

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

DAYLE ELDON HEIN

Transcript of the Reasons for Sentence delivered by The Honourable Justice L. A. Charbonneau, sitting in Yellowknife, in the Northwest Territories, on the 14th day of February, 2017.

APPEARANCES:

Ms. A. Piché: Counsel for the Crown

Mr. C. Davison, agent for
Mr. D. Bullerwell: Counsel for the Accused

(Charges under s. 5(1) x6 of the Controlled Drugs and Substances Act and s. 145(3) x 2 of the Criminal Code of Canada)

1 THE COURT: Mr. Hein has pleaded guilty to
2 two series of charges. The first three are for
3 drug transactions that took place in August 2014.
4 The other charges relate to activities that
5 occurred more recently, during the spring of
6 2016, while Mr. Hein was on process for the other
7 charges.

8 Mr. Hein admits that during the month of
9 August 2014, he sold drugs a number of times to
10 police officers who were working undercover as
11 part of an operation that was ongoing in the City
12 of Yellowknife. Police were targeting drug
13 activities in the city as part of that operation
14 and, during the course of their work, they came
15 into contact with Mr. Hein.

16 The three counts on the Indictment refer to
17 the three types of substances that Mr. Hein
18 admits he sold to the undercover officers. Count
19 1 is for trafficking in cocaine, Count 2 is for
20 trafficking in oxycodone, and Count 3 is for
21 trafficking in fentanyl.

22 More specifically, with respect to Count 1,
23 there was trafficking in cocaine on August 7th
24 and 8th. On August 7, Mr. Hein sold one street
25 gram of crack cocaine to the undercover officer
26 for \$80. The next day, there were two sales of
27 one street gram of crack cocaine, for \$100 each

1 time.

2 During the course of the second transaction,
3 a second undercover officer was present and he
4 asked Mr. Hein about purchasing "oxies",
5 referring to oxycodone. Mr. Hein said that he
6 would text him when he had some of that
7 available.

8 With respect to Count 2, on August the 10th,
9 Mr. Hein did text to say he had two "oxies" for
10 sale for \$120 each. The undercover officer went
11 to meet with Mr. Hein and ultimately was able to
12 make that purchase.

13 The third count is for trafficking in
14 fentanyl and this occurred on August 11 and 12.
15 On August 11, Mr. Hein texted to advise that the
16 "80s" had arrived. There was a discussion about
17 how many could be obtained. Ultimately, Mr. Hein
18 sold three fentanyl pills to the officer that day
19 for \$280. The next day, the undercover went to
20 see Mr. Hein and asked if he could buy five
21 fentanyl pills, and Mr. Hein sold him five pills
22 for \$450.

23 Mr. Hein's supplier was sentenced in
24 September 2016 for his involvement in these drug
25 activities, and he received a term of
26 imprisonment of 42 months, globally. R. v.
27 Moore, 2016 NWTSC 57.

1 With respect to the second set of charges
2 that Mr. Hein pleaded guilty to, they relate, as
3 I said, to events that happened in the spring of
4 2016. Count 1 is for trafficking in cocaine over
5 a period of one month, and Counts 2 and 3 are
6 breaches of recognizance that Mr. Hein was bound
7 by as a result of his other charges.

8 These charges came about as a result of
9 another investigation police undertook, again
10 targeting drug activities in the City of
11 Yellowknife and also elsewhere in the territory.
12 During this investigation, the police obtained an
13 order authorizing them to intercept private
14 communications. Several of the intercepted
15 communications involved Mr. Hein. Essentially,
16 the investigation showed that between March 14th
17 and April 14th, 2016, almost daily, Mr. Hein was
18 purchasing powder cocaine and crack cocaine,
19 three to ten grams at a time, and was reselling
20 it for profit. He used a cellular phone to carry
21 out this enterprise.

