Citation: *R. v. McMillan,* 2015 YKTC 31

Date: 20150911
Docket: 13-00620
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Chief Judge Ruddy

REGINA

v.

JASON MCMILLAN

Publication of information that could disclose the identity of the complainant or a witness has been prohibited by court order pursuant to s. 486.5 of the *Criminal Code*.

Appearances:

Eric Marcoux — Counsel for the Crown
Jeremy Guild — Counsel for the Defence

REASONS FOR JUDGMENT

[1] Jason McMillan is before the court charged with one count of possession of cocaine for the purpose of trafficking. The charge is set out as follows:

> Jason McMILLAN on or about August 30, 2013, at or near Whitehorse, Yukon Territory did possess a substance included in Schedule I to wit cocaine for the purpose of trafficking contrary to section 5(2) of the Controlled Drugs and Substances Act.

[2] The accused was arrested as part of the larger Project Monolith investigation into a significant drug trafficking operation between the Lower Mainland of British Columbia

and the Yukon. As part of this Project, the police utilized a police agent, D.S., who was involved in arranging the street-level trafficking of drugs brought up from British Columbia. D.S. is being compensated for his cooperation and is now subject to witness protection under a new identity. There are several other related prosecutions making their way through the court system.

[3] For this prosecution, the allegation is that Mr. McMillan was involved in the packaging and transportation of drugs from B.C. to Whitehorse. The evidence presented by the Crown is circumstantial, and the Crown's case rests mainly on two fingerprints found on material used to package a one-kilogram brick of cocaine.

EVIDENCE

[4] The Crown called four witnesses at Mr. McMillan's trial: D.S., the police agent; Sgt. Douglas Spencer, a fingerprint expert; Cst. Andrew Greer, who was D.S.' handler, and; Cpl. Lindsay Ellis, the primary investigator for Project Monolith.

Evidence of D.S.

[5] D.S became a police agent on August 29, 2013. Prior to that date, he had, from time to time, been a police informant. D.S. has a long history of involvement in Whitehorse drug circles, having trafficked cocaine and marijuana for approximately a 12-year period prior to becoming an agent.

[6] At the time D.S. became an agent, he was working with a group of people, the main players of which were Asif Aslam, Jesse Ritchie, Michael Brereton, Shaun Naidu and Matthew Truesdale. Mr. Aslam and Mr. Truesdale reside in southern B.C. Mr.

Ritchie appears to divide his time between southern B.C. and the Yukon. Another individual, known by the first names Jimmy or Kuntoniah and by the last names Graham or Papequash, was an associate of Naidu and Brereton in the local drug trade. For the purposes of this decision, he will be referred to as Jimmy Graham.

[7] The charge against the accused flows from a police scenario that D.S. participated in on August 30, 2013, the day after becoming a police agent. On that day, D.S. attended a house in Whitehorse to pick up a kilogram of cocaine that Jesse Ritchie had advised him was ready for pick-up.

[8] D.S.' conduct as a drug dealer historically involved him, in partnership with Mr. Ritchie, paying suppliers in B.C. for kilogram-sized bricks of cocaine, which they would cut and repackage for street-level distribution once they reached Whitehorse. Typically they would receive at least one or two kilos of cocaine a month, at $75,000 a kilo. At the time of the police scenario, shipments were occurring at the rate of one kilo every three weeks. The transportation of the drugs from B.C. to the Yukon was frequently arranged by Aslam, but sometimes by Truesdale. Once re-packaged in Whitehorse, a kilogram of cocaine would sell on the street for approximately $90,000.

[9] Typically, D.S. would pass along money for the previous shipment of cocaine at the same time that he picked up the next shipment. Often the person who physically transported the drugs from B.C. to Whitehorse would be present to receive the cash.

