

Action No.: 10069724201

E-File No.: [REDACTED]

Appeal No.: _____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

HER MAJESTY THE QUEEN

v.

[REDACTED]

Accused

PROCEEDINGS

Calgary, Alberta
May 1, 2012

Transcript Management Services, Calgary
Suite 1901-N, 601-5th Street SW
Calgary, Alberta T2P 5P7
Phone: (403) 297-7392 Fax: (403) 297-7034

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1 Proceedings taken in the Court of Queen's Bench of Alberta, Calgary Courts Centre,
2 Calgary, Alberta

4 May 1, 2012

Afternoon Session

6 The Honourable
7 Mr. Justice Nation

Court of Queen's Bench
of Alberta

9 L. Ibrus
10 P. Fagan, Q.C.
11 E. Green-Stiles

For the Crown
For the Accused
Court Clerk

14 THE CLERK:

Order in Court.

16 THE COURT:

Good afternoon. Please, be seated.

18 MR. FAGAN:

Good afternoon, My Lady.

20 **Reasons for Judgment**

22 THE COURT:

Okay, I have to apologize in advance. I have a cold today, so I will try and get through this, but I didn't do so well this morning. So if I'm coughing or whatever, I might have to adjourn. [REDACTED] -- [REDACTED] [REDACTED] is charged with two counts of possession of cocaine for the purpose of trafficking on June 2nd and June 4th, 2010, contrary to section 5(2) of the *Controlled Drugs and Substances Act*, and one count of trafficking in cocaine on June 2nd, 2010, contrary to section 5(1) of the *Controlled Drugs and Substances Act*.

Many of the elements of the offences are not in contention. There is no issue that on June 2nd, 2010, a package containing various baggies which contained approximately 553 grams of cocaine were intercepted at the DHL Courier Service and the police were called.

The issue is whether the Crown can prove beyond a reasonable doubt that the accused was the individual who took the package to DHL, or whether there is any connection proven between the package and the accused.

Likewise, there is no issue that on June 4th, 2010, the police executed a search warrant at premises described as 163 Royal Birkdale Crescent Northwest, which I will call "the

1 Royal house" in Calgary. There they located various items, including finding in a
2 safe located under the downstairs staircase, which contained approximately two
3 kilograms of cocaine.

4
5 The issue in relation to the June 4th charge is whether the accused possessed these
6 drugs.

7
8 It's admitted that the quantity of the drugs found in the Royal home and the quantity
9 of the drugs in the parcel are inconsistent with personal use, and the Crown has proven
10 that the amounts, if possession is proved, are for the purposes of trafficking.

11
12 So dealing with the June 2nd parcel, the method the Crown relies upon to identify the
13 accused in possession of the parcel is a security videotape that was entered as Exhibit 2,
14 pieced together by the security officer at DHL. He took the security video that showed
15 a red truck driving into the parking lot, an individual crossing the parking lot, an
16 individual entering into the customer service area, to leaving after having left the parcel
17 and paid for its delivery.

18
19 The video shows a red truck, but one cannot see who is driving, let alone the sex of
20 the person or how many people are in the truck, or the license plate. Likewise, from
21 the video of the person walking across the parking lot to the DHL facility, one cannot
22 determine sex or even if the person is carrying a box as they go to the door.

23
24 The only meaningful part of the video for identification is the part when one sees the
25 person's body and face as they interact with the service representative. It must be said
26 that the video was taken from the wall behind, and one cannot zero-in on the face to
27 any great degree. It has not been enlarged to see any detail. It is taken from some
28 distance away.

29
30 The sole Crown witness who dealt with the sender of the parcel, Therese Slinger
31 (phonetic), could not be certain of how the person who sent the parcel looked, other
32 than he was in his twenties, about six feet tall, and was wearing a black or blue jacket.
33 She was not asked to, nor could she have, from her evidence, identify the accused as
34 the person in the video.

35
36 Thus, at best, the Crown relies on the video of the parcel transaction and a video taken
37 of the accused two days later at the bottle depot, Exhibit 9, and a photo taken on
38 the arrest of the accused on January -- or sorry -- on June 4th, to say that the Court,
39 looking at those, should be satisfied beyond a reasonable doubt that this accused was
40 the person in the video, Exhibit 2.

