

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- and -

JAMES VICTOR EDWARD SCHILLER

REASONS FOR DECISION

of the

HONOURABLE JUDGE CHRISTINE GAGNON

Heard at: Yellowknife, Northwest Territories
March 19, 2009

Reasons: April 2, 2009

Counsel for the Crown: R. Shepard

Counsel for the Defendant: J. Bran

[Charged under s. 4(4), 5(4) CDSA]

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Introduction

[1] James Victor Edward Schiller is charged with the following offences:

Count 1: "On or about the 3rd day of April, 2008 at or near the City of Yellowknife in the Northwest Territories, did unlawfully possess a substance included in Schedule II to wit: cannabis (marihuana) in an amount exceeding 30 grams, contrary to Section 4(4) of the Controlled Drugs and Substances Act;

Count 2: "On or about the 3rd day of April, 2008 at or near the City of Yellowknife in the Northwest Territories, did possess a substance included in Schedule II to wit: cannabis (marihuana) in an amount not exceeding 3 kilograms. for the purpose of trafficking, contrary to Section 5(4) of the Controlled Drugs and Substances Act.

[2] Possession within the meaning of the *Controlled Drugs and Substances Act* is defined by reference to section 4(3)(a) of the *Criminal Code of Canada*.

[3] Possession for the purpose of trafficking includes the concept of trafficking which is defined at section 2(2)(a) of the *Controlled Drugs and Substances Act*, and includes,

for the purposes of this case the act “to send”, as well as the concept of possession *simpliciter*.

[4] The offence of simple possession found at Count 1 being an element of the offence of possession for the purpose of trafficking found at Count 2, should the Accused be found guilty under Count 2, he would also be guilty of the offence under Count 1 if the offences arose from the same facts.

[5] By virtue of the rule precluding multiple convictions however, a conditional stay would have to be entered on the lesser charge found at Count 1. This stay would be conditional on the final disposition of the charge of which the accused has been convicted.¹

The Evidence

[6] At the opening of the trial, an Agreed Statement of Facts was filed as Exhibit 1, containing the following material facts:

- Pursuant to information received, Cst. Greg Fast, of the Ulukhaktok detachment of the Royal Canadian Mounted Police (RCMP), attended the airport in this community on April 5, 2008, and seized a package, labeled “meat” and weighing 13 kg, which was intended for one “Sandra Goose”, who was the subject of an on-going police investigation. The name of the shipper appearing on the package was that of the Accused, James Schiller.
- Upon obtaining a search warrant, Cst. Everett MacLaughlin searched this package. The following is the text of paragraphs 4 to 6 of the Agreed Statement of facts:

4) “Upon opening the box, the police found foodstuff. Included was a mini-pizza box that appeared to be re-

sealed. Cpl. MacLaughlin could smell marijuana from this box. Within this mini-pizza box was (*sic*) two ziplock (*sic*) baggies containing marijuana. The larger bag contained 249.6 grams of marijuana. A sample was taken and placed in a Health Canada envelope H950555. The smaller bag contained 169 grams of marijuana. A sample was taken and placed in a Health Canada envelope H950556. The samples were sent to Health Canada via registered mail. The “H” envelopes returned with attached Certificates of Analyst, corresponding to the HC number on the envelope. Certificate #08-02488W corresponds with H950555 and Certificate #08-02487W corresponds to H950556. Both Certificates are attached.

5) Cpl. MacLaughlin received a copy of the waybill from First Air – 245-24839383, Shipper- James Schiller, Yellowknife, NT.

6) Cpl. MacLaughlin sent the plastic bags to G Division Forensic Identification Section to Cpl. Mary Lane for fingerprint analysis.”

- The attached Certificates of Analyst identified that the samples which were received and analyzed contained a controlled substance within the meaning of the *Controlled Drugs and Substances Act*, to wit: Cannabis (marihuana).