22 The recognizance that he was bound by at the
23 time and had been entered into in January 2016
24 required him, among other things, to be inside
25 his residence at all times, twenty-four hours a
26 day, seven days a week, with a few strict
27 exceptions. Needless to say, drug trafficking

1 was not among the exceptions. Mr. Hein was also
2 prohibited from being in possession of a cell
3 phone under the terms of that recognizance.
4 Evidently, he breached the condition regarding
5 the cell phone repeatedly between March 14th and
6 April 14th, 2016, as this was the means he was
7 using to carry out his trafficking activities.
8 He was also observed during the course of the
9 investigation being outside his residence,
10 completing a drug transaction on April 13th,
11 2016. In short, he breached his release terms
12 repeatedly and blatantly.

13 Exhibit S-1, which sets out the facts of the
14 2014 charges, also includes information about the
15 drug fentanyl. This was not a drug that the
16 general public, or the courts, for that matter,
17 heard that much about until relatively recently.
18 But more and more across the country, we hear
19 about it. Usually it is in the context of a
20 death or a near death due to overdose. It is
21 becoming more known, but it bears repeating:
22 Fentanyl is a very dangerous drug. It can be
23 taken through various methods. It can be smoked,
24 it can be ingested, it can be absorbed through
25 skin. It is a drug that is prescribed legally
26 for legitimate medical purposes, but it is now
27 being redirected to the illegal market by

1 unscrupulous people who care only about making a
2 profit and do not care how many people are harmed
3 or killed in the process.

4 The illicit use of fentanyl creates a high
5 risk of overdose. Its potency is 50 to 100 times
6 that of morphine and 20 times that of heroin.
7 The statistics that are coming out about the
8 ravages that this drug causes are very daunting.
9 Exhibit S-1 refers to some statistics from
10 British Columbia from the year 2015. Those
11 statistics were referred in other cases that have
12 come before this court in the last year or so.
13 But this is how the numbers have evolved as far
14 as drug overdoses, deaths, in British Columbia
15 related to fentanyl. In 2012, it was 5 percent;
16 in 2014, it had risen to 25 percent; and in the
17 first eight months of 2015, it had risen to 35
18 percent. There is absolutely no reason to think
19 that this trend changed for the rest of 2015 or
20 for 2016. Quite the contrary. I fully expect
21 that when we have statistics for all of 2015 and
22 when we have statistics for 2016, they will
23 continue to show an increase in deaths or near
24 death fentanyl overdose related incidents.

25 In the City of Yellowknife, as a result of
26 some recent incidents, there are now posters in
27 public places that actually describe the symptoms

1 of overdose from drugs like this one to
2 facilitate, presumably, quick intervention when
3 someone overdoses. That speaks volumes about how
4 serious a public health problem this is becoming.

5 Mr. Hein is 49 years old and is of Metis
6 descent. I have the benefit of a detailed
7 pre-sentence report that goes over the details of
8 his background and family history. It outlines
9 some of the challenges that Mr. Hein has had
10 during his life.

11 I am not going to go over things that are
12 recounted in the pre-sentence report in great
13 detail today, but I have taken Mr. Hein's
14 personal circumstances into account. I have
15 taken into account that he has suffered losses,
16 in particular the tragic loss of his father at a
17 very young age, and consequences flowed from this
18 that were not positive for him as far as the
19 environment he grew up in afterwards. He was
20 exposed at a young age to drugs and alcohol and
21 to parties in the house. There is no indication
22 in the report that he was harmed or placed in
23 danger in the home as a result of those
24 activities, but exposure of these kinds of things
25 was certainly not an ideal environment in which
26 to grow up.

27 Also in the pre-sentence report, there is

1 mention that Mr. Hein, unfortunately, was
2 sexually abused by baby-sitters on two occasions
3 when he was young. Like many others and for very
4 understandable reasons that we hear about
5 frequently in sexual assault cases, he did not
6 disclose what happened to him at the time, but he
7 has struggled with it over the years. Hopefully,
8 he can continue to get help to cope and recover
9 from these events of his past and achieve some
10 measure of healing from them to the extent that
11 that is possible.