1 The Crown also asks the Court to take into account the totality of the evidence. This
2 includes proof that the accused was, at the material time, the registered owner of a
3 certain red truck, and that by looking at Exhibit 2 and the video taken of the accused at
4 the bottle depot when he drove a truck to that bottle depot, to infer that the red truck
5 was his.

6
7 In addition, the parcel in question was addressed to a Todd Godboot (phonetic), at
8 1603 McCullough Apartments in Terrace, British Columbia, from a B. Godboot at
9 189 Cove Park Close Northeast in Calgary. During the search of the Royal house on
10 June 4th, 2010, where there is evidence the accused lived, the police found a
11 similarly addressed label behind the loveseat in the living room. It's Exhibit 8.
12 The argument is by association, the occupants of the house must have been involved
13 with that label, and thus can be connected to the package.

14
15 The onus to prove identity is on the Crown, and the level of proof is beyond a
16 reasonable doubt. The association, it is argued, is to be made from watching a video
17 of the person taking the package to the DHL facility, the other video of the accused, and
18 his police arrest photos. There is no other Crown witness who does the identifying, or
19 any evidence of how any connection was initially made or suspected between the
20 person in the video and the accused or his vehicle.

21
22 When I look at those photographs, I do not find that there is sufficient similarity
23 or connection to say that the Crown has met the onus it faces. It has not proven that the
24 person depicted in the video, leaving the package was the accused. The quality of the
25 video was not such to allow this type of identification.

26
27 I would comment that even having seen Therese Slinger testify, I would be hard-pressed
28 to identify her as the person -- as the customer service representative in the video, just
29 from looking at her in person and looking at the video, although she, herself, identified
30 herself as the person, in her evidence.

31
32 In addition, the defence called Brendan Davies, who testified under oath that he was
33 the person in the photograph, that he took the parcel in at the request of a person called
34 K.J., who gave him marihuana to go in and send the package. His evidence and the fact
35 that his appearance is very -- very similar to the person depicted in the video raises a
36 reasonable doubt in my mind that the identity of the person in the video is the accused.

37
38 The evidence suggested by the Crown to link the accused to the parcel by looking at
39 the totality of the evidence, for example, the coffee containers in the Royal house,
40 the red truck, and the label in the house are tenuous, and I do not find there is
41 sufficient evidence to link the accused with the parcel, to infer any type of possession

1 or connection with that parcel.

2
3 So as a result -- result I find the accused not guilty on counts 2 and 3.

4
5 In relation to the June 4th charge, count 1, the contentious issue revolves around the
6 definition of possession of a substance and its application to the facts of this
7 case. Clearly it was proven that approximately two kilograms of cocaine was found
8 in the house, and this amount, if possessed by someone, is beyond personal use and
9 possessed for the purposes of trafficking.

10
11 The connection of the accused to the house is that he was observed by two RCMP
12 officers who were keeping surveillance on the Royal house. Constable Burton
13 (phonetic) saw a red truck leave that house and go to the bottle depot. He identified the
14 male as average build, short dirty-blond hair, not clean-shaved, with some growth. He
15 identified the accused in the courtroom as the person he observed that day in the truck
16 and at the bottle depot.

17
18 Constable Susan Dugan (phonetic) followed the male individual who came from the
19 direction of the Royal house into the red truck, and she followed him in order to video
20 him at the bottle depot. She also testified she saw a blue car arrive at the Royal house,
21 and a female got out, who seemed to go into the house. And she saw a red sports car
22 pull into the driveway, and a male not fitting the description of the accused go into the
23 Royal house and exit some 40 minutes later.

24
25 During the search of the Royal house, the police found a number of exhibits which
26 are photographed and described in Exhibit 1 and a search warrant video, Exhibit 10.
27 A safe was found under the basement stairs which contained approximately two
28 kilograms of powder packaged in a number of separate baggies, which analyzed as
29 cocaine. It's Exhibits 14, 15, 16, and 17.