Testimony of Cst. Robert Kempf

[7] Cst. Robert Kempf of the Yellowknife RCMP testified that on July 5, 2008, he was tasked with executing a warrant for the arrest of James Schiller. He said that he was familiar with him and that he left his business card at Mr. Schiller’s residence, located at 77 Morrison Drive in Yellowknife. On July 6, James Schiller phoned at the

¹ R. v. P. (D.W.)[1989] 2 S.C.R. 3 and R. v. Kineapple (1975) 1 S.C.R. 729

RCMP detachment. Upon this contact being made, Mr. Schiller attended the detachment and Cst. Kempf put him under arrest. As part of the procedure, Cst. Kempf completed Form C-216, which was entered as trial Exhibit number 2. This form shows the fingerprints of the left and right hands of the subject, who is identified by name and signature. Other information includes: date of birth (1969/10/21), place of birth (Port Alberni, B.C.), current address (77 Morrison Drive, Yellowknife), name of next of kin (Catherine Hamilton) and particularities (Cross (on) top (of) right arm).

Testimony of Cpl. Mary Lane

[8] Cpl. Mary Lane, a member of the RCMP stationed in Yellowknife was presented for the purpose of providing her expert opinion with respect to comparison and identification of fingerprints. Her qualifications were acknowledged by the Defence.

[9] She explained that on April 11, 2008, she received six Ziploc clear plastic bags measuring 30 x 26 cm from Cpl. MacLaughlin of the Ulukhaktok RCMP, who asked that she examine them for fingerprints. She was also given two names: James Schiller and James Hamilton.

[10] Upon the reception of these bags, she individually fumed and dyed them.

[11] She then examined the dried dyed bags using a forensic light source and found what she described as three "latents", meaning fingerprints or impressions left by the friction ridge skin, on two of the six bags. She marked each area with a black circle and further identified each latent as R1, R2 and R3. The two bags were entered as trial Exhibits 4 and 5.

[12] Her next step was to request from Ottawa that they send a C216 form in the name of "Mr. Hamilton or Mr. Schiller". She received a faxed copy and she found that the printing was of poor quality, making it impossible for her to proceed to any fingerprint comparison. She then took digital photos of R1, R2 and R3, copied them on a disc and sent them to the Latent Fingerprint Section in Ottawa, which is a division of the RCMP.

[13] On July 2, 2008, Cpl. Lane received a call from Lisa Rousseau, an employee at the Latent Fingerprint Section in Ottawa. She was advised by Ms. Rousseau that the fingerprints R1 and R2 had been identified to someone.

[14] Cpl. Lane received a Form C-216 from Ottawa on July 8, 2008, which she identified at trial. This form, entered as trial Exhibit 6, contained the fingerprints and identification of one James Victor Hamilton (FPS number 349001-C; date of birth (69/10/21), place of birth (Port Alberni, B.C.), name of next of kin (Cathy Hamilton) and particularities (tattoo: cross on right forearm).

[15] On July 11, Cpl. Lane compared her images of R1 and R2 to the fingerprints found on Exhibit 6 and she concluded that R1 was a print of the right thumb of James Hamilton and that R2 was also a print of Mr. Hamilton's right thumb.

[16] She testified that she then asked the investigator for recent fingerprints of this subject, and she received a Form C-216 in the name of James Schiller, completed by Cst. Kempf of the Yellowknife RCMP. She confirmed that this was the document identified as trial Exhibit 2. She compared both C-216 forms and concluded that the fingerprints found on each form were the same.

[17] Upon cross-examination, Cpl. Lane offered the following additional information:

- She is not able to say when the fingerprints were put on the bags.
- She received the bags in April and found that the state of the bags appeared "pristine", and she said that the two bags (Exhibits 4 and 5) did not appear to have been used heavily.
- With respect to R3, she explained that it was ridge detail but that she was unable to identify it. She clarified later that R3, "did not have enough detail in it to match to anyone." As a result of this, she explained that in such case, no further work is done.

[18] The Prosecution's evidence was completed by the testimony of Derek Jason Cooper, an employee of the airline company First Air. He testified that on April 3, 2008, James Schiller came to the First Air Cargo counter with a box to ship to Holman to the

attention of Sandra Goose. A copy of a First Air Unknown Shipper Declaration Form on which James Schiller's name and address appear was entered as trial Exhibit 7 and the way bill number 34839383 was entered as Exhibit 8. This document shows that the parcel was to be shipped to Sandra Goose in Ulukhaktok, also identified as "Holman Island". The shipper was James Schiller and the cost of shipping was \$127.98. The contents of the package are identified as "FZR – Meats".

