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CR 24-01-39990
(Winnipeg Centre)
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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

HIS MAJESTY THE KING,)	<u>Matthew T. Sinclair</u>
)	for the Crown
- and -)	
)	
KRISTOPHER DAVID FALK,)	<u>Michael P. Cook</u>
)	for the accused
accused.)	
)	
)	Judgment Delivered:
)	September 25, 2024

INNESS J.

INTRODUCTION

[1] This is my sentencing decision for Kristopher David Falk ("Mr. Falk") who pleaded guilty to offences committed on two separate dates involving the possession of controlled substances for the purpose of trafficking, including fentanyl, and possession of loaded prohibited firearms. The specific offences are:

1. On December 30, 2022 (CR 24-01-39931):
 - a) Possession for the purpose of trafficking in methamphetamine, contrary to s. 5(2) of the ***Controlled Drugs and Substances Act*** (the "***CDSA***");
 - b) Possession for the purpose of trafficking in fentanyl, contrary to s. 5(2) of the ***CDSA***;
 - c) Possession of a loaded prohibited firearm (sawed-off shotgun), contrary to s. 95 of the ***Criminal Code*** (the "***Code***"); and
 - d) Possession of a firearm while prohibited, contrary to s. 117.01(1) of the ***Code***.

2. On April 16, 2023 (CR 24-01-39990):
 - a) Possession for the purpose of trafficking in fentanyl, contrary to s. 5(2) of the ***CDSA***;
 - b) Possession for the purpose of trafficking in methamphetamine, contrary to s. 5(2) of the ***CDSA***;
 - c) Possession of a firearm while prohibited, contrary to s. 117.01(1) of the ***Code***;
 - d) Possession of a loaded restricted firearm (handgun), contrary to s. 95 of the ***Code***; and
 - e) Possession of identity documents relating to other persons, contrary to s. 56.1 of the ***Code***.

FACTS

Circumstances of the Offences

The First Arrest – December 30, 2022

[2] On December 30, 2022 Mr. Falk was the subject of a Winnipeg Police Services' Guns and Gangs Unit investigation arising from information received that he was trafficking in methamphetamine and fentanyl and in possession of an illegal firearm in a hotel room in downtown Winnipeg, Manitoba. Police conducted surveillance and observed Mr. Falk and a female leaving a hotel and entering a taxi. Mr. Falk was carrying a piece of luggage that he placed into the taxi. Police followed the taxi to an address on William Avenue, where it stopped. Mr. Falk was arrested for possession for the purpose of trafficking and unauthorized possession of a firearm.

[3] Police searched the luggage and found:

- a) 106 grams of methamphetamine;
- b) 27.5 grams of fentanyl in various colours;
- c) 15 grams of Xanax;
- d) 9 grams of crack cocaine;
- e) A contaminated digital scale;
- f) A loaded sawed-off 12-gauge shotgun;
- g) Various 12-gauge shotgun ammunition, and
- h) A loaded, sawed-off .22 caliber rifle.

[4] The bulk amount of fentanyl seized is the equivalent of 270.5 individual doses (referred to on the street as a "point"), valued at approximately \$8,250 if sold by

the point. The bulk amount of methamphetamine seized is the equivalent of 1,030 individual doses (points), valued at approximately \$5,150 if sold by the point.

[5] By agreement of counsel, Mr. Falk is to be sentenced on these offences as a street-level drug trafficker.

The Second Arrest – April 16, 2023

[6] Mr. Falk was granted bail on the December 30, 2022 offences. On April 16, 2023, Mr. Falk was stopped and arrested for possession of a stolen vehicle after police saw him driving a truck that was of interest to them. Mr. Falk was unable to provide any information about the truck or how he came into possession of it. He was very nervous, sweating and would not make eye contact with police. He kept reaching towards the centre gearshift. A search of Mr. Falk and the vehicle resulted in police finding numerous items including:

- a) \$755 in cash in Mr. Falk's front left pants pocket;
- b) A loaded nine millimeter handgun with an obliterated serial number underneath the driver's seat; and
- c) A backpack containing 31 grams of methamphetamine, 11.1 grams of fentanyl pieces in various colours, 29.4 grams of cocaine, 8 hydromorphone pills, along with identification belonging to Mr. Falk and identification documents belonging to numerous other individuals.