30
31 In addition, there were cardboard boxes under the stairs which contained
32 numerous Ziploc bags, four weigh scales, various powdered substances labeled in
33 containers such as lactose powder, shell flour, dextrose, and benzocaine, as well as a
34 respirator and an electric mixer.

35
36 In various boxes and large garbage bags in the basement, there were numerous Ziploc
37 bags and Ziploc bag boxes. An empty Folger's coffee container was found there, as
38 well as duct tape, Canada Post packaging tape, and many assorted Tupperware-type
39 containers. Various Pyrex mixing cups were found. The residue from one was samples
40 and analyzed as cocaine.

41

1 There were several tables set up and visible from the stairs, with a white residue over
2 the table top and scissors and rubber gloves lying there. A random sample of white
3 substance from the garbage bags loose in the basement analyzed as cocaine. That's
4 Exhibit 24.

5
6 A kilo press was lying on the basement floor in plain view. In addition, there
7 were invoices from various companies, a company Medichest to Shane Calkins at 26
8 Royal Birkdale Court Northwest, and another invoice from the same company to a
9 [REDACTED] at the same address. And there was a Bulk Foods invoice
10 shipped to [REDACTED], and other documents such as a cardboard off a box
11 showed shipments to [REDACTED] at the 26 Royal Birkdale address.

12
13 Upstairs in the Royal house, a passport in the name of [REDACTED] was
14 found in the bedroom drawer, issued December 11th, 2008. There was a passport of
15 another individual [REDACTED] (phonetic), in another bedroom drawer. A Shaw
16 Cable invoice made out to [REDACTED] at the Royal house address, and a CIBC Visa bill
17 to [REDACTED] at the Royal house address were seized from the kitchen of that
18 house. And a record of employment from 2007 and a letter from Capital One Credit
19 dated 2007, both addressed to [REDACTED] at 26 Royal Birkdale Crescent were found
20 in the desk downstairs. And those are Exhibit 19.

21
22 From the video of the interior of the Royal house, it clearly was being lived in. It was
23 not an empty residence or a stash house. The only logical conclusion to draw is that
24 the upstairs was used for sleeping and a dwelling house, and the downstairs was
25 being used to repackage drugs. Anyone going downstairs and seeing the tables,
26 the press, would be suspicious of drug activity, and the contents of the boxes and bags
27 strewn around would rouse further -- further suspicions.

28
29 [REDACTED] testified, invoking the protection of section 5 of the *Canada Evidence*
30 *Act* and section 13 of the *Charter*. His evidence was that he was the owner of the
31 Royal house, and his younger brother, the accused, was living there in June of 2010.
32 His evidence is that his arrangement was his brother and his brother's girlfriend,
33 Amy, could live there and use the main floor and upstairs, but they were to stay out of
34 the downstairs. That was [REDACTED] area.

35
36 [REDACTED] testified he was running a cocaine operation downstairs. He
37 would go over to the Royal house two or three times a week, usually when his brother
38 was not there. He would cut the cocaine with other items, and package and press it. He
39 testified he would usually tidy up and put things away, and he would always keep the
40 cocaine in the safe whenever he was not there. He testified he had -- he knew the
41 combination to the safe.

1
2 [REDACTED] testified that the downstairs was not locked, and anyone with access
3 to the main floor could go downstairs, if they wished. [REDACTED] had keys to the
4 Royal residence, so he could come and go as he pleased, and he acknowledged he had no
5 way to keep the accused or anyone else in the house out of the basement area.
6

7 [REDACTED] testified that the label, photo 38 in Exhibit 1, was written by him, and
8 he had no explanation of how it got upstairs. He could only speculate why it was there.
9

10 [REDACTED] testified that when he was there, the accused never came downstairs,
11 and to his knowledge, the accused didn't know of the operation. He testified he
12 never talked to the accused about it.
13

14 [REDACTED] admitted to having a criminal record, not only for drug offences, but
15 also for breaching conditions on his release and he acknowledged he had served
16 two terms in jail.
17

