Citation: *R.* v*. Lewis,* 2007 YKTC 83

Date: 20071127
Docket: 07–00196
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Chief Judge Faulkner

R e g i n a

v.

Dustin Stuart Lewis

Appearances:
Jennifer Grandy — Counsel for Crown
Nils Clarke — Counsel for Defence

REASONS FOR JUDGMENT

[1] Dustin Stuart Lewis is charged with possession of cocaine for the purpose of trafficking contrary to s. 5(2) of the *Controlled Drugs and Substances Act* as well as with possession of cocaine.

[2] On June 29, 2007, Mr. Lewis was operating a motor vehicle in downtown Whitehorse when he was seen by Constable Cook of the Royal Canadian Mounted Police. Cst. Cook knew that Mr. Lewis did not have an operator's licence. He also believed that there was a warrant for Mr. Lewis' arrest. He decided to stop Mr. Lewis and activated the emergency equipment on his police car.

[3] Mr. Lewis stopped his vehicle but not before he had driven a couple of blocks. Mr. Lewis told the officer later that he had used the time to swallow between twelve and twenty rocks of crack cocaine that he had in his possession.

[4] A search of Mr. Lewis incidental to his arrest produced several small pieces of crack cocaine and two plastic bags of powder cocaine. The first bag, which contained 5.7 grams of the drug, fell out of Mr. Lewis' pant leg. The second bag, containing 5.9 grams of

cocaine, was located in his left sock. A search of the vehicle produced a box containing a number of sandwich sized zip lock plastic bags located under the driver's seat.

[5] Thus, in total, Mr. Lewis possessed 11.6 grams of powder cocaine and at least twelve rocks of crack cocaine of unknown weight. The powder cocaine, if sold by the gram, would be worth at least $1,200.

[6] Constable Gerald Walker of the Whitehorse RCMP Drug Section was qualified to give expert evidence in relation to street level cocaine trafficking and cocaine use. I accept the evidence he provided, which appeared to be based on a solid foundation, including knowledge of the Whitehorse drug scene. He testified that, although a very heavy user of cocaine could consume the amount of cocaine possessed by Mr. Lewis in two or three days, he believed Mr. Lewis' intention was to traffick. In support of this opinion, Cst. Walker pointed to five matters in particular.

[7] First, Cst. Walker said that a even the very heavy user would be unlikely to possess at one time the amount of cocaine that Mr. Lewis had because it was expensive, and because the user would fear being "ripped off" if he had that much cocaine on his person. Although Cst. Walker did not say so, one might logically add that a user would also fear being caught by police in possession of a large quantity of drug. Cst. Walker added that, in his opinion, even street level traffickers would be unlikely to possess this amount of cocaine at one time. Typically, they would be supplied with two or three grams at a time and, after selling that, would obtain more.

[8] Second, Cst. Walker opined that a user would rarely possess two types of cocaine at once, since most users prefer either crack or powder cocaine. Third, Cst. Walker pointed to the fact that the powder cocaine was wrapped in two separate baggies. Forth, Cst. Walker stated that the finding of the baggies in the car was consistent with trafficking as such bags are commonly used to package cocaine.

[9] Finally, Cst. Walker noted that nothing was found that would indicate the drugs were for Mr. Lewis' personal use. For example, since crack is usually smoked, one might expect to find a crack pipe. If cocaine was being injected, there should be a syringe. If cocaine was being snorted, one would commonly find paraphernalia such as a mirror or other flat surface, a razor blade, a straw or rolled up banknote or a coke spoon.

Cst. Walker noted as well, that in his experience, a heavy user, having obtained a supply of drug, would want to use some of it more or less immediately and so would have the required apparatus readily at hand.

[10] The defence called no evidence, arguing simply that the Crown's case did not prove beyond a reasonable doubt that Mr. Lewis possessed the cocaine for trafficking as opposed to his own personal use. Mr. Clarke pointed out that the quantity of drug possessed, though relatively large, was not beyond that which a user might possess. He further noted that, while nothing was found to suggest personal use, neither was anything located, such as money or score sheets, that might indicate an intention to traffick.

[11] Obviously, the Crown bears the burden of proving the case beyond a reasonable doubt. In a case such as this, the Crown must prove that the accused possessed the controlled drug and that he intended to traffick the drug. Absent direct evidence from the accused from a wiretap or a confession, the intent to traffick will need to be proved through circumstantial evidence and the Court will be asked to draw an inference from that evidence as to the accused's state of mind.

[12] Where a verdict of guilty is to be based on circumstantial evidence, the trier of fact "must be satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from the proven facts." *R .v. Cooper*, (1977) 34 C.C.C. (2d) 18 (S.C.C.). This rule dates back to *Hodge's Case,* (1838) 168 E.R. 1136.

