In the Provincial Court of Alberta

Citation: R v M [redacted] 2022 ABPC 248

Date: 20221212
Docket: 191141365P1
Registry: Calgary

Between:

His Majesty the King

- and -

M [redacted]

Decision of the Honourable Judge B.R. Fraser

Introduction

[1] The accused is charged with possession of fentanyl and methamphetamine for the purpose of trafficking and possession of proceeds of crime. The Crown called five RCMP officers involved in the traffic stop in Airdrie as well as an expert in determining if the possession was for the purpose of trafficking and the officer who conducted an interview of the accused. All the evidence was held in a *voir dire* as there was a *Charter* notice alleging breaches of Sections 8, 9 and 10. Also included was a voluntariness *voir dire* relating to the statement taken from the accused. At the end of the *voir dire*, the defence abandoned their *Charter* challenges and took no issue with the voluntariness of the statement. All the evidence called in the *voir dire* was applied to the trial proper by consent. The defence called no evidence.

Facts In Evidence

[2] The accused was driving his truck at 9:30 p.m. with two passengers on Yankee Valley Blvd., in Airdrie and turned onto Highway 2 without signaling. An RCMP officer was following and pulled him over for the traffic infraction. He checked the plate and found the registered owner was on a recognizance for drug charges and a condition of his release was a 24 hour curfew to be in his home in Calgary. The officer approached the vehicle on the passenger side

and asked for documents that confirmed the accused was the registered owner and thus in violation of the recognizance and the curfew condition. He told him he was under arrest and why, chartered and cautioned him, had him exit the vehicle and took him to the side of the road off the highway. He also noticed the accused had red eyes and the passenger in the back was rocking back and forth, consistent with a person using or on drugs. He called for back-up and two other police cars arrived. The officer is a certified drug evaluation expert. One of the other officers who arrived saw tin foil on the floor in the back with burnt residue consistent with drug use. As a result, all three were placed under arrest for possession of drugs and the passengers were taken out of the vehicle.

[3] The vehicle was then searched for drugs and a quantity of heroin, fentanyl and methamphetamine were located in the pouch on the back of the front passenger seat and in the centre console between the front seats. $7,960 in cash in $100's and $50's were also found in the console and $4,450 in $20's were located on the person of the passenger in the back. They also found pepper spray and a role of clear baggies, and several glass pipes consistent for using drugs.

[4] A qualified expert gave evidence that in all the circumstances including the drugs, the money, the tin foil, the pipes, baggies and weapons in his expert opinion, the drugs were at least in part possessed for the purpose of trafficking.

The Law of Possession

[5] The definition of possession is governed by Section 4(3) of the *Criminal Code*:

4(3)(a)(ii) states:

> A person has anything in possession when he knowingly has it in any place, whether or not that place belongs to or is occupied by him for the use or benefit of himself or of another person

And

> (b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

[6] The Crown relies on the definition of constructive possession to prove its case. The definition specifically requires knowledge as to both the location and the nature of the substance. Knowledge that an item is present involves a consideration of all the available evidence and it can be inferred from circumstantial evidence where appropriate.

[7] Constructive possession does not require proof of actual handling by the accused but does require the accused to have the item in possession of another or in a place for a certain purpose. This requires an additional element of control. He must have it in that place which requires some measure of control over the item.

[8] Therefore, to be in constructive possession of the drugs and money, the accused must have knowledge and some measure of control over them.

[9] The Crown can also rely on the definition of joint possession. In order to be in joint possession with others, the accused must have knowledge, consent and a measure of control.

[10] The Crown has produced one authority for the court, ***R v Nafke,*** 2019 ABPC 193, a decision of the Honourable Judge Fradsham, who reviewed the above elements of constructive and joint possession and the authorities that define them. However, the case deals with possession of drugs in an apartment being used as a stash house rented by the accused and another but not used as a residence by the accused only as a place he frequented as opposed to the place being a vehicle as is the case before me.

[11] The decision of this court in ***R v Young,*** 2006 ABPC 36, I find to be more on point with the facts of this case. In that case the accused was driving a motor vehicle with a passenger which was stopped by police. The drugs were located in the sleeve of a jacket lying on the front seat between the driver and the passenger. The issue was whether the accused was in constructive or joint possession of the drugs in those circumstances. The court reviewed a number of authorities that referred to 'control' including being in an automobile of which he is driving or has care or control of and knowledge of what is in the vehicle. I will review those here.

[12] The New Brunswick Court of Appeal stated in ***R v. Vautour*** (1969), 1969 CanLII 1012 (NB CA), [1970] 1 C.C.C. 324 at page 327:

> ... the finding of a narcotic or drug concealed in a car owned and driven by an accused at the time of the seizure is evidence from which the inference may be drawn that the accused knowingly had such narcotic or drug in a place for the use or the benefit of himself which constitutes possession under 4(3)(a)(ii) of the Criminal Code. Under such circumstances the accused has control or a measure of control over the narcotics or drug.

[13] I do not find that ownership of the vehicle is mandatory to make a finding of possession, but is a factor that would strengthen the Crown's case. I say that bearing in mind the definition of "possession" in 4(3)(a)(ii), says, "whether or not the place belongs to the person".

[14] In ***R v. Gosselin*** [2002] B.C.J. No. 2418 the British Columbia Supreme Court reiterated that the owner and driver of a motor vehicle can be presumed in law to have knowledge and control of the contents of the trunk of his vehicle. They referred to ***R v. Anderson,*** a 1995 decision of the B.C.C.A. which stated:

> " The essence of the crime is the possession of the forbidden substance and in a criminal case there is in law no possession without knowledge of the character of the forbidden substance.
>
> Knowledge need not be proved by direct evidence but may be inferred from surrounding circumstances. In this case there was no direct evidence of knowledge.

