

CANADA / JUDGMENT

R. v. Kirk

2022 BCSC 2312

COURT

Supreme Court of British Columbia

DECIDED

23 June 2022

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2022 BCSC 2312 R. v. Kirk

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Kirk,

2022 BCSC 2312

Date: 20220623

Docket: 82821-2

Registry: Nanaimo

Regina

v.

Chad Michael Kirk

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Before: The Honourable Mr. Justice Baird

Oral Reasons for Judgment

Counsel for the Crown:

C. Gibson

Counsel for the Accused Kirk:

D. Melville

Place and Date of Trial:

Nanaimo, B.C.

June 13-17 & 21, 2022

Place and Date of Judgment:

Nanaimo, B.C.

June 23, 2022

INTRODUCTION

- [1] The accused, Chad Michael Kirk, is on trial for three counts of possession of narcotics for the purpose of trafficking, namely, fentanyl, cocaine and methamphetamine; and single counts of possession of stolen property and unlawful storage of a firearm. At the invitation of Crown counsel, I have already dismissed the charge of possession of stolen property, which was Count 4 on the indictment. The allegations date back to April 13, 2018, just over four years ago.
- [2] Investigation of the accused started after the local RCMP received confidential source information to the effect that, using the street alias "Dayton", the accused was selling drugs for someone called Windsor Nguyen, a person believed by police to be a wholesale drug distributor and Lower Mainland gang member. A brief surveillance investigation established that the accused either lived at, or had free and consistent access to, a house located at 5768 Linyard Drive in Nanaimo, B.C. Windsor Nguyen and one of his relatives were also seen at this residence on separate occasions.
- [3] As a result of observations made by surveillance officers over a number of days, the accused was arrested on April 13, 2018 for drug trafficking offences. He was in a motor vehicle registered to him, a little black Honda Civic, in which he had been recently observed driving around Nanaimo and conducting himself in a manner consistent with so-called "dial-a-dope" drug trafficking, and returning between times to 5768 Linyard Road. At the time of his arrest, he had a front seat passenger with him called Isaac McCormick.
- [4] The arrest followed a final brief and apparently pre-arranged meeting in a residential side-street less than 10 minutes after the accused had driven away from a pit-stop at the Linyard address. A person called Nathan Mazerall entered the back of the accused's Honda Civic, remained there for around 30 seconds, and got out again. The police swooped in and arrested the accused, Mr. McCormick, and Mr. Mazerall, the latter of whom had close to 20 grams of cocaine in his trouser pockets. The accused's car was searched and the following items were seized:
- Registration and insurance papers in the accused's name in the glove compartment;
 - The accused's wallet, including his picture driver's licence in the centre console;
 - A gold iPhone in the driver's side door;

- A large knife in the driver's side door;
- A grey iPhone on the driver's seat;
- A gold LG phone on the driver's seat;
- A black Samsung phone in the centre console;
- A black Samsung phone with a charge cable also in the centre console;
- Instructions for a "Kel-Tec" shotgun in the passenger's side visor;
- A green trigger lock with keys in the passenger side door;
- 1.39 grams of cocaine in the centre console; and
- a black backpack on the rear passenger seat.

[5] In this black backpack the police discovered the following:

- \$1,580 contained in a grey wallet;
- \$830 in cash lying loose in the main compartment;
- 13.93 grams of methamphetamine;
- 8.38 grams of methamphetamine otherwise packaged;
- 18.05 grams of fentanyl;
- Another 3.83 grams of fentanyl;
- 12.01 grams of crack cocaine;
- 0.58 grams of powder cocaine; and
- An extendable baton.

[6] The backpack was similar to one that Mr. Kirk had been observed wearing during the previous day's surveillance whilst ascending the elevator to the 15th floor of the Coast Bastion Hotel in downtown Nanaimo. Key cards from that same hotel were found inside it. The various drugs were packaged in spitballs indicating clearly that they were intended for retail street sales.

[7] In the wallet containing the \$1,580 there was an adhesive page marker with "Dayton \$9700" written on it. The various cellphones rang constantly as the police went about their work. Clipped to the driver's side windscreen visor there was a remote device which the police later confirmed opened the garage door at 5768 Linyard Road. A key on the same ring as the Honda's ignition key was used to unlock the front door of the residence.

- [8] In the trunk of the Honda Civic, a Kel-Tec 12-gauge shotgun was found consistent with the instruction manual that had been found clipped to the front passenger windscreen visor. It was in a backpack wrapped inside a t-shirt or towel alongside three boxes containing approximately 100 Challenger shotgun shells. The shotgun was unloaded and its trigger was locked. The exhibit officer discovered that the keys found with the trigger lock in the front passenger door opened the trigger lock on this rifle.
- [9] In the evening hours of April 13, 2018, a warrant was issued to search 5768 Linyard Road. The police attended and entered around 10:00 p.m. I heard no admissible evidence of any measures taken to secure the scene after the accused was arrested at around 2:00 p.m. The house was divided into two suites, but the police searched only the upper floor suite associated to the accused. The search team seized the following items of relevant evidence:
- \$28,400 in tightly packed bundles, six in number, inside a pouch hidden behind the clothes dryer in the laundry room. One of the bundles was affixed with an adhesive page marker just like the one found on the grey wallet located inside the backpack on the back seat with "Dayton \$3340" handwritten on it;
 - Directly beside this pouch with the money in it there was a second pouch containing 182 grams of fentanyl, not separated into spitballs or packaged for sale, in one bag in other words, in the pouch directly beside the money hidden from view behind the clothes dryer;
 - Another \$1,030 concealed in a pillowcase in the master bedroom, \$305 in the master bedroom closet, and \$385 in plain view on a shelf above the desk in the office;
 - Two large vacuum-sealed bags of marihuana bud weighing over one kilogram inside a safe in the office;
 - Multiple electronic digital scales, some of them smeared with narcotics residue;
 - Multiple scoresheets and notebooks found in the office, along with various types of documents (receipts, bills, etc.) in the accused's name;
 - An unopened box in the master bedroom addressed to Windsor Nguyen at an address on E. 54th Avenue in Vancouver;
 - A "Kel-Tec" box under the desk in the office;
 - Pyrex containers with drug residue;
 - A vacuum sealer;
 - A money counter;
 - A taser;
 - A collapsible baton;

