IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Mr. Justice William J. Burnett
Madam Justice Lori T. Spivak

B E T W E E N :

HER MAJESTY THE QUEEN	)	***A. R. Hodge***
	)	*for the Appellant*
Respondent	)	
	)	***J. A. Hyman*** *and*
	)	***M. T. Sinclair***
- and -	)	*for the Respondent*
	)	*(via videoconference)*
	)	
COREY OMILAN SLOTTA	)	*Appeal heard:*
	)	***May 1, 2020***
(Accused) Appellant	)	
	)	*Judgment delivered:*
	)	***August 27, 2020***

COVID-19 NOTICE: As a result of the COVID-19 pandemic and pursuant to r 37.2 of the Manitoba*, Court of Appeal Rules*, Man Reg 555/88R, all appeals are heard remotely by videoconferencing until further notice.

CAMERON JA

[1] The accused seeks leave to appeal and appeals an effective sentence of eight years' incarceration imposed as a result of his guilty plea to one charge of importation of fentanyl (see section 6(1) of the *Controlled Drugs and Substances Act*, SC 1996, c 19).

[2] This is the second of two appeals involving the importation/possession of fentanyl for trafficking that were heard together. In

each case, the accused request a reduction in sentence, while the Crown asks that the Court set sentencing ranges of double to triple the amount established in *R v Rocha*, 2009 MBCA 26 at para 64, for mid-level trafficking of cocaine. Despite the fact that the Crown is requesting a new range of sentencing, it does not ask that the accused's sentence be increased in light of the fact that it requested a sentence of eight years' imprisonment at the time of sentencing (see *Hill v The Queen*, [1977] 1 SCR 827).

[3] In the companion case of *R v Petrowski*, (2020 MBCA 78), the Court declined to set sentencing ranges specific to the trafficking of fentanyl on the basis that it was premature to do so and there was a relative lack of expert evidence. Nonetheless, the Court did state that, based on the heightened danger and harm caused, both to the individual and to society, sentencings involving the trafficking or importation of fentanyl should be higher than those involving cocaine or heroin.

[4] For the reasons that follow, I would grant leave to appeal and dismiss the appeal.

Background

[5] On October 10, 2017, the Canada Border Services Agency intercepted a parcel from China containing 49 grams of fentanyl in powder form. The parcel was sent to a female with the initials of A.S. at an address in Winnipeg (the address). Arrangements were made for an undercover police officer, posing as a postal worker, to make a controlled delivery to the address. When the parcel was delivered, the accused signed for and accepted it. He lived at the address with his partner, his four-year-old child and his pre-teen nephew.

[6] Following the delivery, the police searched the house and seized the parcel containing the fentanyl. Also seized were cellphones, which were later examined. Due to the switching of subscriber identity module (SIM) cards between phones, a common practice of drug dealers according to the findings of the sentencing judge, much of the information could not be retrieved. However, the police were able to recover a number of messages which the sentencing judge found disclosed that, in March and April of 2017, the accused was both a user and trafficker of fentanyl.

[7] At the sentencing hearing, the Crown accepted that the accused was not the primary actor in the offence. It did not contest that his involvement consisted of knowingly allowing his residence to be used for the importation of fentanyl for his supplier in exchange for the provision of fentanyl from his supplier.

[8] On the other hand, the Crown noted that, on October 25th, while the accused was on judicial interim release for this offence, a second package, from the same address in China, with the same shipper and addressed to the same person at the address, was successfully delivered and signed for, undetected by the authorities.

[9] The Crown asked the Court to impose a sentence of eight years' imprisonment.

[10] Asserting that he had reduced moral culpability and significant prospects of rehabilitation, the accused asked that the sentencing judge impose a sentence of two years' incarceration, followed by three years' supervised probation.

Grounds of Appeal

[11] The accused raises five grounds of appeal. I have reorganised and summarised his arguments as alleging that the sentencing judge erred by: (i) making findings of fact regarding addiction absent evidence; (ii) finding that the accused's motivation to commit the offence was an aggravating factor when that motivation was not proven beyond a reasonable doubt; (iii) failing to consider mitigating factors; (iv) failing to consider the principles of rehabilitation and restraint; and (v) imposing an unfit sentence.