[7] A search warrant was obtained for a hotel suite associated with Mr. Falk. Police searched the suite and found various items, including:

- a) A safe under the bed which held a bag containing 833.7 grams of methamphetamine and a bag containing 142.6 grams of fentanyl in assorted colours;
- b) A metal tin on a counter which contained a live round of nine millimeter ammunition and an opened bag containing 211.7 grams of methamphetamine; and
- c) Three contaminated scales and packaging materials.

[8] The bulk amount of methamphetamine seized is the equivalent of approximately 10,000 individual doses (points), with a value ranging from approximately \$8,300 if sold in bulk, to \$50,000 if sold by the point. The value of the fentanyl seized ranges from \$6,000-\$7,500 if sold in bulk to approximately \$42,474 if sold by the point.

[9] By agreement of counsel, Mr. Falk is to be sentenced on these offences as a mid-level drug trafficker.

CIRCUMSTANCES OF KRISTOPHER DAVID FALK

[10] Mr. Falk is 48 years old. His personal circumstances are set out in the pre-sentence report (the "PSR") (Exhibit S1). He also filed four reference letters written by family and friends (Exhibit S2).

[11] Mr. Falk had a stable family upbringing. He was raised by a loving mother and father who were married for 50 years until his mother passed away in June 2023. He has a younger sister and half-brother with whom he maintains a close relationship. There was no criminal involvement, violence or substance abuse in the family home. Mr. Falk's family members love and support him but do not condone his criminal activity.

For example, Mr. Falk's father is willing to cover the cost of a residential substance abuse treatment program for Mr. Falk, if and when Mr. Falk is willing and able to attend.

[12] Mr. Falk has a history of substance abuse, beginning as a teenager and continuing into adulthood. Mr. Falk describes his addiction as a coping mechanism for undisclosed childhood sexual abuse by an older neighbourhood youth, as well as a serious brain injury from a brutal assault in 2008. He participated in substance abuse treatment in 1995 and 2001 but was removed from the last program due to a positive drug test. Despite a history of addiction, Mr. Falk acknowledges that his primary purpose for trafficking was to make money.

[13] Mr. Falk has a grade 12 education, having completed adult education in 2005. He attended one year at Red River College in 2007, taking business administration but due to his brain injury in 2008 he was unable to complete his schooling. His work history has been sporadic but includes employment as a warehouse manager for a furniture company, a clerk with a sports organization and an officer manager for an upholstery company. He reports that he has been unable to maintain stable employment due to his substance abuse, incarceration and brain injury. Mr. Falk has not been employed for many years and was receiving social assistance in the timeframe leading up to his arrest. He owns a cellular phone sales and service company which has not been successful thus far. Notwithstanding this, he hopes to resume this business when he is released from custody.

[14] Mr. Falk told the probation officer who prepared his PSR that he was diagnosed with post traumatic stress disorder and social anxiety. He further reported that he

suffers from a cognitive impairment and a lack of impulse control due to his brain injury. He stated that he saw a mental health professional every two weeks for four months about 10 years ago. Despite the probation file indicating that Mr. Falk was fully recovered from the brain injury, his family indicates that his ability to multi-task and function while being overwhelmed continues to be impacted. I have no further information or documentation regarding Mr. Falk's medical or cognitive conditions, nor any potential impact these conditions may have on him.

