

CANADA / JUDGMENT

HMTQ v. Peterson and Larson

2000 BCSC 1811

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

HER MAJESTY THE QUEEN

AGAINST

TERESA MARIE PETERSON and

DARREN LEE LARSON

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE ROMILLY

Counsel for the Crown: C. J. Gibson

Counsel for the Accused

Teresa Marie Peterson:

M.J.B. Munro

Counsel for the Accused

Darren Lee Larson:

D.N. Lyon

Dates and Place of Hearing/Trial: December 13 and 14, 2000

Victoria, BC

[1] The accused are charged with the following offences:

Teresa Marie PETERSON and Darren Lee LARSON

COUNT #1: On or about the 23rd day of June, 1999, at or near the Municipality of Langford, in the Province of British Columbia, did unlawfully possess for the purpose of trafficking a controlled substance, to wit: Cocaine, contrary to section 5(2) of the Controlled Drugs and Substances Act.

COUNT #2: On or about the 23rd day of June, 1999, at or near the Municipality of Langford, in the Province of British Columbia, did unlawfully produce a controlled substance, to wit: Cannabis (marihuana), contrary to section 7(1) of the Controlled Drugs and Substances Act.

COUNT #3: On or about the 23rd day of June, 1999, at or near the Municipality of Langford, in the Province of British Columbia, did unlawfully possess for the purpose of trafficking a controlled substance, to wit: Cannabis (marihuana), in an amount exceeding three kilograms, contrary to section 5(2) of the Controlled Drugs and Substances Act.

COUNT #4: On or about the 23rd day of June, 1999, at or near the Municipality of Langford, in the Province of British Columbia, did unlawfully possess a controlled substance, to wit: N-methyl-3, 4-methylenedioxyamphetamine (N,a-dimethyl-1,3-benzodioxole-5-ethanamine), contrary to section 4(1) of the Controlled Drugs and Substances Act.

COUNT #5: On or about the 23rd day of June, 1999, at or near the Municipality of Langford, in the Province of British Columbia, did unlawfully possess a controlled substance, to wit: Diacetylmorphine (heroin) contrary to section 4(1) of the Controlled Drugs and Substances Act.

[2] At the outset of the trial both accused entered pleas of not guilty to all of the Counts in the indictment.

Factual Background

[3] The RCMP were interested in the activities that were taking place at 2649 Denille Road in Langford, British Columbia ("the Premises"). As a result, they began observing the activities at the Premises.

[4] On June 23, 1999 Constable Mark Smith set himself up in an observation post from which he observed the comings and goings from the Premises between approximately 6:21 p.m. and one minute to 10:00 p.m.

[5] During this time, he observed seventeen short visits from different people. The majority of these visits lasted for about two minutes. Interestingly, he noticed that many of the visitors seemed to enter the Premises without knocking or using a key.

- [6] While some of these visits took place when the two accused were apparently not at the residence, they were, however, present for eight of these seventeen visits.
- [7] Constable Smith noticed that most of the visits to the Premises were made by occupants of motor vehicles who usually parked their vehicles in the driveway of the Premises.
- [8] Constable Smith had noticed that the two accused arrived at the Premises in a yellow 4x4 Blazer automobile at 7:20 p.m. at which time one of them was seen to be in possession of plastics bags with what appeared to be groceries which were taken into the Premises. These two accused left the Premises again in the same yellow 4x4 Blazer at 8:38 p.m. and returned to the Premises at 9:32 p.m. At that time one of the accused drove the Blazer into the carport.
- [9] After noticing one of these short visits on June 23, 1999, Constable Smith requested that Constable Sandhu and other members of the RCMP apprehend one of the people who had left the Premises. When the R.C.M.P. arrested and searched that person, they found a flap of cocaine.
- [10] On the basis of the police observations of the Premises and the cocaine seized from the visitor, a search warrant was obtained to search the Premises.
- [11] The search warrant was executed late in the evening of June 23, 1999 by Corporal Sutherland, Constables Smith and Sandhu. When they entered the Premises they found the two accused at the kitchen counter.
- [12] I find as a fact that when the police entered the Premises to execute the search warrant they interrupted both accused in the process of packaging drugs on the counter in the kitchen of the Premises. The police found three packages of drugs in a black pouch on the counter. They also found some drugs in a plastic container on an electric scale on the counter and another plastic container with drugs that had a spoon in it and was located next to the scales. Other drug paraphernalia and two fifty-dollar bills were also found on the same counter in the kitchen. These drugs that were found on the kitchen counter all analyzed as cocaine.
- [13] When the accused Teresa Peterson noticed that the police had entered, she threw a small package into the living room. The police recovered the package and determined it to contain cocaine.
- [14] When the police were about to search the accused Darren Larson, he stated that he had some marijuana in his pocket, which he gave to Constable Sandhu.
- [15] The police then searched the remainder of the Premises. They located \$750.00 in a purse that was located in the master bedroom of the Premises. In that purse was also located a Care card in the name of the accused, Teresa Marie Peterson.