Standard of Review

[12] Absent an error in principle, a failure to consider a relevant factor or erroneous consideration of an aggravating or mitigating factor, the decisions of sentencing judges are reviewed on a deferential standard. Even where an error is identified, it must be one where it appears from the reasons that the error is material in that it had an impact on the sentence imposed (see *R v Lacasse*, 2015 SCC 64 at para 44; and *R v Friesen*, 2020 SCC 9 at para 26). Appellate intervention is only justified where a sentence imposed by a sentencing judge is demonstrably unfit (see *Lacasse* at para 51).

Ground (i): Did the Sentencing Judge Err in Making Findings of Fact Absent Evidence?

Ground (ii): Did the Sentencing Judge Err in Finding That the Accused's Motivation to Commit the Offence Was an Aggravating Factor When That Motivation Was Not Proven Beyond a Reasonable Doubt?

Ground (iii): Did the Sentencing Judge Fail to Consider Mitigating Factors?

[13] At the sentencing hearing, the accused submitted that it was a mitigating factor that, at the time of the offence, he was heavily addicted to

fentanyl and committed the offence to feed his addiction as opposed to being motivated by profit. Counsel for the accused described his client as "one of the vulnerable people that is preyed upon by the traffickers". Therefore, counsel submitted that the accused's situation was one of reduced moral blameworthiness.

[14] While the sentencing judge accepted that the accused was a drug addict, he challenged defence counsel regarding the degree of addiction that the accused claimed to have. He noted that the pre-sentence report indicated that, at the time, the accused was, among other things, maintaining a house, capable of maintaining employment and going through the complex process of trying to adopt his nephew. In his reasons, the sentencing judge commented that the person for whom the accused was accepting delivery of the fentanyl would not have trusted him with such a large quantity of highly valuable drugs if he was as addicted as he claimed.

[15] Regarding motivation, the sentencing judge held that, despite the fact that the accused did not receive money for participating in the importation, taking delivery of the drugs was easier than working for the money required to purchase them. He found that the accused was not addicted to the point that he could not find a legitimate avenue to obtain the money to buy the drugs. In support of his finding, the sentencing judge quoted the accused's statement in his pre-sentence report, wherein the accused said that he was "just the one that has a drug problem and that was the easiest way for [him] to get drugs." He also noted that the author of the pre-sentence report described the accused as deflecting blame to his drug addiction.

[16] In declining to accept that the accused was addicted to the extent that his counsel submitted, the sentencing judge referred to indicators that he

considered demonstrative of extreme addiction, which the accused did not exhibit. Counsel for the accused disputed some of those indicators.

[17] The accused contends that the sentencing judge erred in referring to the indicators of addiction on which he relied, as well as in his conclusion that, if the accused was as addicted as he claimed, the person who enlisted him to commit the crime would not have trusted him with the fentanyl. Relying on *R v Kunicki*, 2014 MBCA 22; and *R v Pahl*, 2016 BCCA 234, the accused states that the Crown did not dispute the evidence that he entered through the pre-sentence report and submissions of counsel regarding his addiction. He asserts that evidence was required to prove the generalised statements that the sentencing judge made about the behaviours of extreme addicts in reaching his conclusion that the accused was not as heavily addicted as he claimed. Finally, he asserts that, by assigning less weight to the accused's level of addiction, the sentencing judge failed to consider a mitigating factor.

[18] I disagree with the assertion that the Crown did not dispute the accused's level of addiction. During the Crown's sentencing submissions, the sentencing judge asked about the accused's assertion that he was only involved in the offence to feed his addiction. In response, the Crown reviewed the indicators of addiction in the pre-sentence report, as well as those factors that suggested that the accused was not as addicted as he claimed. The Crown submitted that the level of addiction was "open for debate" and that this was not an "overwhelming factor" that the sentencing judge had to take into account.

[19] The sentencing judge did not have to accept the accused's assertions regarding his degree of addiction and consequent lesser moral culpability. In *Kunicki*, this Court reinforced that the Crown had to prove that the accused

was a mid-level trafficker, an aggravating factor, beyond a reasonable doubt. However, the Court also stated (at para 25):

> I disagree with the Crown's position that, in the circumstances of this case, s. 724(3) of the *Code* operates to compel an accused person to produce evidence of such quality as would be admissible in a trial. To be clear, however, this does not mean that in every case the sentencing judge is compelled to accept an accused's explanation provided by way of submissions of counsel. See *R. v. Coss (T.A.)*, 2012 MBQB 272, 285 Man.R. (2d) 89. The determination as to whether to accept the hearsay evidence or not, and the weight to be placed on it, is one for the sentencing judge.
>
> [emphasis added]

[20] This is exactly what happened in the present case. The sentencing judge did not accept that the accused was as addicted as he claimed. The sentencing judge made his position clear during each of the submissions of the Crown and counsel for the accused. Thus, the accused was put on notice and could have presented evidence of such quality as would be admissible in a trial.

