PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Dennis, 2009 NSPC 80

Date: 20091016
Docket: 1915703
Registry: Sydney

Between:

Her Majesty the Queen

v.

Ronald Alexander Dennis

DECISION

Judge:	The Honourable Judge Jean M. Whalen, J.P.C
Heard:	October 16 & November 6, 2009 at Eskasoni, Nova Scotia
Charge:	Section 5(2) *Controlled Drugs & Substances Act*
Counsel:	Wayne MacMillan, for the Crown Greg MacIsaac, for the Defence

By the Court:

Introduction

[1] Constable MacMillan was on duty on June 11, 2008, when he received information from Constable Mason that a proven, reliable source passed on information that Ronald Dennis had been in Richmond County and was travelling back to Eskasoni with a quantity of pills.

[2] Constable MacMillan and Corporal Marshall drove to a spot near the Iona Bridge and waited for the vehicle in which Mr. Dennis was travelling. At approximately 23:41 hours a red Ford Ranger truck approached their location and turned onto Derby Point Road.

[3] The truck was followed and subsequently stopped by the officers. There were two occupants in the vehicle. Mr. Dennis was in the passenger seat. He was arrested and the truck searched. Drugs and paraphernalia were found in and around the passenger area, and Mr. Dennis was charged with possession for the purpose of trafficking, pursuant to Section 5(2) of the *Controlled Drugs and Substances Act*.

Issues

[4] The issue for the court to decide is whether or not the similar fact evidence should be admitted as part of the trial proper.

Review of Evidence (at trial)

[5] Constable Mark Hurlbert testified that on June 11, 2008 he was on duty and received information from Constable Mason, who was working in the Richmond County Detachment, that a reliable, proven source told him that Mr. Dennis had just left Richmond County with a quantity of prescription drugs and was returning to Eskasoni.

[6] Constable Hurlbert knew Mr. Dennis from his position as Detachment Intelligence Officer and because of numerous drug investigations and anonymous tips, as well as various interactions with the defendant.

[7] The officer also testified that he was familiar with the red Ford Ranger and he believed it was registered to Harrison Gould. However, he believed that because the truck was at the defendant's house on a normal basis in the months preceding this

incident, that it was owned by the defendant, or at the very least, associated with Mr. Dennis.

[8] Constable Hurlbert and Corporal Marshall travelled to Grand Narrows and parked on Highway 223 just before the Grand Narrows crossroad, thinking that Mr. Dennis would use the back route into Eskasoni.

[9] At 23:41 Constable Hurlbert observed a red Ford Ranger truck approach their position. It was approximately three hours after receiving the information.

[10] He testified that the vehicle, upon noticing them, made an abrupt turn towards Derby Point Road. The officers followed the vehicle a short distance and subsequently stopped the vehicle after verifying the license plate belonged to their suspect vehicle.

[11] The officers radioed their location and requested assistance. Both officers approached the vehicle and there were two occupants inside. Ronald Gould was in the driver's seat. Because Constable Hurlbert was familiar with Mr. Gould, he knew

he did not have a valid driver's license and believed him to be impaired. Mr. Gould was arrested.

[12] Constable Hurlbert stated, based on the source information and previous knowledge of Mr. Dennis, he believed there were illicit drugs in the vehicle, so he was arrested for possession for the purpose of trafficking.

[13] Mr. Gould was placed in the back of the police car. Mr. Dennis was secured outside of the police vehicle and watched by Corporal Marshall until other officers arrived.

[14] Constable Hurlbert searched the truck and found "a snort pipe" with white residue (an unknown substance) in the car panel on the passenger side near where the defendant was sitting. The officer also found a blue pill crusher with white residue (an unknown substance), a pill bottle with 46 pills (unknown), five rounds of 30/30 ammunition. These items were found inside the console between the two front seats.

[15] After the initial search, he called a tow truck because the area where the vehicle was stopped is described as a remote area; the lighting was poor and it was wet, a heavy mist was falling; and the Officers had to use flashlights for the initial search.

[16] Constable Mallock and Constable Johnson arrived and transported Mr. Dennis to the Eskasoni Detachment.

[17] Constable Hurlbert waited for the tow truck to arrive which did at 12:55 a.m. The tow truck driver, Mr. Jamael, was instructed to tow the vehicle to the Eskasoni Detachment. Mr. Jamael followed the officers to the Detachment and the vehicle was placed in a secure bay.

[18] At 1:51 a.m. Constable Hurlbert and Corporal Marshall conducted a second search of the truck. Inside the spare tire they located one large bag of marijuana that contained smaller bags, as well as another pill crusher with white residue.

