Citation: *R. v. Silver*, 2006 YKTC 27 Date: 20060327
Docket: 04-00398
Registry: Whitehorse

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

R e g i n a

v.

Daniel Raymond Silver

Appearances:
Sue Bogle Counsel for Crown
David St. Pierre Counsel for Defence

REASONS FOR JUDGMENT

[1] On October 2, 2004, RCMP officers in Whitehorse stopped a motor vehicle driven by the accused, Daniel Silver. The police were acting on a tip provided by an informant that Mr. Silver was on his way to a known drug house in downtown Whitehorse to sell cocaine.

[2] Subsequent to the stop, Mr. Silver was arrested and searched. The search revealed nine packets of cocaine secreted in Mr. Silver's underwear. Four of the packets contained powder cocaine and three contained rock or crack cocaine. The drug in each packet weighed roughly seven grams, or a quarter ounce, for a total weight of 41 grams. Each packet of cocaine had been made by placing the drug in a plastic bag, tying off a corner of the bag and removing the excess plastic.

[3] Mr. Silver also had a loaded Colt .45 calibre pistol tucked into his pants. There were seven cartridges in the pistol's clip. The serial number on the pistol had been obliterated. Mr. Silver had no licence to possess the restricted firearm.

[4] Mr. Silver also had in his possession a cell phone and $105 in cash. A woman and a child were passengers in the vehicle.

[5] Mr. Silver was subsequently charged with:

1. Possession of cocaine for the purpose of trafficking contrary to s. 5(2) of the *Controlled Drugs and Substances Act*.
2. Use of a firearm in the commission of an indictable offence contrary to s. 85(1)(a) of the *Criminal Code*.
3. Using a firearm in a careless manner contrary to s. 86(1) of the *Criminal Code*.
4. Carrying a concealed weapon without authorization contrary to s. 90 of the *Criminal Code*.
5. Possessing a restricted firearm without a licence contrary to s. 91(2) of the *Criminal Code*.
6. Being the occupant of a motor vehicle in which he knew there was a restricted firearm contrary to s. 94 of the *Criminal Code*.
7. Possessing a loaded restricted firearm without a licence contrary to s. 95(a) of the *Criminal Code*.
8. Possessing a firearm knowing that the serial number had been removed contrary to s. 108(b) of the *Criminal Code*.

[6] Mr. Silver challenged the legality of the stop and search and sought exclusion of the items seized. In a decision given on September 15, 2005, I held that the application to exclude the evidence should be dismissed (2005 YKTC 62).

[7] On the facts, Mr. Silver was clearly in possession of the cocaine and the handgun. The issues to be determined are:

1. Has the Crown proven beyond a reasonable doubt that the accused was in possession of the cocaine for the purpose of trafficking?
2. Which of the firearms charges have been proved?

3. Of the firearms charges proved, on which counts should convictions be entered having regard to the rule forbidding multiple convictions for the same delict?

[8] I will deal with these questions in the order posed.

[9] In support of its contention that the accused possessed the cocaine for the purpose of trafficking, the Crown called Corporal John Furac, a very experienced member of the RCMP Drug Section stationed in Surrey, British Columbia. Cpl. Furac was qualified to give expert evidence respecting drug trafficking. In Cpl. Furac's opinion, the circumstances pointed inexorably toward the conclusion that Mr. Silver was in possession of the cocaine for the purpose of trafficking.

[10] Cpl. Furac pointed to the quantity of drug, the number of individual similarly sized packages, the possession of two different types of drug, the secreting of the drug and the presence of the cell phone and the money. He also pointed out that nothing was found indicating that Mr. Silver was, himself, using the drugs. He also opined that drug traffickers often travel with family members or other persons in order to lend an air of normalcy to their activities.

[11] On behalf of Mr. Silver, Mr. St. Pierre contended that Cpl. Furac was overreaching in his evidence. I agree. For example, Cpl. Furac pointed to the possession of the money as a factor. Indeed, he testified that he would have found it to be a factor if Mr. Silver had been in possession of as little as $40. He also stretched the point by saying that traveling with one's family was consistent with trafficking.