- [16] Upon further search, they found a marijuana grow operation on the main floor and in the basement of the Premises. There were 20 marijuana plants on the main floor of the house and 17 plants in the basement. Several trays of marijuana plant clones were also found in the house.
- [17] The police also found 36.5 grams of marijuana and 7 large marijuana joints located in the headboard in the master bedroom.
- [18] In the master bedroom they found a quantity of ecstasy and heroin at the foot of the bed. Near those drugs they found a wallet with identification in the name of Allan John Arsenault and a Master Card in the name of Alexander Thompson.
- [19] They also found a purse beside the bed, containing a driver's licence in the name of Teresa Thompson, however the photo on the licence matches the accused Peterson. The police also found a Care Card in the purse in the name of Teresa Peterson.
- [20] The police found a Winchester shotgun on the bed in the master bedroom. The gun had a trigger lock but the police were unable to find a key for that lock.
- [21] In the carport of the Premises the police found the same yellow Blazer 4x4 automobile that Constable Smith noticed both accused using earlier that evening.
- [22] During the search someone knocked on the door of the Premises shortly after midnight on June 21, 1999. Constable Sandhu took off his police vest and answered the door. The person at the door asked for "Teresa" and Constable Sandhu told the visitor that she was busy. The visitor told Constable Sandhu that he wanted "one-half of a ball", and Constable Sandhu told him to come back. After he left, two more visitors came to the house during the search. They both asked for "Terry" and they were told to come back later.
- [23] When these statements were introduced into evidence, counsel for the accused Peterson, objected to their introduction on the basis that the evidence was hearsay. It was my view, however, that this evidence was admissible but at the time I was unable to find the cases that supported that proposition and I asked counsel for his position on the issue. Counsel for the Crown insisted that these statements were introduced into evidence as part of the narrative and not for their truth. He indicated that he did not seek to admit these statements as evidence against the accused, Paterson.

ISSUES

- [24] This case raises the following issues:
1. Is the key for the trigger lock admissible as evidence against the accused, Larson?
 2. Did the accused have possession of the drugs found at the Premises?
 3. Are the statements made by the visitors to the Premises when it was being search admissible into evidence at this trial?

The admissibility of the statements made by the visitors to the premises when the Premises were being searched.

- [25] I have already noted that the statements of the three visitors during the police search were not tendered by the Crown as evidence in this case. I note parenthetically, however, that counsel for the Crown could have asked to admit this evidence.
- [26] It is not uncommon for police officers to answer the telephone or the door to the premises they are searching. Other decisions have considered whether statements made in these circumstances should be admitted as evidence against an accused.
- [27] In *R. v. Edwards* (1994), 91 C.C.C. (3d) 123 (Ont.C.A.); affirmed (1996), 104 C.C.C. (3d) 136 (S.C.C.), the police intercepted calls to the accused on his cellular phone, in which the callers requested drugs. The majority of the Ontario Court of Appeal held that these calls were not hearsay. They were not admitted for the truth of their content, but rather to demonstrate the activities occurring at the house.
- [28] The Supreme Court of Canada reached a similar conclusion in *R. v. Ly* (1997), 119 C.C.C. (3d) 479 (S.C.C.). In that case the Court admitted a conversation between the police and an unidentified person where the unidentified person arranged to deliver drugs to the police officer. The Court held at 480:

The telephone conversation was admissible. It was a statement of intention, or a statement tendered to establish the alleged drug transaction, and hence not tendered for the truth of its contents. Accordingly, it was not hearsay. The telephone conversation is merely one of the circumstances which, combined with others, may suffice to establish that the accused, when he appeared at the designated time and place, in possession of the drugs, did so for the purpose of trafficking. Any frailties in relation to the connection between the accused and the telephone conversation go to weight and not admissibility.