[15] Mr. Falk's mother and grandfather have passed away since he has been in custody. Also, his partner gave birth to their daughter. Mr. Falk also has four other children from three different relationships that he does not see. He attributes the lack of connection with his children to his substance abuse. Notwithstanding his challenges, Mr. Falk has made good use of his pre-sentence custody, completing cognitive behaviour therapy workbooks and programming. He has been employed on the grounds crew at the institution. He is considered a positive and productive inmate.

[16] Mr. Falk's prior criminal record is very lengthy and includes related convictions. His record begins in 1993 as a youth when he was convicted for a property offence. He received community service work. His offending continued into adulthood which resulted in convictions for property offences, breaches of court orders, assaults, uttering threats and driving offences. He received sentences ranging from fines and probation up to provincial terms of incarceration, including some conditional sentence orders. With respect to related convictions, he has very dated convictions for possession of a controlled substance in 1997 and 1999, for which he received small fines. In 2018, he

was convicted of possession of a firearm or ammunition contrary to a prohibition order that was imposed in 2017 when he was convicted of an assault. He was sentenced to the equivalent of 107 days of pre-sentence custody, plus one day imprisonment and two years of probation, concurrent on all offences. In 2021, he was convicted of possession for the purpose of trafficking and possession of a controlled substance, along with multiple breaches of court orders. He was sentenced to the equivalent of 401 days of pre-sentence custody plus a further 184 days imprisonment, concurrent on all offences. Of note, despite a lengthy and related record, Mr. Falk has never been sentenced to a penitentiary term of imprisonment.

[17] Mr. Falk was assessed as a very high risk to reoffend on the Level of Service/Case Management Inventory test. The significant criminogenic factors include Mr. Falk's criminal history, substance abuse, employment/education, companions and leisure/recreation.

[18] In his dock statement, Mr. Falk expressed an apology for his behaviour and said he was motivated to make changes in his life, remain sober and reconnect with his children. His family believe he is capable of doing so if he has appropriate supports and resources. According to the probation officer who prepared the PSR, he would benefit from trauma informed counselling from a psychiatrist, psychologist or counsellor.

POSITION OF THE PARTIES ON SENTENCE

Crown Position on Sentence

[19] The Crown seeks 7 years' imprisonment on the offences that took place on December 30, 2022, broken down as follows:

- a) 5 years for possession for the purpose of trafficking methamphetamine;
- b) 6 years concurrent for possession for the purpose of trafficking fentanyl;
- c) 4 years concurrent for possession of a loaded sawed-off shotgun; and
- d) 1 year consecutive for possession of a firearm contrary to a prohibition order.

[20] The Crown seeks 11 years' imprisonment on the offences that took place on April 16, 2023, broken down as follows:

- a) 10 years for possession for the purpose of trafficking fentanyl;
- b) 8 years concurrent for possession for the purpose of trafficking methamphetamine;
- c) 6 years concurrent for possession of a loaded handgun;
- d) 1 year concurrent for possession of identity documents; and
- e) 1 year consecutive for possession of a firearm contrary to a prohibition order.

[21] The Crown suggests that the sentences imposed on each set of offences ought to run consecutive to each other, for a total of 18 years. The Crown further suggests that in order to achieve totality, one year ought to be deducted from each of the sentences imposed on the fentanyl offences, resulting in an overall length of 16 years. The Crown agrees that Mr. Falk ought to receive credit for his pre-sentence custody at the enhanced ratio of 1.5:1 to the date of sentencing.

Defence Position on Sentence

[22] The defence seeks 5 years' imprisonment in total on the offences that took place on December 30, 2022, broken down as follows:

- a) 3 years for the possession for purpose of trafficking methamphetamine;
- b) 4 years concurrent for possession for the purpose of trafficking fentanyl;
- c) 3 years concurrent for possession of a loaded sawed-off shotgun; and
- d) 1 year consecutive for possession of a firearm contrary to a prohibition order.