[19] At 2:25 a.m. Constable Hurlbert instructed the same tow company to transport the vehicle to their compound and secure it.

[20] On June 12, 2008 Constable Hurlbert received further information from Constable Kutcha (reliable confidential human source information) that there were more drugs in the vehicle.

[21] Constable Kutcha obtained a search warrant on June 12th to do a further search of the vehicle. Constable Hurlbert was present and they found a white baggy containing prescription pills, (84½ pills) and PMS was marked on the outside of that bag. This was located inside the roof lining immediately above the passenger seat where Mr. Dennis had been seated the evening before.

[22] The pills were analysed and found to be hydromorphone, a Schedule I drug.

[23] Exhibits were tendered by the Crown:

C1 - marijuana found in wheel well;
C2 - individual portions from seven bags in bigger bag of marijuana;
C3 - ephedrine which was found in console;
C4 - hydromorphone found in the roof lining;
C5 - Certificate of Analysis; proper service was admitted by defence counsel.

[24] On cross examination Constable Hurlbert stated that no drugs or drug paraphernalia were found on Mr. Dennis' person. There was no fingerprint examination carried out on the large bag of marijuana found in the wheel well.

[25] Constable Hurlburt testified he did not receive permission from the driver, Mr. Gould; that he searched the vehicle incident to arrest after the initial stop and at the Detachment.

[26] Corporal Marshall testified he has been an RCMP officer for 22 years and currently assigned to the Eskasoni Detachment. He received a phone call from Constable Mason that Mr. Dennis was returning to Eskasoni with a large quantity of "suspected drugs."

[27] Corporal Marshall stated he has known Mr. Dennis all of his life. He is familiar with the red Ford ranger as he has seen the vehicle on numerous occasions in the last six months and saw the defendant in the vehicle earlier in the day. He had also seen the vehicle at Mr. Dennis' house.

[28] Corporal Marshall assisted Constable Hurlbert in locating the vehicle and subsequently stopped it. He kept watch of Mr. Dennis while his partner searched the vehicle.

[29] Corporal Marshall did not search Mr. Dennis, nor did he see any drugs in the defendant's possession.

[30] Officer William MacDonald testified he is a Staff Sergeant and has been employed with the RCMP for 33 years. He was subsequently qualified as an expert in the area of use, availability, distribution, packaging, sale price, and value of hydromorphone, oxycondone, and cannabis marijuana, and able to give opinion evidence. His curriculum vitae was tendered, Exhibit 11.

[31] Staff Sergeant MacDonald opened Exhibit 4, the bag of 84 hydromorphone pills. He stated in his experience that a person never has 84 pills as a user on the street, and if so, it is in a prescription bottle or a dispenser. In this particular instance the 84 pills were in a vitamin bottle The same could be said for the ephedrine.

[32] Also, traffickers sell other things like marijuana and that is normally sold in one pound to half pound bags, not in smaller bags as seized. A heavy user normally purchases one ounce. It is rare you see them purchase half a pound or a pound. If they did you would not divide it up in seven one ounce bags. This indicates purchase for resale.

[33] As well, given where the pills were located, particularly hidden in roof liner, marijuana in the wheel well, as well as the number of pills and the number of cell phones, all suggested drugs possessed for illegal purpose of trafficking.

[34] The street value of the drugs was:

Ephredrine	- $1,680.00
Marijuana	- $2,450.00
Hydromorphone	- $1,680.00
	$5,810.00

Voir Dire

[35] The Crown was granted the opportunity to enter into a *voir dire* to present "similar fact evidence" regarding a separate incident involving the defendant.

[36] Constable D. Mason testified that he is part of Street Crime Enforcement unit. Between June 12th and 13th, late night, he received source information that Mr. Dennis was in Louisdale buying drugs.

[37] The officer went to Louisdale between 9 and 9:15 PM. He noticed a Ford truck described by the source as beige or brown, 4 x 4 with a camper. There was one other native male in the truck.

[38] The truck was coming out of a residence. The vehicle went by the officer and he got the license plate number. He inquired if the defendant had any connection with the vehicle.

[39] Constable Mason followed the truck to Arichat and lost the vehicle for a short period of time. Constable Mason took up a position of surveillance at Isle Madame

and at approximately midnight he saw the vehicle go by. He followed it down Highway 320 to St. Peters.