12 The pre-sentence report makes it clear that
13 Mr. Hein has be plagued by his addiction to drugs
14 for many years. Over time he became entrenched
15 in the drug trafficking culture and lifestyle.
16 The criminal record is evidence of that as well.
17 Drug trafficking is basically how Mr. Hein has
18 "made a living" for the last several years, and,
19 with that, he has come into conflict with the law
20 and has had general dysfunction in his life.

21 The challenges that Mr. Hein has faced are
22 relevant to his sentencing because they may serve
23 to explain in part why he chose the path that he
24 did, but they do not excuse his conduct and that
25 must be made clear. In being part of the drug
26 trafficking world, in selling these substances
27 and making them available to people, Mr. Hein has

1 contributed, no doubt, to creating more addicts,
2 more broken lives, more despair, and more
3 dysfunction. It is virtually certain that many
4 of this "customers" are now on the same path as
5 the one he found himself on because they too
6 became addicted to cocaine or other drugs. It is
7 a cycle that repeats itself and it does so
8 exponentially. Every dealer has a number of
9 customers and every single customer is at risk of
10 becoming another Mr. Hein.

11 I agree with the Crown that there are some
12 indications in the pre-sentence report about some
13 measure of ambivalence on Mr. Hein's part as far
14 as taking responsibility for his actions. For
15 example, there are comments about a sentence
16 dating back to 1997 for possession of cocaine
17 which Mr. Hein feels apparently was unduly harsh
18 and had negative consequences for him, such as
19 the loss of a good job he had at the time. There
20 are also comments in the report about him not
21 realizing what he was selling and how dangerous
22 it was.

23 Yesterday, during submissions, Mr. Hein's
24 lawyer provided some context to the second
25 comment, the one about the dangerousness of the
26 drug. I do accept that in 2014 the harms caused
27 by fentanyl and the risks associated with it were

1 less known than they are now, and I have no
2 reason not to accept what has been said on
3 Mr. Hein's behalf, that he did not fully
4 understand the dangers of the drugs he was
5 selling at the time he was selling fentanyl in
6 2014.

7 As for the other comment, I referred to, the
8 one referring to the 1997 sentence, to the extent
9 that it might signal somewhat of a
10 rationalization on Mr. Hein's part for the
11 choices that he has made during the 20 years
12 after that sentence was imposed, I think that
13 those comments are tempered by what Mr. Hein said
14 yesterday when he was given an opportunity to
15 speak. I listened carefully to what he said and
16 I observed how he said it. He said he was sorry
17 for having contributed to this problem in our
18 city. He seems genuinely remorseful and I hope I
19 am not wrong. I hope he is genuinely remorseful
20 and that he realizes the harm this has caused not
21 just to him but to others, and mostly I hope that
22 he will have the strength to turn the page on
23 this lifestyle for good and never ever return to
24 it.

25 The pre-sentence report says that he has
26 some support, including from his spouse, even
27 though they have had their share of struggles. I

1 certainly hope that with the help of those around
2 him and some of the programs available to him in
3 custody, Mr. Hein will find within himself the
4 strength to overcome his issues and never return
5 to this lifestyle.

6 The report mentions that Mr. Hein's own
7 children suffer from drug addictions too now.
8 Sadly, that is not uncommon. But one thing is if
9 Mr. Hein is able to overcome his addiction, then
10 perhaps he will be in a good position to help
11 others, including his own children maybe, to do
12 the same.

13 Mr. Hein's criminal record is lengthy and
14 includes all sorts of offences, including
15 offences for crimes against people. He also has
16 a number of drug-related convictions, not
17 surprisingly, including trafficking convictions
18 for which he has received jail terms of some
19 significance, but nothing that comes anywhere
20 close to the sentence that he faces today.