- [29] The Ontario Court of Appeal reached the opposite conclusion in *R. v. Wilson* (1996), 107 C.C.C.(3d) 86. In *Wilson*, a police officer gave evidence that while he was in the accused's apartment, a man came to the door, asked for "Rob" and wanted to buy drugs. The court distinguished *Edwards*, and rejected the statement at issue. McMurtry C.J.O. speaking for the court stated at 94:

In *Edwards* the cellular telephone and pager comprised a business centre in that there were 10 separate calls requesting drugs that identified the nature of the enterprise the appellant was conducting. An irresistible inference could be drawn from the evidence of these calls.

- [30] In Wilson, only one individual came to the accused's door asking to buy drugs. In this case however, three people visited the Premises during the search, one of whom asked specifically to buy drugs. These visits came after the police observed some 17 separate visits to the Premises shortly before the search began. Further, the police had already seized cocaine from the person who had been seen at the Premises and later stopped by the R.C.M.P.
- [31] The visitors' statements to the police are informed by the other information and evidence this court has about the accused's activities on the Premises.
- [32] The Court of Appeal in Edwards also held that even if the statements were hearsay, they were admissible under the new approach to hearsay. In this case, the statements made the police are reliable because the visitors had no reason to lie to the police about who they were looking for and for what reason. They are necessary because they demonstrate the activities of the accused.
- [33] I wish to make it clear, however, that in view of the position taken by the Crown with respect to these statements, that my decision in this case did not turn on the admissibility of this evidence. However, I note that there exists sufficient caselaw to support an argument for its admission of this evidence in this case.

Is the evidence of that the accused, Larson, produced the key to the trigger lock to the gun that was found in the master bedroom of the Premises admissible as evidence against him?

- [34] A few days after the search, the accused Larson attended the police detachment and gave Corporal Sutherland a key to the trigger lock for the gun they found in the master bedroom of the Premises. It would appear that on the day before this trial began, it became apparent to Crown Counsel that the accused Larson had made a statement to Corporal Sutherland and that at the Corporal's urging Larson turned over to the Corporal the key for the trigger lock. Upon discovering this evidence, Crown counsel had Corporal Sutherland prepare a "will say" statement and faxed to defence counsel. In his fax he stated that he did not intend to introduce into evidence at this trial any of the statements made by the accused, Larson, to Corporal Sutherland. At the trial the statements were not introduced but the evidence of the keys being turned over to the Corporal was introduced into evidence. Defence counsel objected to the introduction of this evidence. He submitted that without the conversation that accompanied the turning over of the key, the whole transaction was meaningless and that by not leading the statements made by the accused Larson the introduction of the evidence of the key being turned over made the trial unfair.
- [35] Under cross-examination of Corporal Sutherland he admitted that when the accused Larson gave the key to the police he made a statement about what the key belonged to. However, without Larson's statement, the police would not have known that the key fit the trigger lock. Counsel for Mr. Larson argues that the introduction of the key by the Crown amounted to a technical breach of his undertaking not to enter the statements made by Larson to Corporal Sutherland because the turning over of the key to him was inextricably linked to the

statement that was not introduced.

- [36] While I am aware that since the decisions of *R. v. Oickle* (2000), 36 C.R. (5th) 129 (S.C.C.) and *R. v. Sweeney* (2000), 36 C.R. (5th) 198 (Ont.C.A.) there has been a renewed interest in the confessions rule, in my view this seems to be an ethical argument rather than a legal one. I see no legal reason for not admitting the evidence of the fact that a few days after the Premises were searched, the accused Larson turned over to the police the key to the trigger lock on the gun that was seized from the master bedroom of the Premises.

Did the Accused have Possession of the Drugs Found at the Premises?