[40] Constable Mason advised other members who were assisting to stop the vehicle. Constable Mason passed the vehicle and saw the defendant, Mr. Dennis, in the front seat on the passenger's side. Mr. Harrison Gould was the driver and a Mr. S. Francis was a passenger in the back seat. A pill crusher was found in Mr. Francis' possession.

[41] Mr. Dennis was searched incident to arrest and nothing was found on his person. The vehicle was quickly searched after arrest of the individuals. On the top driver's side lining a small plastic baggy was located. The search was suspended and the vehicle was locked and subsequently towed to the Detachment and secured for the night.

[42] As a result of a number of facts; the defendant being stopped the night before in a similar situation, combined with the source information and the baggy found in the roof lining, Constable Mason applied for a search warrant. On June 13, 2008 at 16:51 hours the vehicle was searched. Constable Anthony recorded where items were found.

[43] A quantity of money was located under the lining in the back seat area ($1,110.00). Two baggies were located in the roof liner by the driver's seat containing oxycodone and hydromorphone,99 and 100 pills respectively.

[44] Two baggies located on the passenger's side containing oxycodone , 98 pills in each. The drugs were sent for analysis.

[45] On cross examination Constable Mason testified that the registered owner of the vehicle is one Virginia Francis and the license plate belonged to Blair Francis.

[46] None of the exhibits were found on the defendant's person. They were not in plain view when the vehicle was searched. They were not in the glove box or the side pockets of the vehicle.

[47] There were no fingerprints taken from the exhibits, in particular the bags and money that were found.

[48] Staff Sergeant MacDonald's qualifications were accepted although defence counsel objected to the *voir dire* itself. Based on the following, Staff Sergeant MacDonald expressed the opinion that the drugs were in possession for an illegal purpose, particularly trafficking because:

(1.) the drugs were in plastic bags;
(2.) they were hidden in liner of the truck;
(3.) the quantities of 99, 98, 45 pills do not suggest personal use;
(4.) approximately $1,100 cash in small denominations, common in the drug trade; people do not carry large amounts of cash in their pockets given the ease of use of debit and or credit cards;
(5.) the market value of oxycondene $10.00 per pill; the hydromorphone $15 or $20;
(6.) these amounts are not for personal use; personal users purchase two, three, maybe four at a time.

[49] Evidence adduced solely to show that the defendant is the sort of person likely to have committed an offence is, as a rule, inadmissible. Admissibility of similar fact evidence depends on whether, in the particular circumstances of the case, it's probative value outweighs the prejudicial effect. The more morally repugnant the evidence shows the accused to be, the higher it's prejudicial effect, requiring increased probative value for admission.

[50] The current regime for determining the admissibility of similar fact evidence is as follows:

(1.) the evidence of other discreditable conduct is presumptively inadmissible;

(2.) evidence of other discreditable conduct may be admitted where the prosecution establishes on a balance of probabilities that in that particular case, probative value of the evidence in relation to a particular issue outweighs it's potential prejudice.

(3.) probative value may be assessed by reference to the following:

(a) the strength of the similar fact evidence, including the extent to which the evidence can be proven, and any allegations of collusion;

(b) whether the issue in question and it's relative importance in the particular trial must be identified;

(c) some of the factors that connect or distinguish the similar fact evidence to or from the facts alleged in the charge, and the degree of connection required to make the proposed evidence admissible. Some connecting factors may, but need not include:

(i) proximity in time of the similar acts to the offence charged;

(ii) extent to which the other acts are similar in detail to the offence alleged;

(iii) frequence of similar acts;

(iv) circumstances surrounding or relating to the similar acts;

(v) distinctive features unifying the similar acts and the offence charged;

(vi) intervening events;

(vii) other existing factors tending to support or rebut the underlying unity of the similar acts and the offence alleged.

(4.) If the similar fact evidence is not properly capable of supporting the inferences sought by the Crown, generally the analysis need go no further.

(5.) Potential prejudice to the accused may be assessed by considering:

(a.) moral prejudice, risk of connection because the accused is a bad person rather than cause of proof beyond a reasonable doubt;

(b.) reasoning prejudice.

[51] The basis of probative value is an objective improbability of coincidence derived from the degree of similarity between the acts. Admissibility requires the judge's conclusion that the degree of similarity objectively establishes the improbability of coincidence, *R. v. A.R.P. (1998), 129 C.C.C. (3d) 321*.

[52] "Unique trademark" and "series of significant similarities" are both simply descriptions of when the degree of similarity objectively establishes the improbability

of coincidence. Enough significant similarities each far from unique on it's own, can eliminate coincidence just as effectively as one striking similarity.