18 [REDACTED] testified that when he cut crack cocaine downstairs, there was an
19 odour when he took it out of the microwave, and he had a ventilator or a respirator
20 for the smell when he cut cocaine in the microwave, as it stinks.
21

22 Possession is defined in the *Criminal Code* and adopted in the *Controlled Drugs and*
23 *Substances Act*. It can be of three types: Personal possession; constructive
24 possession; or joint possession.
25

26 Personal possession requires the person to have the item in his personal possession
27 knowingly. Constructive possession is defined as having it knowingly in the actual
28 possession or custody of another person or any place, whether or not that place belongs
29 to him or is occupied by him, for the use and benefit of himself or another person. And
30 joint possession is where one or more persons, with the knowledge and consent of the
31 rest, have anything in their custody and possession, then it is deemed to be in the
32 custody and possession of each and all of them.
33

34 Here, there is no suggestion the accused had personal possession. The drugs were not
35 found on his person, body, or in his hands. It is argued by the Crown that the facts
36 support a finding that the accused had constructive or joint possession of the
37 cocaine in the basement.
38

39 For constructive possession, the Crown has to prove beyond a reasonable doubt that the
40 accused had the cocaine in some place -- here, the Royal house -- for the use or
41 benefit of himself. The Crown must prove the accused was aware of the possession

1 in that place, more than quiescent knowledge. It could not have been there by
2 ignorant mistake or accident. The accused has to have the intention to possess the item
3 and an element of control.

4
5 The Crown argues this can be inferred from the fact that the accused lived there, and if
6 unaware of the operation downstairs, he would had to have been wilfully blind to the
7 activities going on downstairs, based on [REDACTED] evidence.

8
9 For joint possession, the Crown must prove knowledge, consent, and a measure of
10 control on the part of the person deemed in possession. The Crown argues the Court
11 can find the cocaine was in the joint possession of the accused and [REDACTED] it
12 was downstairs with the knowledge and consent of both and under their control.

13
14 So the question here is whether there is sufficient evidence to connect the accused to the
15 Royal house, and if he is connected to the property, is he in constructive or joint
16 possession of the drugs found there? Can it be said he was aware of the drugs? Did he
17 have the necessary intention to possess them and the element of control?

18
19 Knowledge and control have to be inferred here, and that has to be considered
20 carefully where there is non-exclusive occupancy.

21
22 I find from the evidence that the accused was parking his vehicle in the driveway of
23 the Royal residence. It appeared that he approached and left the house, and he made a
24 run to the bottle depot, leaving from and going to the house. I find he did not have
25 exclusive possession of the house. Other individuals were seen to come and go while
26 the police had surveillance set up.

27
28 Shaw Cable and CIBC invoices to the Royal house would seem to put him using that
29 address. His passport was there in the bedroom drawer.

30
31 From his physical presence in the house and the nature of the documents found in the
32 house and the police videotape during the search showing the pictures and the details of
33 the living space, the clothes, the type of activities one can infer from those, I find
34 that the accused was using the residence at least to receive household bills and store
35 documents, and I infer that he was living there.

36
37 I have to consider the -- the evidence of [REDACTED] From that evidence, I accept
38 that the accused had lived in the house at the material times and had done so for several
39 months, while it was owned by [REDACTED]. Despite [REDACTED] evidence that
40 he told his brother not to go downstairs, and his evidence that [REDACTED]
41 himself used the downstairs, I find the accused must have had knowledge of the drugs

1 and the drug activity downstairs. He lived there eight to ten months. His brother was
2 coming and going. There would have, at times, been a strong odour from his brother
3 cooking cocaine downstairs. The whole restriction from going downstairs with no
4 explanation, coupled with the criminal background of his brother, and no lock to separate
5 access to the downstairs, leads me to infer that the accused knew of the drugs
6 downstairs, or if he was not aware, that he was, in law, wilfully blind to their
7 existence.

8
9 The Crown must also show control over the drugs. And although I approach the
10 evidence of [REDACTED] with a healthy suspicious -- suspicion, it does, in my
11 mind, raise a reasonable doubt as to whether the accused had the requisite control over
12 the drugs in question. I accept that they were stored in a locked safe, as they were found
13 by the police.