[10] With respect to the August 30 transaction, through a series of in-person and electronic exchanges with Jesse Ritchie, D.S. was advised to pick up the cocaine at the residence of Brereton and Naidu. While under police surveillance, he drove to the

house. Jimmy Graham was in the driveway and directed D.S. to the stove, where the drugs had been concealed in the bottom drawer. D.S. retrieved the drugs, which were in a brown paper bag, and returned immediately to his police handlers at a safe house. Evidence suggested that Jesse Ritchie had left the payment for the shipment in the same stove drawer earlier, but it had already been removed when D.S. retrieved the cocaine.

[11] D.S. was not aware of any involvement by the accused in the transaction. He testified that he did not really know Mr. McMillan, but that he had met him at least one time. The only meeting D.S. could recall was at the Yukon Inn two to four weeks before he became a police agent. I pause to note that it is common ground that D.S. was outside of the territory between August 9 and 29, having been sent away by the RCMP both for his protection and to negotiate the terms of his work as an agent.

[12] D.S. did not identify the accused as someone who had delivered cocaine to Whitehorse in the past. With respect to the cocaine picked up by D.S. on August 30, he had been told by Jesse Ritchie that it was being delivered by Truesdale. However, D.S. did not know who the driver actually was or when it was delivered. Although sometimes money was exchanged directly with the driver for the drugs, as noted, on this occasion the money had been left by Jesse Ritchie in the same oven drawer that the cocaine was put in. In cross-examination, D.S. acknowledged that there was a third person at the house, apart from himself and Jimmy Graham, that could have been the delivery driver, but that person was not familiar to him. He did not identify him as the accused.

[13] D.S. has been generously compensated for becoming a police agent. He has already received $117,500 and will receive another $117,500 once he has finished testifying in the Project Monolith trials. He was paid a stipend of $1,500 a week during the active phases of the investigation, amounting to $22,500. He was also sent to Mexico on an all-expenses-paid trip as part of a plan to make him inaccessible to his associates while the terms of his agency were being finalized. He will get additional long-term benefits once in witness protection.

Evidence of Cst. Andrew Greer

[14] Cst. Greer was D.S.' handler during his time as a police agent. As D.S. had difficulty in recalling the substance of his exchanges with Mr. Ritchie in relation to the cocaine delivery, Cst. Greer provided details of the arrangements made for the August 30 transaction as they were relayed to Cst. Greer by D.S. in August of 2013. Of note, he indicated that D.S. had advised of a meeting with Mr. Ritchie on August 27 in which Mr. Ritchie indicated that the cocaine was already in Whitehorse, which had happened over the last couple of days.

[15] Cst. Greer also confirmed that D.S. was out of the territory between August 9 and 29. Cst. Greer was present when D.S. left the safe house to make the pickup and when D.S. returned to the safe house with the brick of cocaine.

Evidence of Cpl. Lindsay Ellis

[16] Cpl. Ellis was the primary investigator in Project Monolith. She conducted surveillance while D.S. was retrieving the cocaine from the Porter Creek house on

August 30, 2013. She testified to seeing a blue Jetta in the driveway of the residence and noting a male individual with his head and upper body bent into the rear of the vehicle. She was unable to identify the individual, but testified that the vehicle, distinctive due to its tinted windows, is associated with Jimmy Graham.

[17] Cpl. Ellis also testified about a different delivery of cocaine to Whitehorse on August 6, 2013, which D.S. was also involved in distributing, notwithstanding a caution from police that he was not to engage in criminal activity.

Evidence of Sgt. Douglas Spencer

[18] Sgt. Spencer was qualified as an expert in the detection, analysis, comparison and identification of friction ridge impressions, or fingerprints.

[19] The package that was retrieved by D.S. was taken directly from the safe house to the RCMP lab. The one-kilogram brick of cocaine had been wrapped in cellophane that was taped with red "Tuck Tape". That package was in a heat-sealed plastic wrapper. The sealed package had been loosely wrapped in a white plastic “Petro-Canada” bag - a standard grocery or convenience store plastic bag - which in turn was in a brown paper "Super A" bag. D.S. had retrieved the brown paper bag from the house.