[53] From *R. v. A.R.P supra* at p. 341:

> "... where the evidence shows a distinct pattern to the acts in question, the possibility that the accused would repeatedly be implicated in strikingly similar offences purely as a matter of coincidence is greatly reduced."

[54] *R. v. Trochym, 216 C.C.C. (3d) 225*, states:

> Evidence of similar behaviour on one previous occasion is usually not sufficiently probative to outweigh the potential prejudicial effect of admission to prove identity.

[55] However, *R. v. Titmus, 191 C.C.C. (3d) 468*, states:

> Where it is the conduct element of the *actus reus* and not the defendant's identity that is in issue, evidence of similar acts may be admitted to prove the defendant committed the offence charged.

[56] As well, *R. v. Kowall, 108 C.C.C. (3d) 481*, states:

> There were sufficient similarities in the *modus operendi* to allow similar fact evidence to be admitted. It was used only to corroborate the complainant's testimony.

[57] And *R. v. Chan, 188 C.C.C. (3d) 14*, states:

> The use of one incident as evidence of others is permitted only where the similarities are so striking as to preclude coincidence.

[58] With respect to the similarities between the trial evidence and the similar fact evidence, I find on the trial evidence:

(1.) There was a reliable proven source;

(2.) There was a red Ford Ranger seen in Mr. Dennis' driveway and/or Mr. Dennis was seen in that vehicle.

(3.) The registered owner was a Harrison Gould.

(4.) The driver was Ronald Gould.

(5.) The passenger at the time the vehicle was stopped was Mr. Dennis.

(6.) The time was approximately 23.41 pm

(7.) Mr. Dennis was searched and nothing was found on his person.

(8.) There were no fingerprints on the items found in the vehicle that belonged to Mr. Dennis.

(9.) The items found were a snort pipe in the car panel, passenger's side, a pill crusher, 46 pills of ephedrine, ammunition in the console, marijuana in the wheel well and pill crusher and pills in the roof lining above the passenger's seat.

[59] With respect to the similar fact evidence:

(1.) A reliable proven source.

(2.) There was a beige or brown Ford truck involved. The registered owner was a Virginia Francis, the driver a Harrison Gould.

(3.) The passenger was Mr. Dennis found in the front passenger's seat.

(4.) The time was shortly after midnight.

(5.) The defendant was searched and nothing was found on his person.

(6.) No fingerprints on the items found in the vehicle belonged to Mr. Dennis.

(7.) And the items found were a pill crusher on the passenger's side in the back, two baggies in driver's side roof, two baggies in the passenger's side, and money under the lining of the back seat.

[60] Mr. MacIsaac objected to the *voir dire* and all evidence heard because the facts alleged have not been proven at trial. But similar fact evidence is admissible, even if that evidence does not constitute a crime, been proven at trial, or if no charges were laid after an investigation.

[61] From the outline previously mentioned, there are certainly common threads running through the evidence of Constable Hurlbert, Constable Mason and Staff Sergeant MacDonald regarding both matters, eg. proximity in time, similar fact evidence is very similar in detail to the alleged offence, and the circumstances leading to the vehicle being stopped.

[62] Justice McLaughlin held in *R. v. B.(C.R.) (2003), 171 C.C.C. (3d) 159* that similar fact evidence may be useful in providing corroboration in cases where identity or *mens rea* is not in issue. If it does not show a "system or design" it can show a pattern of behaviour suggesting that the testimony outlining the alleged charge, and in this particular case possession for the purpose of trafficking, is true.

[63] *R. v. B.(C.R.)* also states:

> Distinction must be made between evidence of general character and *modus operendi* (MO). The law seeks to forbid a process of reasoning that would condemn the accused because of his character. However, a highly individualized *modus operendi* is tantamount to evidence that the accused left his/her calling card.

[64] Having reviewed all of the evidence, including the degree of distinctiveness between the similar fact evidence and the offence alleged, and the connection of the

evidence to the issues, other than propensity, and in this particular case, the element of possession, I would admit the evidence called by the Crown on the *voir dire.*

Decision on the merits (By the Court)

[65] In order to be reasonable, search and seizures must be authorized by the law. *R. v. Caslake (1998), 121 C.C.C. (3d) 97* at para. 12 sets out three ways in which a search can fail to meet those requirements.