[23] The defence seeks 7 years' imprisonment in total on the offences that took place on April 16, 2023, broken down as follows:

- a) 6 years for possession for the purposes of trafficking fentanyl;
- b) 5 years concurrent for possession for the purpose of trafficking methamphetamine;
- c) 4 years concurrent for possession of a loaded handgun;
- d) 1 year concurrent for possession of identity documents; and
- e) 1 year consecutive for possession of a firearm contrary to a prohibition order.

[24] The defence agrees with the Crown that the sentences imposed on each set of offences ought to run consecutively, for a total length of 12 years. The defence further suggests that the overall sentence be reduced to 10 years in order to account for the totality principle. The defence also agrees that Mr. Falk ought to receive credit for his pre-sentence custody at the enhanced rate of 1.5:1 to the date of sentencing.

ANALYSIS

Purposes and Principles of Sentencing

[25] In sentencing Mr. Falk, I must consider and apply the purposes and principles of sentencing set out in s. 718 of the *Code*, including general deterrence, specific deterrence, denunciation, rehabilitation and restraint. While recognizing that sentencing requires an individualized approach, I must attempt to impose a sentence that is similar to sentences imposed on similar offenders in similar circumstances. Furthermore, the sentence should be increased or decreased to account for any aggravating or mitigating circumstances relevant to Mr. Falk or the offences he committed. Overall, however, the sentence I impose must be proportionate to the gravity of the offences and Mr. Falk's degree of responsibility in committing the offences.

Sentencing Principles Relevant to Drug and Firearm Offences

[26] Because drugs are a highly valuable commodity, traffickers fear being "ripped" (robbed) of their product. The drug trade is well known to be a violent, cash based business. A ready-loaded, easily concealable firearm protects the dealer, the product and the cash. The obvious dangerousness of this criminal activity increases when traffickers bring their drugs and firearms into public areas. Carrying a loaded firearm in a public area puts innocent members of society at grave risk of harm or death. This invariably makes the commission of the combined offending even more serious.

[27] The "*deadly cocktail of 'drugs and guns'*" (*R. v. Rider*, 2013 MBQB 116, at para. 20) (emphasis added) has been well recognized as posing a serious risk to public safety. There is no doubt that sentences for these combined offences have

correspondingly risen with the increasing prevalence of this offending. Exemplary sentences that meet the objectives of denunciation and deterrence are expected. (See *Rider*, at paras. 20-21 and 45; *R. v. McLean*, 2022 MBCA 60, at para. 57.)

Sentencing Considerations Unique to Fentanyl

[28] Sentencing considerations for trafficking in fentanyl, a highly toxic synthetic opioid, must take into account the unique dangers arising in its consumption. The risk of significant harm or death is demonstrated by the increasing number of opioid overdoses in Manitoba and elsewhere, described as a "*national crisis*" (*McLean*, at paras. 86-89; *R. v. Petrowski*, 2020 MBCA 78; *R. v. Parranto*, 2021 SCC 46, at paras. 96-97).

[29] Like with other drugs, adulterants are added to fentanyl to reduce its potency and increase the profit margin for the trafficker. It may be cooked into a harder form and colour may be added, as was done with the fentanyl seized in the present case. When an adulterant (cutting agent) is added, the fentanyl often does not blend properly, leaving "hot spots" or high concentrations of the drug. This results in a stronger potency that can lead to overdoses or deaths, even when only a very small amount is consumed. This is what makes the drug so dangerous. The purpose of colouring the drug is so users can differentiate it. Purchasers may learn which colour of fentanyl is stronger and that colour becomes more attractive for purchasers. Ironically, those batches are also more deadly.

Sentencing Precedents for Fentanyl Trafficking

[30] Sentencing ranges provide guidance to judges as to the appropriate sentences for street-level, mid-level or high-level drug traffickers, however the discretion of the

sentencing judge is not meant to be fettered. Ultimately the task of the sentencing judge is to determine "*the magnitude of the individual's participation*" in the offences (***McLean***, at paras. 60-62, quoting ***Regina v. Lecapoy*** (1974), 1974 ALTASCAD 50 (CanLII), 18 CCC (2d) 496, at para. 27).