> Knowledge, being a state of mind, may be found to exist in the same way as intent, by proper inferences from facts proved".

[15] This line of authority was followed by this court in ***R v. Wong*** (2003) 2003 ABPC 110 (CanLII), 344 A.R. 310, which states; " Where the prohibited item is found within a motor vehicle, knowledge of the prohibited nature of the item can be presumed by the person who drove, owned or rented the motor vehicle"' referring to the cases ***McKinnon*** and ***Vautour***.

[16] This line of reasoning and drawing of inferences was also applied in ***R v. Szczerba*** (2004) 2004 ABCA 189 (CanLII), 354 A.R. 10 (Alta Q.B.) which states:

> "...there is evidence that I accept that at the time of his arrest he had control of the truck and the brief case inside it, and an inference from that that he had knowledge of the four ounces of cocaine in the brief case, and indeed that he had control of it, and thus had possession in fact and in law of such cocaine."

Analysis

[17] In this case the accused is driving the truck and is the registered owner. The drugs and money are found in his vehicle that he is driving. There are two passengers, one in the back exhibiting signs of drug consumption. Drugs are found on the floor in the back, in the pouch on the back of the passenger seat and in the front console between the driver and passenger seats. Glass pipes used to consume drugs are found in plain sight.

[18] Based on the authorities referred to, these circumstances give rise to an inference that may be drawn that the accused knowingly had the drugs and money in a place being the vehicle for his use or benefit and in such circumstances he had a measure of control over the drugs and money. Knowledge, being a state of mind, can exist in the same way as intent. Where the drugs and money are found in a motor vehicle, knowledge can be presumed by the person who drove and owned the motor vehicle, as stated in the authorities referred to above.

[19] The circumstances here provides evidence that allows an inference of guilt to be drawn which proves a *prime facie* case of possession unless there is an explanation as stated in ***Young*** where no explanation was offered and there was no basis to conclude otherwise.

[20] In this case the accused did not take the stand and under oath offer an explanation subject to cross-examination. However, the police interviewed him and recorded that interview during which he gave an exculpatory statement denying knowledge of the drugs and money, that they were not his and he did not know they were in his vehicle. The statement was led by the Crown in the *voir dire* and was found to be voluntary. The interview was some 45 minutes in length and played twice for the court, the second time during the evidence of the police officer who conducted the interview. The statement was applied to the trial proper and became part of the Crown's case. The defence cannot lead self serving statements of the accused at least without the accused taking the stand in the defence case. Only the Crown can as they did here. Once they do so it becomes part of the Crown's case. The denial of knowledge and control must be weighed against drawing that inference.

[21] The defence has provided me with authorities that suggest the court should apply a ***WD*** analysis to evidence favourable to the accused or is self serving even if the accused does not take the stand and not cross-examined as to credibility. I find none of those authorities apply to the situation here where the Crown puts the accused's explanation before the court in its own case. In such a situation the explanation becomes a part of the Crown's case.

[22] During the interview, the accused stated he did not know the drugs were in the car but he knew the two passengers were doing drugs together. He did not see drugs, did not touch any drugs and does not know how the money and drugs got into the centre console. He said he had a drug problem in the past but no longer and is on naloxone to assist him in that regard. He does not know where the tin foil came from. He did not see the passengers bring anything such as drugs or money into the vehicle. He did not have pepper spray or any weapons in the vehicle. When he was pulled over, he did see the passengers pulling things out of their pockets. He did not see anyone put anything in the centre console.

[23] Throughout the interview, Cpl. Ashe, the police interviewer, continually told the accused he believed him and he thought he was being honest with him. As to how the money and drugs got into the centre console if the accused did not put them there and did not see the passengers put anything in there, the defence hypothesized there was a period of time when the officer took the accused out of the vehicle and had him under arrest by the side of the road while he waited for backup. During that time the passengers were alone in the vehicle and could have placed things in the console out of sight of the accused and the police. That amount of time was a point of disagreement between counsel. Defence counsel thought it was 10 minutes while Crown counsel said it was five minutes based on the evidence. My notes indicate seven minutes passed between the arrest of the accused (during which time he was outside the truck) and the arrest of the passengers. In any event there was time during which either passenger could have placed items in the console out of sight of the accused.

[24] I find when the Crown has led a self serving explanation by the accused which is not subject to cross-examination, and therefore difficult to make a credibility finding, there is no basis for me to disbelieve it or at least it raises a reasonable doubt that he had knowledge and control over possession of the drugs and money in the truck. I also take into account the officer conducting the interview thought he was being honest and believed what he was telling him. In those circumstances, I find I cannot draw the inference from the circumstantial evidence that he had knowledge and control and was in constructive or joint possession. In the circumstances, it is not necessary to analyze the expert opinion that the drugs were in possession at least in part for the purpose of trafficking.

Conclusion

[25] I find based on the whole of the Crown evidence, including the self serving statement of the accused, the Crown has not proven beyond a reasonable doubt the accused was in constructive or joint possession of the drugs and money and I find him not guilty of all three counts.

Dated at the City of Calgary, Alberta this 12th day of December, 2022.

B.R. Fraser
A Judge of the Provincial Court of Alberta

Appearances:

Adam Halliday
for the Crown

Patrick C. Fagan
for the Defence