[21] While the sentencing judge may have considered the absence of signs of severe addiction that may or may not specifically apply to fentanyl, to the extent that this could be characterised as an error in principle, it had no impact on sentencing. In reaching his conclusion regarding the level of addiction, the sentencing judge listed many examples of facts found in the pre-sentence report that supported that the accused was able to function. On the evidence before him, it was open for him to reach the conclusion that, based on an examination of all the circumstances, although the offence was linked to addiction, the circumstances did not support a finding that the moral blameworthiness of the accused was low.

[22] Furthermore, the sentencing judge did not consider the findings that he made regarding the accused's level of addiction and his motivation in committing the offence to be aggravating factors. Rather, the sentencing judge concluded that, while the ultimate sentence would take into consideration the feature of addiction, it was not sufficiently mitigating that it would temper the sentence to any material extent.

[23] Absent error, the weight that the sentencing judge placed on the proffered mitigating factor is subject to deferential review. In my view, no palpable and overriding error has been shown.

Ground (iv): Did the Sentencing Judge Fail to Consider the Principles of Rehabilitation and Restraint?

[24] The accused argues that, because the sentencing judge placed little emphasis on the mitigating factor of his addiction, this caused him to unreasonably place limited weight on the factors of rehabilitation and restraint. I disagree.

[25] The sentencing judge carefully considered the issue of rehabilitation in the context of the accused's addiction in his reasons. He noted that the accused was previously placed on probation and ordered to complete counselling, which he did not do. He observed that the accused failed to attend follow-up programming for his drug use as requested by Child and Family Services based on a positive test for drugs he was required to take as part of the process to adopt his nephew. Further, he noted that, despite having applied to two residential addictions programs while in custody on these matters, the accused failed to follow up with any counselling when he was released to his grandparents, who were in their 90's and who signed as sureties.

[26] The sentencing judge concluded that there was nothing on the record before him sufficient to support a finding that the principle of rehabilitation should be prioritised or emphasised in a case such as this where that consideration is otherwise subordinated to the principles of general deterrence and denunciation.

[27] As to the principle of restraint, this was fully argued before the sentencing judge, who held that the period of eight years' incarceration was the least period of custody "capable of adequately reflecting the sentencing principles" based on the facts that he found.

[28] The limited weight that the sentencing judge chose to place on the above principles is supported by the record, and I am not persuaded that he erred in principle in the manner suggested by the accused.

Ground (v): Did the Sentencing Judge Impose an Unfit Sentence?

[29] The accused argues that the sentence imposed on him was unfit. I have reviewed the applicable principles in this regard in the companion case of *Petrowski*. To summarise, an unfit sentence is one that is "clearly unreasonable" or represents a "marked departure" from the principle of proportionality (*Lacasse* at para 52; see also para 53).

[30] At the outset, I agree with the Crown that the conduct engaged in by the accused is comparable to a mid-level trafficker with no decision-making power, such as a courier of cocaine that would have fallen within the three to six-year range, as set out in *Rocha* at para 64. In *Petrowski*, this Court found that, in general, the penalties for trafficking in fentanyl should be higher than for those involving cocaine based on the increased danger and harm both to

the individual and society. In this case, the sentence is two years over the six-year range set out in *Rocha*.

[31] At his sentencing hearing, the accused filed a number of cases in support of his contention that he should receive a sentence of two years' imprisonment followed by supervised probation. The sentencing judge distinguished the cases on which the accused relied on the basis that they dealt with street-level trafficking and/or included a number of additional mitigating factors not present in this case, such as youthful first-time offenders or persons with the demonstrated motivation to rehabilitate.

[32] The sentencing judge also distinguished some of the cases supporting a lower sentence based on the fact that the accused in those cases cooperated with the authorities. He found that, while the accused in this case had no obligation to cooperate with the authorities, had he done so, he could have prevented the successful undetected delivery of the second parcel.