14
15 Although there is a suspicion that the accused was involved in the operation with his
16 brother, from the invoices as -- in his name, the other documents down -- found
17 downstairs, and the label near the loveseat upstairs, when I look all -- at all of the
18 evidence, I do not find that the only reasonable inference is that, as well as knowledge,
19 the accused had control over the cocaine sufficient to prove constructive or joint
20 possession in law.

21
22 And as a result, I find the accused not guilty on count 1 of the Indictment.

23
24 THE COURT: [REDACTED] I have to say this to you.

25
26 MR. FAGAN: Stand up.

27
28 THE COURT: The finding is that -- not -- is not that
29 you're innocent, but that you are not guilty of the charges. If you are as smart and as
30 clean as your brother suggests, I trust you've learned from this to be suspicious and
31 careful of association of places where you might be wilfully blind to the presence of
32 drugs.

33
34 I hope not to see you as accused in criminal court again, but whether that happens is
35 totally up to you.

36
37 Thank you, Counsel, for your presentations.

38
39 MR. FAGAN: Thank you, My Lady.

40
41 THE COURT: I take it -- do you -- do you need an order that

1 the drugs be destroyed or --

2

3 MS. IBRUS: I would ask for the usual forfeiture order in
4 any event, and that the personal documents can be returned to Mr. [REDACTED]
5 any personal documents in his name.

6

7 MR. FAGAN: What --

8

9 MS. IBRUS: I don't know if his passport was returned or
10 not. It's -- it's in evidence right now --

11

12 THE COURT: Right.

13

14 MS. IBRUS: -- but --

15

16 THE COURT: Okay. Anything marked as an exhibit, I guess,
17 after the necessary appeal period, that's documentary that Mr. [REDACTED] wants -- and
18 perhaps you can identify that, at some point, for the exhibits --

19

20 MR. FAGAN: I might be able to make this real quick, My
21 Lady.

22

23 THE COURT: -- people.

24

25 MR. FAGAN: I know it's easiest for the police if we have
26 a blanket order. All you need back is the passport; is that correct?

27

28 THE ACCUSED: Yeah.

29

30 MR. FAGAN: All he is asking for --

31

32 THE COURT: He's after the passport?

33

34 MR. FAGAN: -- is the passport.

35

36 THE COURT: All right. So then the passport -- that exhibit
37 will be returned to the accused after the appeal period, and the rest of anything
38 could be forfeited to the Crown.

39

40 MR. FAGAN: By consent.

41

1 MS. IBRUS:

Thank you, My Lady.

2

3 THE COURT:

Okay, all right. Thank you --

4

5 MR. FAGAN:

Thank you.

6

7 THE COURT:

-- very much.

8

9 THE COURT CLERK:

Order in court.

10

11

12 PROCEEDINGS CONCLUDED

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1 **Certificate of Record**

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I, Elizabeth Green-Stiles, certify that this recording is the record made of the evidence in the proceedings in Court of Queen's Bench held in courtroom 1504 at Calgary, Alberta on the 1st day of May, 2012, and that I was the court official in charge of the sound-recording machine during the proceedings.

1 **Certificate of Transcript**
2

3 I, Sarah Bodnar, certify that
4

5 (a) I transcribed the record, which was recorded by a sound-recording machine, to the
6 best of my skill and ability and the foregoing page area a complete and accurate
7 transcript of the contents of the record, and
8

9 (b) the Certificate of Record for these proceedings was included orally on the record and
10 is transcribed in this transcript.
11
12

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14 Sarah Bodnar,
15 Order No. 9527-14-1
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35 Pages: 14
36 Lines: 539
37 Characters: 18609

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Detailed Transcript Statistics	
Order No. 9527-14-1	
Page Statistics	
Title Pages:	1
ToC Pages:	1
Transcript Pages:	12
Total Pages:	14
Line Statistics	
Title Page Lines:	50
ToC Lines:	4
Transcript Lines:	485
Total Lines:	539
Visible Character Count Statistics	
Title Page Characters:	490
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