Testimony of James Schiller

[19] The Accused testified and confirmed that he was born in Port Alberni, B. C., that his date of birth is October 21, 1969, that he lives at 77 Morrison Drive in Yellowknife and that he used the name of Hamilton until the age of 17. He acknowledged that he was now known as James Schiller.

[20] He said he knew a woman named Sandra Goose and that he first met her in 1996. He said that she used to live in Yellowknife and that she moved away to Inuvik. He believed that she now lived in Holman. He described their relationship as "friendly".

[21] He saw Ms. Goose in early January 2008. She called him up in the evening and she asked if he could come by her sister's house; she said that she had just gotten to town and she had a gift to give him. He went up to the units on the hill top behind the Red Apple, where he met Sandra Goose, her sister and a couple of other people. She gave him a pair of seal skin mitts and a lighter that said Holman on it.

[22] He then said "she gave me the gloves, and we were talking, we had coffee"... she had taken me into the laundry room, and (...) she told me she had scored some dope. So she showed me in the laundry room, she had three or four different bags of dope and so she gave one to me. She threw it at me, and I grabbed it, I opened it up took a smell and I said "Hey, right on" and I gave it back to her."

[23] He testified that the house "smelled like dope" when he walked through the door and that Sandra was "rolling weed and people were smoking it and I ... I think I had some that night with her, and I proceeded home."

[24] His next encounter with Ms. Goose was later in the same month. Ms. Goose called him again and asked if he could hold onto a box for her. He accepted. She later came to his house with a box. She stayed about 10 minutes, said that she was heading home and that she would call him when she wanted the box. She did not say what was in the box, except to mention that it was “some foods and stuff she bought”. He described the box as a brown cardboard box that was taped up and had no markings on it.

[25] He put the box in his freezer because Ms. Goose told him there was meat in it.

[26] He said that the next contact with Ms. Goose was a phone call from her. She phoned to tell him that she was sending fish. He went to pick it up at First Air; it was prepaid. He said “I opened up the bag and two chars were in one bag. In the other bag there was a Northern bag with \$200 in 20s (...) It was taped around the fish.”

[27] He testified that he then called her and asked her what she wanted him to do.

[28] Ms. Goose asked him to send the box whenever he could and to use the \$200 to pay for the freight and to keep whatever money was left over.

[29] He then explained that he put Ms. Goose’s name on the box, brought it to First Air Cargo and shipped it to her. He said that he told the Cargo employee that the box contained meat.

[30] Mr. Schiller said that he was curious about the box.

[31] In cross-examination, Mr. Schiller provided this additional information:

- He knows what marihuana is;
- Sandra Goose brought the box about a week after their initial meeting in January;
- Ms. Goose had never asked him to hold on to a box before;
- Mr. Schiller did not ask Ms. Goose why she wanted to leave the box to him;
- Sandra Goose had never offered him gifts in the past;

[32] After cross-examination, the Accused was asked the following questions by his counsel, with respect to his evidence that Sandra Goose threw a bag of drugs to him:

Q “Do you know if you would have touched the other bags, as well?”

A She – she had them in a duffle bag, so I – I don’t think I grabbed the duffle bag.

Q Is it possible that you could have touched them when you were looking at all this marihuana?

A Could have been, yes.”

[33] Although the Crown did not object to these questions put by the Defence counsel to his witness, there would have been reasons to do so, namely because the questions were leading, but also because the purpose of re-examination is to address new issues raised in cross-examination that require an explanation. Mr. Schiller testified in his examination in chief that Ms. Goose threw one bag of marihuana to him, and he reiterated the same in cross-examination. It was therefore not open for the Defence counsel to re-examine his client on this issue. I will therefore place more weight on the evidence given in chief by Mr. Schiller.

Analysis

A) The Law

[34] Since the Crown bears the onus of proving the offence beyond a reasonable doubt, I will first analyze the evidence tendered by the Crown. This is a case where there was no direct evidence of possession. The Crown’s case is essentially circumstantial and more particularly, the issue is to determine what inferences, if any, can be drawn from the fact that the fingerprints of the Accused were identified on two clear plastic bags containing a controlled drug.