> In order to be reasonable, searches and seizures must be authorized by law. The reason for this requirement is clear: under both the Charter and the common law, agents of the state can only enter on to or confiscate someone's property when the law specifically permits them to do so. Otherwise, they are constrained by the same rules regarding trespass and theft as everyone else. There are three ways in which a search can fail to meet this requirement. First, the state authority conducting the search must be able to point to a specific statute or common law rule that authorizes the search. If they cannot do so, the search cannot be said to be authorized by law. Second, the search must be carried out in accordance with the procedural and substantive requirements the law provides. For example, s. 487 of the Criminal Code, R.S.C., 1985, c. C-46, authorizes searches, but only with a warrant issued by a justice on the basis of a sworn information setting out reasonable and probable grounds. A failure to meet one of these requirements will result in a search which has not been authorized by law. Third, and in the same vein, the scope of the search is limited to the area and to those items for which the law has granted the authority to search. To the extent that a search exceeds these limits, it is not authorized by law.

[66] In this matter, the Crown is relying on the common law power of search incident to arrest. Given the background leading up to the defendant’s arrest, ie.

reliable third party source and that the police had known information about Mr. Dennis, ie. he was known to the police, I find that they had reasonable and probable grounds to stop the vehicle and arrest the occupants, and then they searched incidental to arrest. I find that the reasonable and probable grounds existed on both occasions.

[67] The court is of the view that the sole issue that should be decided is that of possession.

[68] Possession for the purpose of trafficking, pursuant to the *Controlled Drugs and Substances Act*, is defined in Section 2(1): " 'possession' means possession within the meaning of Subsection 4(3) of the *Criminal Code*".

[69] *R. v. Kocsis, 157 C.C.C. (3d) 564* states the three elements required for personal possession are:

(1.) Knowledge of the thing;
(2.) Intention to possess the thing; and
(3.) Control over the thing.

[70] In *R. v. Aiello, 38 C.C.C. (2d) 485*, the knowledge necessary to constitute the offence of possession beyond a reasonable doubt is that the defendant assumed control

of a package knowing that it contained a drug, and knowledge can be inferred from surrounding circumstances.

[71] *R. v. Kelly [1992] S.C.J. No. 53* says knowledge is a state of mind and must be found to exist in the same way as intent by proper inferences from facts proved.

[72] *R. v. Podkydailo, 125 C.C.C. (313)* states proof of transportation by itself is not conclusive proof of the purpose for which the defendant had possession, but it is an important element in determining the purpose.

[73] *R. v. Chan (2004), 178 C.C.C. (3d) 269* states says in some circumstances the quantity of the drug the defendant possessed may be indicative of trafficking, but the quantity possessed is not an essential element of the external circumstances.

[74] And lastly, *R. v. Breau (1987), 33 C.C.C. (3d) 354* states constructive possession still contemplates an element of control over the drug.

[75] What, if any, evidence is there of the required three elements? The first element, knowledge of the drugs: No drugs were found on the defendant. All the

drugs hidden, not in plan view except for the corner of what the officer thought was a plastic bag when he used a flashlight to see into the truck and examine it. There were no statements from any witnesses. There is no cautioned statement from the defendant, or a co-accused. The informant information is hearsay and only goes to the reasonable and probable grounds for arrest.

[76] The second element, “intention to possess”. The defendant was stopped twice as a passenger in a car that contained drugs and cash, I find they were significant quantities and therefore, they are trafficking amounts. There are no statements from any other witnesses. The third party source regarding Mr. Dennis is once again, as I said, hearsay, and went to the reasonable and probable grounds.

[77] The third element, “the control over the drugs”. There were absolutely no fingerprints from Mr. Dennis found on anything seized, either the drugs, the money, the pill crushers or the baggies. There were no statements from any other parties or other witnesses. There was no cautioned statement from Mr. Dennis. Mr. Dennis was a passenger twice in vehicles, but those vehicles were not registered to Mr. Dennis or owned by him.

[78] The Crown has the burden of proof and it must prove Mr. Dennis' guilt beyond a reasonable doubt. And also, since Mr. Dennis testified, the court must consider *R. v. W.D.*

[79] The court must look at the totality of the evidence and then draw an inference as to whether the defendant had possession of the drugs for the purpose of trafficking. The court may in determining whether the Crown has established an intention to traffic draw inferences from such evidence as outlined above in those three elements.

[80] Having considered all of the evidence and the test in *R. v. W.D.*, I find Mr. Dennis' behaviour very suspicious. I think he was evasive and at times untruthful. However, the court cannot convict on suspicion. The court must be satisfied beyond a reasonable doubt of the defendant's guilt. I find that I am not satisfied and therefore I find Mr. Dennis not guilty.

J.