[33] In reaching his conclusion that the sentence of eight years was appropriate, the sentencing judge looked to the cases of *R v Betteridge* (12 December 2017), Winnipeg 012-53288 (Man Prov Ct) (trafficking of powdered fentanyl, carfentanil and dilaudid, first-time offender—joint recommendation of 10 years imposed); *R v Csincsa* (21 June 2018), Winnipeg CR17-01-36464 (Man QB) (importing fentanyl, principal participant, related record—joint recommendation of 10 years imposed); and *R v Olvedi*, 2018 ONSC 6330 (importing 499.5 grams fentanyl, not principal participant, no record, excellent rehabilitation prospects—15 years imposed). In addition, he relied on the 10-year sentence imposed in *Petrowski*.

[34] While the sentencing judge recognised there were differences between the cases he relied on and the specifics of this case, he found them

sufficiently similar to guide him in arriving at a proportionate sentence. He reasoned that, but for the fact that the accused was not the primary actor in the offence and the role that his addiction played, a sentence of 10 years would have been appropriate. He accordingly imposed the eight-year sentence.

[35] At the hearing of the appeal, the accused submitted that a sentence of five to six years' imprisonment would be more in keeping with the jurisprudence. In this regard, he relies on many of the same cases that he argued before the sentencing judge, including *R v Mann*, 2018 BCCA 265 (two young accused receiving the equivalent of four years for trafficking fentanyl—sentence upheld); *R v Lloyd*, 2019 BCCA 128 (effective sentence of six years' imprisonment for possession of 51.29 grams of heroin mixed with fentanyl—sentence upheld); and *R v Farski* (16 July 2019), Winnipeg 556-21633 (Man Prov Ct) (co-accused to *Petrowski*, received package and gave it directly to Petrowski, rehabilitated drug addiction while on bail and a number of other significant mitigating factors—32 months' less one day imprisonment, less eight months' pre-trial detention, leaving two years less one day going forward).

[36] Some of the above cases contain facts which distinguish them from this case. In *Mann*, when upholding the sentences for the two accused, the Court specifically stated that the only reason that the sentences were not higher was based on the accused's youth and relative lack of records. I would also note that, in that case, the accused were actually sentenced on a number of other offences, receiving global sentences of five years and seven years respectively.

[37] There are numerous mitigating factors in *Farski* which do not apply in this case.

[38] In addition, the accused cites and distinguishes *R v Hudson*, 2019 ONSC 290. In that case, the accused received a package containing 323 grams of fentanyl through Canada Post and was convicted after trial. In imposing a sentence of eight years' imprisonment, the Court noted that she had no prior record, no addiction issues, and excellent prospects for rehabilitation. Here, the accused states he should receive less time because he did not possess as much fentanyl as in that case and that he entered a guilty plea.

[39] In my view, the *Hudson* case is quite similar to this case. While, in that case, there was a higher quantity of fentanyl and the mitigating factor of a guilty plea was not present, in this case, the accused had a prior record and did not have excellent prospects for rehabilitation.

[40] Other cases that I have considered are: *R v Felix*, 2019 ABCA 458 (13 years would have been appropriate but 10 years imposed for wholesale trafficking based on Crown position at sentencing); *R v Leach*, 2019 BCCA 451 (aggregate sentence of 16 years, eight of which were for trafficking in fentanyl); *R v Smith*, 2019 SKCA 100 (aggregate sentence of 11 years for drug and weapons-related offences, eight of which were for trafficking in pills containing fentanyl and heroin); and *R v White*, 2020 NSCA 33 (possession of fentanyl and cocaine for the purpose of trafficking raised from six to eight years on appeal).

[41] Based on all of the above, I am of the view that the accused has not demonstrated that the sentence imposed was unfit. The accused was a 32-year-old man, with a prior record, who knowingly engaged in a scheme to import fentanyl into Canada. Despite being aware of how dangerous the drug was, he stored it at his home where his partner and two young children resided, thereby revealing a lack of concern for the risk to others. Moreover, his demonstrated behaviour caused the sentencing judge to find that he had

refused to take advantage of the opportunities he had to rehabilitate himself despite his long-term addiction and that he used his addiction to deflect blame from himself.

[42] In the result, I would grant leave to appeal sentence and dismiss the sentence appeal.

"Cameron JA"

I agree: "Burnett JA"

I agree: "Spivak JA"