[20] Chemicals used to detect fingerprints were employed on all the layers of packaging. While there were a number of prints that were incapable of being identified, there were two on the outside of the Petro-Canada bag that could be linked back to Jimmy Graham and two that Sgt. Spencer was able to link to the accused. In order to do this, Sgt. Spencer queried the Automated Fingerprint Identification System ("AFIS")

with the images he developed. He was then able to retrieve a “ten print fetch” with all ten of the accused's fingerprints, and it was using those that he was able to conduct the ridgeline comparison to determine identity.

[21] The accused's left thumbprint was located on the Tuck Tape used to tape the cellophane, immediately next to the brick of cocaine and inside the heat sealed plastic wrap. The orientation was parallel to the long edge of the brick. A fingerprint from the accused's left index finger was on the interior of the Petro-Canada bag, near the handles at the bag’s opening.

[22] Sgt. Spencer testified that there is no scientific way to date the time a fingerprint was left on an item, and that such a date is generally established through circumstantial evidence.

[23] In cross-examination, Sgt. Spencer agreed that the print on the Tuck Tape would have been placed before the brick of cocaine was heat sealed. He also agreed that it is logical that the heat-sealed plastic wrapper was put in place as a means to help avoid detection, and that this wrapping would most likely have been done before the drugs were transported to Whitehorse. He has seen drugs packaged with cellophane, Tuck Tape and heat-sealed plastic in other cases.

SUBMISSIONS

Crown

[24] The Crown acknowledges the circumstantial nature of its case and says that the only reasonable inference that can be drawn from the evidence is that the accused was

in possession of the cocaine, in Whitehorse, on or about August 30, 2013. As such the offence has been proven beyond a reasonable doubt.

[25] He says that the accused's fingerprint could only have been on the Tuck Tape because he was involved in packaging the brick of cocaine. It would have been impossible for him to have been unaware of the nature of the substance he was wrapping. This demonstrates possession. This is bolstered by the accused's second fingerprint on the Petro-Canada bag, which suggests that the accused handled the cocaine throughout its packaging and transportation.

[26] In terms of proving the accused's possession of the cocaine on the date and at the place particularized in the information, the Crown says that the only reasonable inference on all of the evidence is that the accused packaged the cocaine and drove it to Whitehorse. Crown says it is obvious that the accused had acted in a delivery capacity before, given the encounter between D.S. and the accused three weeks prior to the August 30 drug transaction, which coincided with the August 6 cocaine delivery. When the fingerprints on the packaging of this cocaine and the presence of the accused in Whitehorse at the time of an earlier cocaine delivery are taken together, the logical inference is that the accused wrapped this package and then transported it to Whitehorse.

Defence

[27] Defence counsel argues strenuously against the inferences the Crown is urging.

[28] He raises questions about the reliability of the fingerprint evidence, but says that, even if the fingerprints are accepted as belonging to the accused, the location of the fingerprints are consistent with innocent handling of a roll of Tuck Tape and a Petro-Canada bag. The Crown's evidence therefore falls short of proof of possession.

[29] Defence also says that even if the fingerprints are accepted as evidence that the accused had been in possession of the cocaine, the location of the thumbprint on the Tuck Tape under the heat sealed wrapping is more consistent with it being handled by him in the Lower Mainland area of B.C. than in Whitehorse. He points to the evidence that it is highly likely that the heat-sealed packaging would have been put in place before the cocaine was transported as it helps prevent detection, and also noted that it would protect the product. Petro-Canada bags are widely available across Canada, and there is nothing to say this particular one originated in Whitehorse.

[30] The defence points to the complete absence of any evidence that the accused was in Whitehorse on or about August 30, 2013. There are no credit card statements, no gas receipts, no hotel bills or any other item that would put the accused here. While there was a third person at the house where the drugs were retrieved, he was not identified by D.S. as the accused. Defence says it is likely that this unidentified person was the delivery driver and the evidence is that he was not the accused.