[31] In ***McLean***, the Manitoba Court of Appeal held at para. 118:

[118] The range of sentence for someone minimally involved in mid-level fentanyl trafficking, such as a courier or custodian without some decision-making authority or responsibility in the trafficking activity, is six to eight years' imprisonment (leaving aside the effect of the aggravating and mitigating factors and, in the case of an Indigenous offender, a proper application of section 718.2(e) of the Code). ...

However, for those who are more heavily involved in mid-level trafficking, the range of sentence is, as in accordance with ***Parranto***, "*in the high single digits ... into double digits*" (***McLean***, at para. 122). Thus far, the Manitoba Court of Appeal has explicitly declined to comment on the sentencing ranges for street-level and high-level trafficking in fentanyl, leaving those to be determined in future cases (at para. 123).

[32] Identifying comparable sentencing precedents for the purposes of parity is challenging. No two offences or offenders are the same and there are few reported decisions in Manitoba with similar facts.

[33] The Crown referred me to ***Petrowski***, where 51 grams of fentanyl was seized and a 10-year sentence was imposed, as well as ***R. v. Slotta***, 2020 MBCA 79, where 49 grams of fentanyl was seized and an 8-year sentence was imposed. Those individuals, however, were involved in the importation of fentanyl into Canada. The Crown also provided me with ***McLean***, where the accused was operating as a mid-level interprovincial courier, found in possession of 220 grams of fentanyl and a 981-gram

brick of cocaine. He had a dated, unrelated criminal record. The Manitoba Court of Appeal allowed the appeal and reduced his sentence on the fentanyl conviction from 12 years to 9 years. The reduction in sentence also accounted for the no-free-ride principle with respect to the cocaine offence, for which the accused was sentenced to 6 years concurrent (*McLean*, at paras. 124-126 and 130-131). The court emphasized that poly-drug trafficking of serious substances for profit increases the offender's overall moral blameworthiness (at para. 94).

[34] I have also considered *R. v. McKay*, 2024 MBPC 19. In that case, the accused pled guilty to eight offences including possession for the purpose of trafficking fentanyl (489 grams) and methamphetamine (770 grams) and possession of two loaded prohibited firearms, as well as ammunition. The contraband was found within a vehicle and a further search warrant executed at a residence located another firearm and ammunition, among other items. The offender in *McKay* was on three separate firearms prohibitions at the time of the offences. He had a related criminal record for trafficking, firearms offences, and breaching prohibition orders, including a three-year penitentiary term in 2020 for a firearm offence. Given the seriousness of the offences, his addiction issues and *Gladue* factors did not appreciably reduce his moral blameworthiness. He was sentenced as a mid-level fentanyl trafficker to 13 years' imprisonment with concurrent sentences on the other offences.

[35] The closest comparable sentencing decision for the purposes of parity is *Parranto*. In that case the accused was charged with possession for the purpose of trafficking in fentanyl (27.8 grams) and offences related to possession of a loaded handgun. He had

a related criminal record. While on bail for those offences, the accused was charged again with the offence of possession for the purpose of trafficking in fentanyl (485.12 grams) and offences related to possession of a loaded handgun. He was subject to a firearms prohibition on both offence dates. The accused pleaded guilty to both sets of charges. The facts included the agreement that although he had an addictions issues, he was wholesale trafficking in fentanyl for monetary gain as was evident by the large amount of cash seized on each occasion. The Supreme Court of Canada upheld the total 14-year sentence imposed by the Alberta Court of Appeal.