[12] He also stubbornly refused to agree with certain seemingly common sense propositions put to him in cross-examination. For example, it was put to him that a drug user of means might purchase more drugs at a time than an impecunious user. Similarly, it was suggested that a user might elect to buy more

than he needed for his immediate use rather than making multiple purchases since each purchase involved a renewed risk of detection. One might also have said that a purchaser might buy more than he could use immediately for any number of reasons including better price or availability. Cpl. Furac would probably have resiled from these suggestions as well.

[13] Thus, the weight of the expert's evidence suffers from the irresistible conclusion that his testimony is far from even-handed.

[14] Having said that, there remains in my view, only one conclusion to draw from the circumstances, that being that Mr. Silver was in possession of the cocaine for the purpose of trafficking. Mr. Silver had 41 grams of cocaine on his person. He was not in his residence but in an automobile headed in the opposite direction. The cocaine was packaged in nine separate packages of roughly equal weight. There were two different types of cocaine. The drugs were secreted in a slit (obviously purposely made) in his shorts. At the same time, he had a loaded handgun tucked in his pants and readily accessible. He also had a cell phone. Moreover, nothing was found that would indicate that the cocaine was for personal use.

[15] It is quite true that some of these factors taken alone, for example, possession of a cell phone, are completely benign. It is also true that some of the factors taken alone would be equally consistent with personal use. For example, the quantity of drug was not beyond what a heavy user could consume in a matter of days. Even possessing a loaded handgun does not, in and of itself prove an intent to traffic.

[16] However, if one looks at the circumstances as a whole, a clear picture emerges.

[17] The packaging of the drug and the fact that there are two types of cocaine is more consistent with trafficking than with personal use. While a user might also secrete his drugs for transport, in this case, the underwear had been purposely modified to hide drugs, which suggests that the accused was in the habit of transporting drugs in this fashion and that he had not simply stuffed the drugs in his shorts when stopped by the police. Moreover, in my view, the concurrent possession of a loaded handgun is strongly suggestive of an intent to traffic.

[18] At the end of the day, I am satisfied beyond a reasonable doubt that count one has been proved and I find the accused guilty.

[19] I turn to consider which, if any, of the firearms charges have been proved. Count two alleges the use of a firearm in the commission of an indictable offence. Mr. St. Pierre submitted that “use” (at least in the context of s. 85(1)(a) of the *Code*) requires something more than simply having the firearm in one’s possession. I agree. See *R. v. Chang* (1989), 50 C.C.C. (3d) 413 (B.C.C.A.). Therefore, count two is dismissed.

[20] Count three alleges careless use of a firearm. Clearly, having a loaded handgun hidden away in a temporary hiding spot constitutes careless storage of a firearm: *R. v. Carlos*, [2002] 2 S.C.R. 411, 163 C.C.C. (3d) 449, 2002 S.C.C. 35. It is not so clear that it constitutes careless use, since it is hard to conceive of being able to actually use a firearm for its normal purpose without loading it. Count three is dismissed.

[21] Count four alleges carrying a concealed weapon without authorization. This charge has been proved.

[22] Count five alleges possessing a restricted firearm without a licence. This charge has also been proved.

[23] Count six alleges that the accused was the occupant of a motor vehicle in which he knew there was a restricted firearm. This offence has been proved.

[24] Count seven alleges possession of a loaded restricted weapon without an authorization or licence. This offence has also been proved.

[25] Count eight alleges possession of a firearm knowing that the serial number had been removed. Again, this charge has also been proved.

[26] The Crown conceded that if there was a conviction on Count seven, Count five should be conditionally stayed. I find that counts four and six should, likewise, be stayed. It is true that concealment (Count four) and being in a motor vehicle (Count six) are not essential elements of Count seven. Nevertheless, the delict throughout involves possession of an unlicenced handgun.

[27] Count eight, possession of a firearm with an obliterated serial number is a separate matter and a conviction should be entered on that count.

[28] In the result, I find the accused guilty on Counts one, seven and eight.

Faulkner C.J.T.C.