[31] Defence also says that the evidence that the Crown wants to rely on about the accused being in Whitehorse at the time of the August 6 cocaine delivery should be treated with extreme caution. First of all, D.S. was not specific about seeing the accused on that date. His evidence was that they had met at the Yukon Inn two to four weeks

before August 30, which puts the encounter anytime between roughly August 1 and August 16. The fact that D.S. was not in Whitehorse between the 9th and the 29th means that his memory of the time, already vague, is also untrustworthy.

[32] Indeed, defence says that D.S.' evidence is unreliable for several reasons, including his criminal history, his compensation as a police agent, and his extensive marijuana use. Apart from issues with credibility, he pointed to several instances where D.S. was unable to recall significant details about other events, including an inability to situate them in time with respect to this transaction. This included his retrieval of his first shipment of marijuana the day before the cocaine was picked up and the dates and times of most of the conversations he had while arranging the August 30 drug pick-up.

ANALYSIS

[33] Despite lengthy argument on other aspects of the evidence, I am of the view that this case can be disposed of on the narrow basis of whether the Crown has proven the time and location of the offence, as particularized in the information, beyond a reasonable doubt. In so doing, I am starting from the premise that the fingerprints are Mr. McMillan's, and that their location on the packaging of the cocaine is sufficient to give rise to the inference of possession for the purpose of trafficking. Given my findings with respect to time and location, it is unnecessary, in my view, to make definitive findings with respect to the arguments raised by the defence on these two issues.

[34] Although not all particulars set out in a count are essential to the charge, a count must be drafted so as to identify the transaction in a manner that allows the accused to understand the case to be met (*R. v. Saunders,* [1990] 1 S.C.R. 1020, *R. v. Martin,*

2006 YKTC 36). This common law principle is codified at s. 581(3) of the *Criminal Code*:

> 581(3) A count shall contain sufficient detail of the circumstances of the alleged offence to give to the accused reasonable information with respect to the act or omission to be proved against him and to identify the transaction referred to, but otherwise the absence or insufficiency of details does not vitiate the count.

[35] This section has been called the converse of the rule about surplusage, which says that any non-essential element particularized in a count is surplusage and not required to be proven for a conviction. Section 581(3) and the rule about surplusage deter courts from approaching criminal charges in a manner that focuses excessively on technicalities. Even the rule about surplusage, however, is subject to the proviso that the Crown is obligated to prove the particulars if the accused's defence has been prejudiced by his reliance on the content of the charge as drafted (*R. v. Vezina,* [1986] 1 S.C.R. 2).

[36] In the case at bar, the particularized date of on or about August 30, 2013 and the particularized place of Whitehorse, Yukon, are, in my view, essential elements that the Crown is required to prove. These details are necessary to the accused's understanding of the allegation against him and the case he has to meet to defend himself. In the event that I am wrong about that, I am also of the opinion that the accused relied on those details when considering how to mount his defence. There would have been a number of strategic decisions made on the basis of the charge as drafted, including ones about how to cross examine the Crown's witnesses. Furthermore, the case law provided by counsel clearly establishes that it is open to a court to convict on the basis

of a single fingerprint where guilt is the only reasonable inference which can be drawn, and no innocent explanation has been provided. Had the location in the information been particularized as the Lower Mainland rather than Whitehorse, this may well have impacted on the accused's decision as to whether or not to testify and provide such an explanation. Though, of course, if the possession of the narcotics is found to have occurred in B.C. as opposed to in the Yukon, a question arises about the jurisdiction of this court to try the charge.

[37] In any event, I am not satisfied that the Crown has proven either the date or the location of the offence as set out in the charge against Mr. McMillan.

[38] With respect to the location, as observed by defence counsel, there is no direct evidence that the accused was in Whitehorse at any time close to August 30, 2013. There is no paper trail indicating that he took a trip here, and no evidence that anyone saw him in Whitehorse or the Yukon around that time. It is significant that the third individual that was present at the Whitehorse house during D.S.' drug retrieval on August 30 was not identified by D.S. as the accused.

