parties to address or make submissions on a point of fact or law that may be troubling the court: *R. v. Al-Fartossy*, 2007 ABCA 427 at para. 24; *R. v. Grewal*, 2018 ONSC 5325 at paras. 60, 68; *R. v. Fraillon* (1990), 62 C.C.C. (3d) 474 (Que. C.A.) at 476. This is especially the case where the court rejects a concession made by a party, and the opposing party does not address it believing that it is not in issue.

[38] In the circumstances of this case, had the trial judge indicated his intention to reject the Crown's concession, or that he was concerned by it, the appellant could have argued that the fentanyl was not possessed by him for the purpose of trafficking: see e.g., *R. v. Anderson*, 2005 BCCA 143 at paras. 11, 14. Based on the extracts of the proceedings to which I have referred, this did not occur and a crucial finding was made without the defence having an opportunity to address the issue.

The Power to Dismiss Appeal, Substitute Verdict and Impose Sentence

[39] The parties do not seek a new trial. Rather they ask the Court to conclude that a reversible error of law occurred and substitute a verdict of simple possession of fentanyl for possession of fentanyl for the purpose of trafficking.

[40] The legal basis for this submission is found in the application of subsections 686(1)(b)(i) and (3) of the *Criminal Code*, R.S.C. 1985, c. C-46 [Code] which provide:

686 (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

...

(b) may dismiss the appeal where

(i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted on another count or part of the indictment,

...

(3) Where a court of appeal dismisses an appeal under subparagraph (1)(b)(i), it may substitute the verdict that in its opinion should have been found and

(a) affirm the sentence passed by the trial court; or

(b) impose a sentence that is warranted in law or remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law.

See *R. v. Biniaris*, 2000 SCC 15 at para. 16; *R. v. Reeves*, 2017 BCCA 97 at para. 23.

[41] In my view, for the reasons I have indicated, the remedy sought by the parties is appropriate in this case being in accordance with the interests of justice, and in particular, trial fairness.

A Fit Sentence for Possession of Fentanyl

[42] The parties jointly submit that, pursuant to s. 686(3)(b) of the *Code*, this court should impose a fit sentence for the appellant's conviction on Count 2 for simple possession of fentanyl.

[43] The relevant antecedents include the following. The appellant was 27 years old at the time of sentencing. He was born in Victoria and was raised by his mother until age 12, when he was placed in a foster home. The appellant had a history of drug abuse and addiction and was not a first time offender. He also had an extensive and relevant adult criminal record dating back to 2005, which included convictions for assault, drug and firearms offences.

[44] Considering the circumstances of this case, and the appellant's personal circumstances, the appellant, with the Crown's agreement, submits that the fit sentence for simple possession of fentanyl is a prison term of 90 days.

[45] The Crown refers to *R. v. Lynn*, 2018 BCSC 2183, where the offender entered a guilty plea to possession of 0.2 grams of a mixture of carfentanil, heroin and fentanyl, along with other drug offences and a firearms offence. For the possession of carfentanil, heroin and fentanyl offence, she was sentenced to a prison term of 30 days.

[46] In my view, the joint submission for the substituted verdict on Count 2 is at the low end of the range that would constitute a fit sentence. In that regard, I note that Ms. Lynn pleaded guilty and had what was described by the trial judge as "a minor, unrelated criminal history": *Lynn* at para. 10. Her personal circumstances and history of drug dependency were also more compelling than those of the appellant.

[47] And yet, considering the totality principle and the revised global sentence that would result, being 3 years and 90 days' imprisonment before credit for pre-sentence time in custody, I am mindful of the principles that relate to joint submissions on sentence. In *R. v. Anthony-Cook*, 2016 SCC 43, the Court noted the important role joint submissions on sentence play in the criminal justice system. The

Court held that they should be accepted by the sentencing judge unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest: *Anthony-Cook* at para. 32.

[48] Accordingly, I would accept the joint submission of 90 days' imprisonment on the verdict of simple possession of fentanyl on Count 2.

Conclusion

[49] For the foregoing reasons I would:

- (1) dismiss the appeal against conviction on Count 2 and order that a verdict of guilt for simple possession of fentanyl be substituted for possession of fentanyl for the purpose of trafficking;
- (2) grant the appellant leave to appeal against sentence and allow the appeal to the extent of imposing a 90-day prison sentence for possession of fentanyl, in substitution for the two-year prison sentence imposed by the trial judge for possession of fentanyl for the purpose of trafficking; and
- (3) allocate the 321 days credit for time spent in custody awaiting trial and sentencing by attributing 90 days to Count 2 (possession of fentanyl) and 231 days to Count 6 (possession of a restricted firearm), with a resultant sentence of 864 days for Count 6.

[50] **DICKSON J.A.:** I agree.

[51] **GRIFFIN J.A.:** I agree.

"The Honourable Mr. Justice Abrioux"