The Appropriate Sentence for Mr. Falk

Concurrent vs. Consecutive Sentences

[36] It is appropriate to sentence Mr. Falk concurrently for the offences that occurred on the same date and within each set of offences, except for the breaches of the prohibition orders. This is consistent with the direction from ***R. v. Coutu***, 2020 MBCA 106, where the Manitoba Court of Appeal emphasized that "*prohibition orders are designed to protect the public by reducing the misuse of weapons*" (at para. 34). Therefore, charges of possession of a firearm or ammunition contrary to s. 117.01(1) of the ***Code*** are to be treated differently than other breaches of court orders. A serious consequence for breaching prohibition orders generally requires consecutive sentences (***Coutu***, at paras. 33-35).

Aggravating and Mitigating Factors Relevant to Each Set of Offences

[37] Statutory aggravating factors include the fact that Mr. Falk carried a weapon in relation to the offence of possession for the purpose of trafficking (s. 10(2)(a)(i) of

the **CDSA**) as well as being previously convicted of a designated substance offence (s. 10(2)(b) of the **CDSA**). Further aggravating factors include the possession of the firearms in public, the offences were profit-motivated and the possession of multiple serious substances for the purpose of trafficking.

[38] Mitigating factors include the entering of guilty pleas, good behaviour, rehabilitative efforts while in pre-sentence custody and strong family support.

Sentencing Principles Relevant to Each Set of Offences

[39] Due to Mr. Falk's related offending history and increased reinvolvement shortly after being granted bail, significant consideration must be given to the principle of specific deterrence. A strong, clear message needs to be conveyed to Mr. Falk through the sentence imposed. The sentence must reflect the seriousness and dangerousness of his recent criminal involvement as a deterrent to becoming reinvolved yet again.

[40] While Mr. Falk appears genuine in his desire to rehabilitate and leave his criminal offending behind him, his ability to do so remains questionable as his offending took place within the context of strong family supports and a common-law relationship. He has been assessed as a very high risk to reoffend, which indicates the degree of change required by Mr. Falk to stop his offending behaviour.

[41] While I am aware that Mr. Falk suffered a serious, permanent brain injury resulting from a violent assault in 2008, the degree to which any long-lasting impacts from that injury are connected to his criminal record, and in particular the offences upon which I am sentencing him, is unclear. I have no evidence or information before me upon which I could conclude that his brain injury resulted in cognitive deficits that would reduce his

moral blameworthiness. Without any cogent evidence to link Mr. Falk's brain injury, substance abuse or mental health challenges with involvement in these offences, I cannot find that his moral culpability is lowered in accordance with ***R. v. J.M.O.***, 2017 MBCA 59, at paras. 73-74. That said, the background information about Mr. Falk's circumstances remain relevant to an understanding of the individual before the court and will hopefully receive attention by the correctional authorities in their assessments and case planning for Mr. Falk, including options for treatment and programming. For example, any impulse control issues that could pose challenges for Mr. Falk in a penitentiary setting.

[42] Mr. Falk's involvement in the offences before the court was significant and sophisticated. The extent of Mr. Falk's deep involvement in drug trafficking is demonstrated by his ability to resume his drug trafficking operation so quickly after being released on bail. It would appear that his trafficking was only minimally interrupted by the first arrest. Using a hotel for a stash location is evidence of the commercial aspect of his enterprise. He used a vehicle that could not be traced to him. No explanation was offered for his possession of various identity documents belonging to multiple people but it is obvious they were not possessed for any lawful purpose. Furthermore, the possession of a handgun containing hollow point rounds is even more concerning. The facts cumulatively support the conclusion that this was a well-thought out, sophisticated, profit-driven criminal enterprise.

Sentence for December 30, 2022 Offences

[43] I find that Mr. Falk's involvement in the first incident from December 30, 2022, while at street level, is of a significant and extensive nature. Although I am only sentencing him on the offences for which he pled guilty, the entire facts and circumstances were placed before me, by agreement, in order that I fully appreciate the nature and extent of Mr. Falk's drug dealing activities, including his possession of a second, loaded sawed-off shotgun in the same duffel bag found within the taxi. The messages on his cell phone prove his "hands on" involvement in a classic "dial-a-dealer" operation.