[13] In the case of Mr. Lewis, the quantity of drug, the fact that there was more than one type of drug and that it was in more than one package, reasonably leads to the inference that he intended to traffick. On the evidence, there is really nothing that points the other way. There was no evidence of personal use. I do not forget that Mr. Lewis ingested some of the cocaine just before he was stopped, but this was clearly done in an effort to avoid being found in possession of the drug.

[14] The finding of the zip lock plastic bags in the car is also consistent with trafficking – though the finding of the bags, in and of itself, is not terribly significant since the vehicle was not owned by Mr. Lewis and the bags obviously have lawful uses. These bags are commonly used to package cocaine. It appears that at least one of the bags in which Mr. Lewis's cocaine was packaged was not a zip lock bag. However, little turns on this. If,

Mr. Lewis received the drug in a plastic bag, the bag would be whatever kind the vendor utilized. The bags under the seat of the car would be used to repackage the drug.

[15] No single fact in the present case leads conclusively to the inference that Mr. Lewis intended to traffick. Rather, it is the totality of all the facts suggestive of trafficking, together with a paucity of facts pointing toward personal use, that leads to such a conclusion.

[16] It could be argued that an inference of an intention to traffick should not be drawn because it would not be too great a mental feat to imagine scenarios wherein a user would possess this quantity of cocaine for his own consumption. To use a locally relevant example, one could imagine a cocaine user planning on working for an extended period in an isolated camp. He might provision himself with a much larger quantity of cocaine than normal to get around the problem of resupply.

[17] However, the law is clear that such competing theories or inferences must arise from the evidence. Otherwise the court is simply speculating.

[18] This point is well illustrated in *R. v. McIver* [1965] 1 C.C.C. 210; affirmed [1965] 4 C.C.C. 182 (Ont. C.A.); affirmed [1966] 2 C.C.C. 289n (S.C.C.). McIver was charged with careless driving after crashing into a parked car. The facts were simple. The road was clear, visibility was good and McIver was noted to have a strong smell of alcohol about him on his arrest. Convicted at trial, he appealed. In affirming his guilt, McRuer C.J.H.C. said this:

> It is argued that all possible suggestions which would be consistent with the view that the collision was not due to carelessness must be excluded whether there is any evidence to support them or not. For example, a suggestion that a child might have run into the path of the automobile and that the appellant was diverted from his course while trying to avoid hitting the child, or that a passenger might have been in the automobile and touched the steering wheel, or a multitude of other similar imaginative suggestions. To admit such argument would be to destroy the efficacy of circumstantial evidence in criminal cases. Such an argument disregards the express words of the rule in Hodge's Case which has been applied in

> circumstantial cases for over 125 years. The rule makes it clear that the case is to be decided on the facts, that is, the facts proved in evidence, and the conclusions alternative to the guilt of the accused must be rational conclusions based on inferences drawn from proven facts. No conclusion can be a rational conclusion that is not founded on evidence. Such a conclusion would be a speculative, imaginative conclusion, not a rational one.

[19] In *R. v Torrie*, (1967) 3 C.C.C. 303 (Ont. C.A.), the Court again dealt with the interplay of reasonable doubt, inferences and speculation. Torrie was charged in connection with a traffic accident. He was the only survivor and there were no other witnesses to the collision. There was evidence that he had been drinking heavily before driving and that at the time of the collision he was on the wrong side of the road. Torrie's tire was punctured, and although an expert testified that the puncture likely occurred during the collision, on cross-examination he stated that it was possible that the tire was punctured immediately before the accident and could have precipitated Torrie's swerve into the wrong lane. There was no evidence of a sharp object in the road. This hypothetical scenario served as the '[substantial], if not [whole]' basis for finding reasonable doubt as to Torrie's guilt, and this was an error in the absence of evidence. The Crown's case had established that Torrie was impaired and was on the wrong side of a well-marked highway in reasonably good road conditions and with unobstructed visibility. According to Evans J.A.:

> I recognize that the onus of proof must rest with the Crown to establish the guilt of the accused beyond a reasonable doubt, but I do not understand this proposition to mean that the Crown must negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused.
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> It is abundantly clear from the reasons for the judgment of the learned trial Judge that he would have found the respondent guilty of either criminal negligence or the included offence of dangerous driving, had it not been for the conjectural possibility logically assented to by the witness McMillan.

Torrie has been cited approvingly by all levels of court, and in virtually every jurisdiction.

[20] At the end of the day, the proven facts satisfy me beyond a reasonable doubt that the accused, Dustin Lewis, was in possession of cocaine for the purpose of trafficking. There is no evidentiary basis to conclude otherwise. See *R. v. Noble,* [1997] 1 S.C.R. 874.

[21] I find the accused guilty on count one. Count two, the possession charge, is conditionally stayed.

FAULKNER C.J.T.C.