[39] As well, the Crown's circumstantial case is not able to bear the weight of the inferences that I am required to make to get to a finding that the accused was in Whitehorse, or indeed in the Yukon, on or about August 30, 2013. Although there is some evidence that Mr. McMillan was in Whitehorse around the time of the earlier cocaine delivery on August 6, 2013, the date of the Yukon Inn meeting cannot be fixed with anywhere near the precision the Crown urges. On D.S.' evidence it could have been anytime during the first two weeks of August; not necessarily on August 6 or even

August 4,5 or 7 for that matter. Indeed, taking D.S. at face value, the meeting could have taken place while he was in Mexico pursuant to the arrangements made by the RCMP. The inability to fix this date with any certainty renders an already weak piece of circumstantial evidence even weaker.

[40] Furthermore, I have serious questions about the reliability of D.S.' evidence with respect to meeting Mr. McMillan at the Yukon Inn. Firstly, I would note the notorious frailties of identification evidence have led courts to be particularly cautious in this area. The identification in this case amounts to nothing more than an assertion that D.S. had seen Mr. McMillan on one prior occasion some two years before the trial date. There was no evidence given in relation to the nature or length of the meeting, any peculiarities in appearance or manner, or of any other details of unique significance that would provide a reasonable basis upon which to conclude that D.S. would be in a reliable position to positively identify Mr. McMillan.

[41] My concerns with respect to the reliability of the evidence concerning the Yukon Inn meeting is compounded by D.S.' apparent difficulty with recollection about the details leading up to the police scenario, in particular, with respect to his exchanges with Mr. Ritchie regarding the shipment. His inability to recall all of the specific details is not altogether surprising given the passage of time, but I find it difficult to accept that D.S. is able to identify Mr. McMillan two years after a single meeting with any degree of certainty, when he cannot recall meeting with his partner, Mr. Ritchie, to discuss the details of the cocaine shipment giving rise to the charge before me.

[42] In the result, I am not satisfied that there is any evidence upon which to conclude, beyond a reasonable doubt, that Mr. McMillan had ever been in the Yukon prior to these proceedings.

[43] I also find that the location of the accused's fingerprints is more consistent with his having been in contact with the brick of cocaine in B.C. than in Whitehorse. I agree with defence that it is only logical that the heat-sealed layer of packaging would have been in place during the transportation of the cocaine from the Lower Mainland of B.C. to Whitehorse. Transporting the brick without this layer of protection would have made it more vulnerable to things like water and friction and also would have rendered it more easily detected in the event that the car was searched en route to Whitehorse. The fact that the accused's left thumbprint is on Tuck Tape sealed with the cocaine under this layer strongly suggests his contact with the brick of cocaine took place before it left the Lower Mainland. Although it is true that the other print could have been left on the Petro-Canada bag in Whitehorse, or indeed anywhere between the Lower Mainland and Whitehorse, it is equally plausible that this contact occurred in the Lower Mainland. The inference the Crown wants me to draw about where the accused had contact with the cocaine is far from the only reasonable one on the evidence before me.

[44] With respect to the time of the offence, there is no evidence which puts Mr. McMillan in proximity to the cocaine on August 30. The Crown did submit that 'on or about' August 30 did create some room on either side of that date. I agree. I am of the view that the court ought not to take so rigid a position with respect to the particularized time of the offence as that urged by defence counsel in suggesting that anything beyond a day or two of the particularized date would be fatal. In this case, the evidence

suggests that the cocaine arrived in Whitehorse sometime between August 24 and 27, likely the 25th or 26th. If the evidence were capable of establishing possession at any time between the 24th and the 30th, I would be satisfied that the time of the offence had been made out. However, there is no evidence before me which would establish possession within this time frame. While Mr. McMillan's prints may be sufficient to draw the inference that he was in possession of the drugs at some time, they are incapable of establishing actual time of possession. This, coupled with the fact that there is no evidence putting Mr. McMillan in Whitehorse at any time, let alone a time between August 24 and 30, leaves me to conclude that the Crown has failed to prove that he was in possession of the cocaine at a time proximate to August 30, 2013.

[45] In the result, I am not satisfied that the offence has been made out and the charge is hereby dismissed.

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RUDDY C.J.T.C.