[44] Although Mr. Falk's circumstances may receive less consideration in determining his overall moral culpability in sentencing him for the combined possession of drugs and guns, the length of the term of imprisonment must still be carefully considered (*Rider*, at paras. 29 and 31). With respect to the offences committed on December 30, 2022, having reviewed the sentencing precedents, in particular *McLean*, and taking into account the circumstances of the offences and Mr. Falk's circumstances, the purposes and principles of sentencing, the aggravating and mitigating factors, and his overall moral culpability as a street-level drug trafficker, I have determined that a fit and appropriate sentence for Mr. Falk on each offence is as follows:

- a) For the possession for the purposes of trafficking fentanyl – 6 years' imprisonment, which reflects a slightly elevated sentence to account for the no-free-ride principle;

- b) For the possession for the purposes of trafficking methamphetamine – 5 years' imprisonment concurrent;
- c) For the possession of a loaded sawed-off shotgun – 4 years imprisonment concurrent; and
- d) For the conviction of possessing a firearm contrary to a prohibition order – 6 months' imprisonment consecutive.

This brings the total length of the sentence for these offences to 6.5 years.

April 16, 2023 Offences

[45] With respect to the offences committed on April 16, 2023, Mr. Falk's level of involvement is agreed to be that of a mid-level drug trafficker. As with the first set of offences, all of the facts and circumstances were placed before me for consideration. I note that Mr. Falk utilized a hotel room as a stash location and operated a vehicle that could not be traced by police. His ability to become so heavily reinvolved in drug trafficking so soon after his release reflects the nature and extent of his criminal involvement and connections in the drug trafficking world. It is an aggravating factor that Mr. Falk became more heavily involved shortly after being released from custody on the very same, serious charges.

[46] Mr. Falk's explanations for his offending behaviour do not afford him any mitigation on sentence. He said he was selling drugs for money in order to pay for his apartment, as he was struggling financially, however it is obvious that he was profiting significantly from his enterprise. He also said that he had possession of the firearms to protect

himself from being robbed of his drugs. His explanation of knowing that it was wrong but assessing that it would be worse not to carry a firearm is concerning.

[47] Again, although Mr. Falk's circumstances may receive less consideration in determining his overall moral culpability in sentencing him for the combined possession of drugs and guns, the length of the term of imprisonment must still be carefully considered (*Rider*, at paras. 29 and 31). With respect to the offences committed on April 16, 2023, having reviewed the sentencing cases filed, and in particular *McLean*, and taking into account the circumstances of the offences and Mr. Falk's circumstances, the purposes and principles of sentencing, the aggravating and mitigating factors, and his overall moral culpability as a mid-level drug trafficker, I have determined that a fit and appropriate sentence for Mr. Falk on each offence is as follows:

- a) For the possession for the purposes of trafficking fentanyl – 10 years' imprisonment;
 - b) For the possession for the purposes of trafficking methamphetamine – 8 years' imprisonment concurrent;
 - c) For the possession of a loaded handgun – 6 years' imprisonment concurrent;
 - d) For the possession of identity documents – 1 year imprisonment concurrent;
- and
- e) For possession of a firearm contrary to a prohibition order – 1 year imprisonment consecutive.

This brings the total length of sentence for these offences to 11 years.