21 In imposing sentence, I have to apply the
22 sentencing principles that are set out in the
23 Criminal Code and in the case law. Like many
24 crimes, drug trafficking covers a wide range of
25 possible behaviours, some more blameworthy than
26 others. People involved in drug trafficking are
27 always somewhere in a chain of distribution. The

1 higher up the person is in the chain, the more
2 blameworthy they are and the more significant the
3 sentences become. This difference in
4 blameworthiness is why, in the sentencing case
5 law, there are distinctions between street-level
6 trafficking, commercial operations, and wholesale
7 operations. Mr. Hein's activities can be
8 characterized as a commercial operation within
9 the meaning of the case law.

10 As far as trafficking in cocaine is
11 concerned, the law has been clear for many years
12 that for that type of offence, the starting point
13 is three years' imprisonment. That starting
14 point was set out by the Alberta Court of Appeal
15 and has been applied in this jurisdiction. R. v.
16 Lau, 2004 ABCA 408, R. v. Hodges, 2015 NWTSC 59,
17 and R. v. Mohammed, 2015 NWTSC 38.

18 Trafficking in fentanyl, as I mentioned
19 already, is a more recent phenomenon, or at least
20 more recent in terms of cases making it to court.
21 But we have heard more about it over the past
22 year or so, and, sadly, we can expect to hear
23 more. As I have already noted, it is a very
24 dangerous drug and the number of overdoses and
25 deaths related to it have increased dramatically
26 in various parts of the country. I talked about
27 this at some length in R. v. Castro, 2013 NWTSC

1 8, pages 3 to 7, and in Moore, pages 15 to 21. I
2 am not going to repeat now what I said in those
3 cases, but I adopt here what I said then:
4 Fentanyl has caused ravages elsewhere. As is
5 often the case, it took a little longer to be
6 commonly available here in the Northwest
7 Territories compared to when it became available
8 in other places in Canada. But now, clearly, it
9 is part of the drug trafficking picture. That
10 being the case, as I have said in other cases, it
11 would be delusional to think that what has
12 happened elsewhere will not happen here. It is
13 entirely predictable that as this drug continues
14 to be sold, we will see more and more deaths
15 resulting from it. At this point, it would be
16 very difficult for anyone to claim that they do
17 not know the harm that this drug can cause. What
18 that means is at this point, anyone who chooses
19 to traffic in this drug to make money is making a
20 choice to take a very real risk of killing people
21 to make money. It is that simple. And if those
22 people get caught, they can expect to face very
23 stern sentences from the Court.

24 When I sentenced Mr. Moore, I was provided
25 several fentanyl related cases from other
26 jurisdictions, and, after having reviewed those
27 cases, I decided to adopt the same approach that

1 was adopted by some courts in Ontario. Those
2 courts have decided that fentanyl trafficking
3 should be treated in a manner similar to heroin
4 trafficking on the basis that at this point, it
5 is established that fentanyl is at least as
6 dangerous as heroin. The starting point set out
7 by the Court of Appeal of Alberta for trafficking
8 in heroin is five years. R. v. Ostertag, 2000
9 ABCA 232. In Moore, I adopted that starting
10 point for fentanyl trafficking here in the
11 Northwest Territories.

12 The starting point in sentencing for
13 trafficking in cocaine at the level Mr. Hein was
14 doing it is three years. The starting point for
15 trafficking in fentanyl, I continue to find
16 should be, for now at least, the same as it is
17 for trafficking in heroin, which is five years.

18 A starting point is not a minimum sentence.
19 It is, just as the word suggests, a starting
20 point that reflects the objective seriousness of
21 the offence. From this the sentence has to be
22 adjusted to reflect the mitigating and
23 aggravating features of each case and all of its
24 circumstances because sentencing is not a
25 mechanical process. It is not a tariff-based
26 process. It is a highly discretionary, highly
27 individualized process.