[35] The leading case on this issue is the Supreme Court of Canada decision in *R. v. John Paul Lepage* [1995] 1 S.C.R. 654.

[36] The majority decided that “whether an accused’s fingerprint on an article will support an inference that he was in possession of the article will depend on the particular circumstances of the case.”²

[37] The Supreme Court stated that the fact that the respondent’s fingerprints were on the bag containing (a drug) is highly probative of possession of the narcotics, but that this evidence alone is not in itself proof beyond a reasonable doubt of possession: see *R. v. Kuhn (No 1)*³, *R. v. Breau*⁴, *R. v. Mehrabnia*⁵.

[38] The *Lepage* decision was applied in the recent case of *R. v. Smarch*, in which the Yukon Territorial Court stated that the evidence of the presence of the Accused’s fingerprints on a garbage bag containing stolen property “constitute circumstantial evidence of his possession of the stolen goods”⁶.

[39] The legal standard on the issue of circumstantial evidence was reviewed by the Manitoba Court of Appeal, in the matter of *R. v. Jenner*⁷, who said:

“In cases based wholly on circumstantial evidence, guilt must be founded on the conclusion that there is no other rational explanation for the circumstantial evidence but that the accused committed the crime.”

[40] Possession of a thing in a manner that engages the criminal responsibility of a person requires proof that this person had knowledge of the presence of the thing and that he had knowledge of the illegal nature of this thing. The person must also have some measure of control over this thing.

[41] Wilful blindness is imputed knowledge, and is the equivalent of actual knowledge. The *mens rea* of the wilfully blind person requires a subjective consciousness of risk,

² *Idem*, at par. 25

³ (1973) 15 C.C.C. (2d) 17

⁴ (1987) 33 C.C.C. (3d) 354

⁵ (1993) O.J. No 2717

⁶ (2003) Y.J. No 94 at par. 18 *in fine*.

and “applies where a person becomes aware of the need for inquiry, but declines to make the inquiry because he does not wish to know the truth; he prefers to remain ignorant. The person is subjectively at fault in deliberately failing to inquire when he knows there is reason for inquiry.”⁸ The Court in R. v. Hampton concluded that “if there is no reason for actual suspicion, then there flows no imputed knowledge through willful blindness.”⁹

B) Position of the Parties

[42] The Defence does not contest the fact that Mr. Schiller shipped a box to Sandra Goose in Ulukhaktok in which drugs were found. It was argued however, that the Crown presented no direct evidence showing that the Accused had any knowledge of the contents of that box and the Defence also emphasized the fact that there is no direct evidence of who packed the drugs into that box.

[43] The Crown agreed that the issue is whether Mr. Schiller knew that there were drugs in the box he sent to Sandra Goose. It argued that the presence of one thumbprint on the outside of each clear plastic bag entered as exhibits at trial shows that the Accused had both of these bags in his hand at some point. The bags were filled with marihuana, they were packed in a mini-pizza box which was re-sealed. This mini-pizza box was packed in a larger box which was sealed and had Mr. Schiller’s name on the box. The Crown’s theory is that the Accused had to have known that there were drugs in this box, because of the fact that his fingerprints were located on an item found packaged within two sealed boxes and that the only reasonable explanation for these fingerprints to be there is that the Accused packed the drugs himself into the box. Alternatively, the Crown argues that the Accused was willfully blind in accepting to hold on to the box brought by Sandra Goose.

[44] Looking only at the evidence presented by the Crown, I find that the presence of the impression of Mr. Schiller’s right thumb on Exhibit 4, and the presence of the impression of his right thumb on Exhibit 5 is evidence that Mr. Schiller handled each of

⁷ (2005) M.J. No 95; see also R. v. Ayala (1994) O.J. No 687 at par. 60-61

⁸ R. v. Sansregret, 1985 1 SCR 570 discussed in R. v. Hampton [1998] N.B.J. No 206 at par. 16

⁹ Idem at par. 58

the clear plastic bags on two distinct occasions before or when they were put inside the box. The fact that the box was shipped by Mr. Schiller is evidence that he was in personal and physical possession of the box on the date appearing on Exhibits 7 and 8.