(a) Direct Possession

- [37] When the police entered the Premises they found both accused dividing up a large quantity of cocaine on the kitchen counter. Eighteen grams of cocaine were being divided into smaller packages; 8.25 grams of cocaine had already been divided into packages that were on the kitchen counter. A further 5 grams of cocaine were found inside a black bag also on the counter.

- [38] It is clear that both the accused, given their actions when the police entered the Premises, had actual possession of the cocaine.

- [39] Further, the cocaine found was of a sufficient quantity that I infer that their purpose of possessing the drug was to distribute the drug.

(b) Constructive Possession

- [40] Section 4(3)(b) of the Criminal Code defines constructive possession:

- (3) For the purposes of this Act,

- (b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

- [41] In *R. v. Sherman* (1945), 62 B.C.R. 241 the Court of Appeal discussed what constitutes constructive possession, and held that it requires more than quiescent knowledge and that the accused have some measure of control over the subject matter. See also: *R. v. Colvin and Gladue* (1942), 58 B.C.R. 204 (B.C.C.A.); *R. v. Larier* (1960), 35 C.R. 61 (Sask.C.A.); *R. v. Terrence* (1983), 33 C.R. (3d) 193 (S.C.C.); *R. v. Shaw* (1985), 14 W.C.B. 348 (B.C.C.A) June 21, 1985 Vancouver Registry CA002811.

- [42] To establish control for the purpose of constructive possession, the Crown need not prove actual physical control by the accused over the drugs in question. In *R. v. Terrence* (1980), 55 C.C.C. (2d) 183 (Ont.C.A.), affirmed (1983), 4 C.C.C. (3d) 193 (S.C.C.), the Supreme Court of Canada seemed to accept that control means power or authority over the drugs in question.

[43] In *Re Chambers and the Queen* (1985), 20 C.C.C. (3d) 440 (Ont.C.A.), the court held that if an accused can grant or withhold consent to drugs stored in a bedroom, he or she exercised the requisite control for constructive possession. However, it is not necessary for the Crown to establish that the accused actually gave or withheld consent.

[44] In *R. v. Miller* (1984), 12 C.C.C. (3d) (B.C.C.A.) Lambert J.A. held that passive acquiescence was not enough to establish consent within the meaning of s.4(3)(b) of the Criminal Code. He stated at 86:

... the use of the word "consent" [in s.4(3)(b) of the Criminal Code] has been taken to indicate some power to decline to consent in an effective kind of way. Passive acquiescence will not bring the presumption into operation. This concept of control was adopted in *R. v. Colvin and Gladue* (1942), 78 C.C.C. 282, [1943] 1 D.L.R. 20, [1942] 3 W.W.R. 465 (B.C.C.A.), and in a number of cases in which that case was followed. But in *R. v. Lou Hay Hung* (1946), 85 C.C.C. 308, [1946] 3 D.L.R. 111, [1946] O.R. 187 (Ont.C.A.); *R. v. Caldwell* (1972), 7 C.C.C. (2d) 285, 19 C.R.N.S. 293, [1972] 5 W.W.R. 150 (Alta.S.C.A.D.), per McDermid J.A. at p.287 C.C.C., p.294 C.R.N.S., and *R. v. Edwards* (1981), 63 C.C.C. (2d) 94, 24 C.R. (3d) 281, 50 N.S.R. (2d) 118 (N.S.C.A.), it is suggested that a finding of control is not a universal prerequisite to a finding of consent or to the application of the presumption.

[45] It is necessary to consider all the evidence found at the Premises to determine whether or not the accused had constructive possession of the drugs.

[46] In *R. v. Carroll* (unreported), February 14 1978 (B.C.C.A.) the police obtained a search warrant to search an apartment. The accused used a key to enter the apartment during the search. The police found a briefcase containing one and one half pounds of cannabis resin and a number of documents of a personal nature that referred to the accused. These documents included an expired passport with the accused's name and photograph. McIntyre J.A. (as he then was) stated at 3 - 4:

The trial judge made it clear in his judgment that he had borne in mind the need to show control over the narcotic, with knowledge of its nature, and he concluded on the basis of the appellant's presence in the apartment, his means of access to the apartment, coupled with the evidence of his residence or presence there, as indicated from the documents found in the brief - case with the drugs, that the appellant had that degree of control and knowledge required to base a finding of possession. ... I cannot say that the trial judge was wrong and I would dismiss the appeal.