Mr. Falk's Overall Sentence and the Application of the Totality Principle

[48] The sentence for the offences from April 16, 2023 is to run consecutively to the sentence imposed for the offences from December 30, 2022, bringing the total length of sentence to 17.5 years. Prior to imposing the final sentence, however, I must consider the totality principle and take one "last look" (*R. v. Rose*, 2019 MBCA 40, at para. 24) at the total sentence to ensure that it does not exceed Mr. Falk's overall culpability. The factors to be considered in the application of the totality principle are set out in *Rose*, at para. 30:

- [30] ...
- (a) the length of the combined sentence in relation to the normal level of sentence for the most serious of the individual offences involved;
 - (b) the number and gravity of the offences involved;
 - (c) the offender's criminal record;
 - (d) the impact of the combined sentence on the offender's prospects for rehabilitation, in the sense that it may be harsh or crushing;
 - (e) such other factors as may be appropriate to consider to ensure that the combined sentence is proportionate to the gravity of the offences and the offender's degree of responsibility.

...

[49] Assessing a sentence for totality can be challenging. This was recognized by the Manitoba Court of Appeal in *Rose*, at para. 29, when it stated, "[a]s an initial observation, the decision to reduce a sentence to reflect totality considerations is a delicate matter of judgment and discretion. It is most certainly not a mathematical calculation or scientific precision". As such, absent any other errors in the determination of the sentence, the court went on to say in *Rose*, at para. 36, that a "decision regarding the appropriate reduction for totality is entitled to considerable deference, and it will be

a rare case when [an appellate] Court intervenes to substitute its view for that of the sentencing judge'.

[50] With the above in mind and considering all of the factors relevant to the totality principle, I have determined that the overall length of the sentence ought to be reduced by three years. In addition to consideration of factors relevant to totality, this reduction also takes into account parity and the total sentence imposed in ***Parranto*** (see ***R. v. Whincup***, 2021 MBCA 64, at para. 12; ***R. v. Romaniuk***, 2024 MBCA 20, at para. 55). While I acknowledge that the accused in ***Parranto*** was an Indigenous individual, the amount of fentanyl he possessed was significantly more than Mr. Falk. Furthermore, unlike Mr. Falk, the accused in ***Parranto*** had previously been sentenced to a 3-year penitentiary term for possession for the purpose of trafficking.

[51] In order to apply the totality principle as transparently as possible, I make the following adjustments to the sentences imposed. The consecutive sentences imposed on each of the two convictions for possession of a firearm contrary to a prohibition order will be served concurrently rather than consecutively (see ***R. v. Wozny***, 2010 MBCA 115, at para. 72). The 6-year sentence imposed on the fentanyl offence committed on December 30, 2022 will be reduced by 6 months to 5.5 years. Finally, the 10-year sentence imposed on the fentanyl offence committed on April 16, 2023 will be reduced by 1 year, resulting in a 9-year sentence. This results in a total sentence of 14.5 years' imprisonment.

CONCLUSION

[52] I have determined that a combined sentence of 14.5 years' imprisonment remains a significant and lengthy sentence that adequately accounts for Mr. Falk's moral blameworthiness but does not result in a harsh or crushing sentence on a 48-year-old man who, despite a lengthy criminal record and serious involvement, has never previously been sentenced to a penitentiary term of imprisonment. The combined sentence is higher than the normal sentence that might be imposed for the most serious offence, which is the fentanyl conviction from April 16, 2023. It is a significant penitentiary sentence but still allows Mr. Falk an opportunity to change, should he truly focus his efforts into doing so.

[53] The overall sentence of 14.5 years' imprisonment is to be reduced by the number of days Mr. Falk has served in pre-sentence custody up to the date of the pronouncement of this sentence, at the enhanced rate of 1.5:1. I leave the determination of the precise credit to be determined by the sentence calculator at the federal institution where Mr. Falk is placed.

[54] In addition to the periods of imprisonment imposed, I also make the following orders:

- a) DNA order (to be taken within the institution within 30 days);
- b) Lifetime weapons prohibition; and

c) Forfeiture of all items seized, except for laptops, cell phones and electronics with the exception of the Samsung cell phone seized during the December 20, 2022 arrest of Mr. Falk (Police Exhibit 17), which will be forfeited by consent as offence-related property.

_____ J.