1 Here, the main aggravating factors are the
2 criminal record, the fact that there were several
3 transactions, and the fact that Mr. Hein
4 continued his activities while on process for the
5 2014 charges. The main mitigating factor is that
6 Mr. Hein has pleaded guilty.

7 Considering those factors and the starting
8 points that apply, it may seem at first blush
9 that the global sentence of six years that was
10 proposed by counsel yesterday could appear to be
11 quite low. But there are other important
12 sentencing principles that must also be applied.

13 The principle of totality is very important
14 in this case. That principle means that when
15 sentencing a person for several offences, the
16 Court cannot simply add up what each sentence
17 would be for each individual offence without
18 taking into account the global impact of the
19 sentence. Applying the principle of totality
20 almost inevitably means that the sentences
21 imposed for each offence is reduced somewhat to
22 ensure that the overall effect of the sentence is
23 not crushing for the person. That, in effect, is
24 what totality means.

25 Sometimes people have a hard time
26 understanding this because it seems like a
27 sentencing discount for people who commit a lot

1 of offences. This could be seen, I suppose, as a
2 reward for committing many offences. I
3 understand that may be how it seems, but the
4 principle of totality is there to ensure the
5 overall effect of the sentence is not crushing on
6 the individual. And that is important because,
7 ultimately, the hope always is that people will
8 achieve rehabilitation. That is ultimately one
9 of the best ways for the public to be protected.
10 So in our criminal justice system in Canada, we
11 do not simply pile up sentences on people without
12 taking into account what the global effect of
13 that sentence is going to be.

14 Another important sentencing principle is
15 parity. That is a matter of fairness. People
16 convicted of similar offences, who are in similar
17 circumstances, should receive similar sentences.
18 I must take into consideration the sentence that
19 I imposed on Mr. Moore for his involvement in the
20 2014 offences. As I mentioned, Mr. Moore's
21 sentence was 42 months. Mr. Moore did not have
22 Mr. Hein's criminal record. He too suffered from
23 a drug addiction; he too was remorseful; and he
24 too pleaded guilty. But there was an aspect of
25 Mr. Moore's case that was more aggravating than
26 Mr. Hein's because Mr. Moore was at a higher
27 level in the organization than Mr. Hein. He was

1 Mr. Hein's supplier. And in Mr. Moore's case,
2 the principle of totality was not really a
3 consideration because he was being sentenced for
4 one set of charges only.

5 Finally, as in all cases, the principle of
6 restraint must also be remembered. Mr. Hein's
7 circumstances must be taken into account,
8 including his difficult upbringing, and the
9 directions given by the Supreme Court of Canada
10 in the cases of Gladue and Ipeelee must be
11 brought into effect.

12 The principle of restraint applies to every
13 sentencing, but in sentencing Aboriginal
14 offenders, the Criminal Code and Supreme Court of
15 Canada direct sentencing courts to pay particular
16 attention to that principle. In simple terms,
17 restraint means that no sentence should ever be
18 harsher than what is required to achieve the
19 goals and purposes of sentencing. Those include
20 deterrence, denunciation, and protection of the
21 public, but they also include the goal of the
22 eventual rehabilitation of the offender.

23 There is no question that Mr. Hein could
24 easily be facing a sentence longer than what
25 counsel have jointly recommended, but even
26 setting aside the weight that a joint submission
27 carries in law, under all the circumstances, I

1 agree that what is being proposed is fair and
2 just and that it is a sufficient sentence to
3 reflect the seriousness of these offences while
4 also giving due weight to Mr. Hein's personal
5 circumstances and his guilty pleas.

6 The Crown has applied for a number of
7 ancillary orders and those are not opposed.

8 There will be a firearms prohibition order.
9 It will commence today and expire ten years from
10 Mr. Hein's release from custody. The order for
11 the surrender of firearms will be forthwith.