[emphasis added]

[47] The accused are also charged with producing marijuana and possession of marijuana for the purpose of trafficking. As discussed earlier in these reasons, the police found a large marijuana grow operation in the basement and on the main floor of the Premises, as well as a quantity of consumable marijuana elsewhere in the house.

- [48] In order for the Crown to prove beyond a reasonable doubt that the accused committed this crime, it must establish that they had possession of the marijuana found at the Premises. It is necessary, therefore, to examine the evidence demonstrating the their knowledge of the marijuana and their control over it in the house.
- [49] On June 23, 1999 the police observed the two accused exit from and return to the Premises twice during their surveillance. The accused left the house in a vehicle parked in the carport, and re-parked the vehicle in the carport when they returned. I note that they did not park on the street or even in the driveway of the house as did most of the other visitors.
- [50] The accused did not seem to have any difficulty entering the Premises.
- [51] On one occasion when the accused returned to the house, the police observed them take what appeared to be grocery bags out of the Blazer and bring them into the Premises.
- [52] When the police entered the Premises, they saw both of the accused standing at the kitchen counter, parcelling out drugs. When the accused Peterson saw the police she threw, what was later determined to be a package of cocaine, into the living room.
- [53] Upon a search of the Premises, the police found a purse containing a driver's license with the accused Peterson's picture though the name on the licence was "Teresa Thompson". The purse also contained a Care Card in the accused Peterson's name.
- [54] In relation to the accused Larson, I have already admitted the evidence of the key to the trigger lock on the gun found in the master bedroom that he provided to the police, and his statement that it fit the trigger lock. In addition when he went to the police station to turn over the key to the trigger lock on the gun, he retrieved the co-accused driver's licence and Care card from the police.
- [55] Some time after the police conducted their search of the Premises, at the beginning of this year, they attended the Premises again in order to serve the Certificate of Analysis on the accused. Mr. Larson answered the door at the Premises, and accepted service of the documents.
- [56] Given each accused's access to the Premises, their presence and conduct during the surveillance and search, and the physical evidence found in the master bedroom, I find that each of them had the necessary knowledge and control over the marijuana found in the Premises for them to have had possession of it.
- [57] In arriving at this conclusion I have also referred to the following authorities: *R. v. Black*, [1996] B.C.J. No. 3148 (QL) (C.A.); *R. v. Bradley*, [1999] B.C.J. No. 1291 (QL)(S.C.); *R. v. Iturriaga*, [1993] B.C.J. No. 2901 (QL) (C.A.); *R. v. Anderson*, [1995] B.C.J. No. 2655 (QL) C.A.); *R. v. Lee*, [1996] B.C.J. No. 1196 (QL) C.A.); *R. v. Fong*, [1993] B.C.J. No. 1737 (QL) (C.A.); *R. v. Amado and Soulie*, [1996] B.C.J. No. 1737 (QL) (C.A.); *R. v. John Aylward and Iris Aylward* (1993), 36 B.C.A.C. 14 (B.C.C.A.); *R. v. Barreau* (1991), 19 W.A.C. 290 (B.C.C.A.) and *R. v. Coull and Dawe* (1986), 33 C.C.C. (3d) 186 (B.C.C.A.).

- [58] Having found that both accused were in possession of the marijuana, and given the significant amount of marijuana found in the Premises, I find that they both produced the marijuana and did so for the purpose of trafficking.
- [59] Counts 4 and 5 deal with the possession of ecstasy and heroin respectively. Those drugs were found near a wallet containing identification. The identification in that wallet cannot be conclusively tied to either accused. Thus I do not find the requisite degree of care and control over the drugs to establish guilt of either accused on those charges.
- [60] I find that Teresa Peterson and Darren Lee Larson are both guilty of possession of cocaine for the purpose of trafficking. I also find that they are both guilty of production of marijuana, and possession of marijuana for the purpose of trafficking, Counts 1 and 2 in the indictment.

"S.R. Romilly, J."

The Honourable Mr. Justice S.R. Romilly

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