[45] This evidence, along with the observations made by Cpl. MacLaughlin with respect to how the drugs were packed, the observations made by Cpl. Lane with respect to the fact that the clear plastic bags appeared to be in “pristine” condition or at least not heavily used, ties him intimately to the contents of the box. Based on all this evidence, I conclude that there is circumstantial evidence that Mr. Schiller knew there was marihuana in the box, and that he was in possession of the marihuana contained in the box sent to Ulukhaktok on April 3, 2008. This evidence is compelling to a point that, unless a reasonable explanation is provided, I would be entitled to find that Mr. Schiller was in possession of the drugs beyond a reasonable doubt.

[46] I now turn to the explanation provided by the Accused. Counsel for the Defence argued that there is an air of reality to his client’s version of the events, emphasizing the fact that he did not appear nervous to the clerk at First Air Cargo, that he did not attempt to withhold any information when he filled the shipping forms or with respect to identifying himself. The evidence given by Mr. Schiller was in two parts: first, he explained how his fingerprints would have been left on one clear plastic bag that was found inside the box. Then he explained why and how he came to be in possession of this box that Sandra Goose asked him to send her. Counsel for the Defence argued that the Accused had no reason to ask Ms. Goose any further question with respect to the contents of the box nor to inquire why she would ask him to hold the box for her, and that I should conclude that Mr. Schiller had no knowledge of the fact that the box he sent to Ms. Goose contained drugs.

[47] With regard to his fingerprints, Mr. Schiller clearly stated in his examination in chief and in cross-examination that Ms. Goose threw one bag at him and that he grabbed this bag, opened it, smelled the drugs and gave it back to her.

[48] However, this evidence is in contradiction with Exhibits 4 and 5 because each exhibit contains an impression of Mr. Schiller's right thumb, suggesting that Mr. Schiller handled two bags, on two separate occasions.

[49] Mr. Schiller observed Ms. Goose handling at least one bag of drugs on his first encounter with her in January. His version of events suggests that Ms. Goose would have packed the drugs herself inside the box, indicating further handling of the bags. I find it odd then, that the only prints found on the clear plastic bags, which were in "pristine" condition, were only those of Mr. Schiller. Consequently I do not believe this explanation.

[50] I also do not accept his evidence that he did not know and had no reason to suspect that there would be drugs inside the box.

[51] He saw and therefore knew that Sandra Goose is in possession of an important quantity of marihuana in early January 2008, and he saw her distribute marihuana at a party;

[52] He received from Sandra Goose a number of gifts, which was unusual as she had never done this since he's known her.

[53] She had never asked him to hold or send anything to her in the past.

[54] This is a person who had family in Yellowknife but chose to ask a friend rather than family to keep a box of meat.

[55] These circumstances are consistent with the behavior of someone who wishes to avoid detection and tries to put some distance between her and the contents of the box.

[56] She then would have sent more gifts to him, in addition to a sum of money in excess of what was necessary to pay for the shipping of her box.

[57] Under the circumstances, the lack of concern shown by Mr. Schiller towards Ms. Goose's behavior, which was unusual and unprecedented, is consistent with willful blindness rather than with good faith.

[58] The unexplained presence of Mr. Schiller's thumbprint on two clear plastic bags containing drugs, which were found inside a sealed box which was placed inside another sealed box proves that he handled those bags, knowing what they contained, and I am satisfied beyond a reasonable doubt that Mr. Schiller had knowledge and control of the drugs contained in the box that he shipped on April 3, 2008, to the attention of Sandra Goose.

[59] I find consequently that he was in possession of the 418.6 grams of marihuana found in Exhibits 4 and 5.

[60] Given the fact that Mr. Schiller sent the box containing the drugs to someone, this act comes within the meaning of trafficking found at section 2(2)a) of the *Controlled Drugs and Substances Act*, and I find that he was in possession of a controlled substance, namely cannabis (marihuana) for the purpose of trafficking.

Conclusion

[61] I declare James Victor Schiller guilty of the offence found at Count 2 on the Information.

[62] I direct a stay of proceedings on Count 1 of the Information.

Christine Gagnon
T.C.J.

Dated at Yellowknife, Northwest Territories
this 2nd day of April, 2009.

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