12 There will also be a DNA order. This is a
13 secondary designated offence.

14 I am required by law to impose a victim of
15 crime surcharge under the Criminal Code. I have
16 no jurisdiction to waive that surcharge. I stand
17 to be corrected, but my understanding is that
18 there has to be a surcharge of \$200 for every
19 count, which means a total of \$1200 because there
20 are six counts. The default time and the time to
21 pay are statutory.

22 I have not mentioned this yet, but counsel
23 agree that Mr. Hein should be given credit for
24 the time that he has spent on remand. Based on
25 the calculations I was provided by counsel, the
26 total credit to be given to him, I gather, for a
27 few of the days, counsel were in agreement that

1 he should be credited on a ratio of one-to-one.
2 For the rest, counsel agree that he should be
3 credited on a ratio of one-and-a-half-day credit
4 for each day of remand. So the total amount of
5 credit he is entitled to based on those
6 calculations is 400 days and a half, which works
7 out to 13 and a half months using 30 days per
8 month as an average. This is not an exact
9 science and, on the whole, I am going to give
10 Mr. Hein credit for 13 months for the time he has
11 spent on remand.

12 Please stand, Mr. Hein.

13 Dealing first with the 2014 charges. For
14 the reasons I have mentioned, I agree with the
15 joint submission. For each of the Counts 1, 2,
16 and 3, on that first file, 2014-137, if not for
17 the time you have spent on remand, I would have
18 sentenced you to three years on each count but
19 concurrent (to be served together). I am giving
20 you credit for 13 months for the time you have
21 spent on remand. That means for each of these
22 counts, the further jail term would be 23 months,
23 served together. For the second set of charges,
24 on file 2017-18, the sentence on Count 1 is three
25 years' imprisonment, consecutive to the other
26 sentences; Count Number 2, 90-days' imprisonment,
27 concurrent; and Count 3, 90 days, also

1 concurrent. You can have a seat. The total
2 further jail term will be four years and eleven
3 months.

4 I do want to emphasize with respect to my
5 sentence on Count 3, on file 2014-137, that
6 sentence should not be treated as a precedent as
7 far as sentencing for trafficking in fentanyl for
8 all the reasons that I have been talking about.
9 It is only as a result of the application of the
10 principle of totality, the fact that this was a
11 global joint submission, and under the
12 circumstances of this case that I have arrived at
13 that particular sentence for that particular
14 count. It should not be an indication of what
15 people can expect to be sentenced to if they are
16 convicted of trafficking in fentanyl.

17 Mr. Moore's sentence is a better indication of
18 what would ordinarily be imposed for someone with
19 circumstances similar to his. As time goes on,
20 as more is known about the dangers of this drug,
21 it may very well be the courts will see fit to
22 impose even harsher sentences for those who
23 choose to get involved in these activities.

24 Given that Mr. Hein's supports are here in
25 Yellowknife, I am going to endorse the Warrant of
26 Committal with my strong recommendation that he
27 be permitted to serve his sentence here in the

1 Northwest Territories so he can be closer to the
2 people who can help him through what is going to
3 be, I am sure, a long road ahead.

4 THE ACCUSED: Yeah.

5 THE COURT: I hope that those who make
6 these decisions will take into account the proper
7 considerations. Sometimes they look at things
8 like treatment programs that are available and
9 what is better for a person's rehabilitation, and
10 that is why it is their decision, not mine. But
11 I certainly hope that in considering all the
12 factors, they will consider the fact that you
13 need to be supported through this and the people
14 supporting you are here.

15 THE ACCUSED: Yeah.

16 THE COURT: I can assist you with the
17 wording of the recommendation, Madam Clerk, if
18 you wish, but certainly I want the Warrant of
19 Committal to reflect this recommendation. There
20 will also be a transcript prepared of these
21 remarks, including what I have just said.

22 THE ACCUSED: Okay.

23 THE COURT: And possibly that might have
24 an impact. I just do not know.

25 THE ACCUSED: Thank you.

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Certified Pursuant to Rule 723
of the Rules of Court

Jane Romanowich, CSR(A)
Court Reporter