- A 22-calibre rifle, the same rifle referred to in Count 5 of this indictment alleging that it was possessed by Mr. Kirk and unlawfully stored;
- A variety of pellet guns;
- Various knives;
- Bear spray;
- Four boxes of Challenger shotgun shells, the same sort of shotgun shells that were found in the backpack in the boot of the car; and
- Various smaller amounts of drugs and trafficking paraphernalia in the office, master bedroom, master bathroom, and secondary bedroom.

[10] The following day, April 14, 2018, the accused gave a warned statement to one of the investigating officers. In that statement, the accused admitted, without much prompting it has to be said, that he was distributing drugs in "partnership" with Windsor Nguyen, and confirmed that he had lived at 5768 Linyard Road for several months. He told the investigator that Windsor Nguyen stayed at the residence sometimes and that Nathan Mazerall, the person with whom he had been arrested, was one of his customers. He claimed to know about the money stashed behind the clothes dryer, but he steadfastly denied that he had any knowledge about the pouch of fentanyl. He referred in his police statement to the master bedroom of the house as "my bedroom", the master bathroom as "my bathroom", and the office as "my office".

[11] When asked about how much money he had been making, the accused answered "We wrote everything down, I'm sure you'd have my book." I repeat that in the office, amidst bills, documents and correspondence with the accused's name on them, the police found notebooks containing "scoresheets" or account ledgers, which taken together stand as clear evidence that the accused was, at the very least, an active participant in a brisk, ongoing and significant drug trade in fentanyl, crack cocaine, powdered cocaine, methamphetamine and marihuana, generating thousands upon thousands of dollars in revenue every day.

[12] The accused did not testify at this trial and of course he was under no obligation to do so. Instead, he put the Crown to the strict proof of its case. In the end, he argued that, because of the evidence establishing that other people came and went from both his Honda Civic and the Linyard Road residence, I should have a doubt about whether the backpack in the rear passenger seat of his car belonged to him, and whether he knew about the pouch of fentanyl hidden behind the clothes dryer in the laundry room of the house.

[13] In this connection, I would note once again that, during his confession to the police, the accused readily admitted that he had been dealing in drugs in partnership with Windsor Nguyen, acknowledged his responsibility for much of the cash and contraband found in the house, and did not deny ownership of the backpack or knowledge of its contents. However, he did expressly deny all knowledge of the fentanyl behind the clothes dryer.

[14] In respect of the backpack and its contents, I have no reasonable doubt. Apart from the obvious fact that the car belonged to the accused and was registered in his name; that he appeared throughout to be its sole operator; that he was in care and control of it at the time of his arrest; and that Nathan Mazerall had no backpack with him when he entered the rear passenger seat, I would summarise at least the following further indicators of possession:

- The accused admitted in his police statement that he was a drug dealer;
- He admitted that Nathan Mazerall was his customer;
- On April 13, 2018, Nathan Mazerall entered the accused's vehicle and engaged in a brief, obviously pre-arranged meeting followed immediately by his arrest upon alighting from the accused's vehicle;
- Nathan Mazerall had powdered cocaine in his pockets which, according to the undisputed testimony of the Crown's drug trafficking expert, was roughly equivalent in value to the amount of money (\$1,580) found in the wallet located within the backpack;
- In this same wallet was found an adhesive page marker just like the one found later affixed to one of the bundles of money in the pouch behind the clothes dryer at 5768 Linyard, this one marked "Dayton 9700";
- On April 12, 2018, surveillance officers had seen the accused carrying a similar looking backpack whilst attending room 1513 of the Coast Bastion Hotel. The accused confirmed in his police statement that he had been visiting his girlfriend there. Key cards from the Coast Bastion Hotel were found in the backpack after his arrest;
- The fentanyl found in the backpack was of a similar potency to the fentanyl located at Linyard Road, between 6 and 6.4 percent; and
- The backpack contained \$2,410 in cash and drugs valued by the Crown's expert at approximately \$3,300 - not the sort of property, in other words, that someone else would have left sitting on the accused's back seat.

[15] In my view, the only reasonable inference to be drawn from the established facts is that Nathan Mazerall had purchased the cocaine found in his possession from the accused only moments before his arrest. I would note in passing that the amount of cocaine found on Mr. Mazerall is far more product than I would expect a street level user to purchase in one go, and it establishes to my satisfaction, along with other evidence, that the accused was engaged in supplying street level drug dealers with product for re-sale.

[16] I agree with the undisputed evidence of the Crown's drug expert that the scoresheets found in the office, along with the accused's commentary concerning them in his warned police statement, stand as crystal-clear confirmation of this conclusion. In his statement the accused referred to "my office" and "my book", and within these records we see plain evidence of packaged sales of various substances in far larger quantities than could plausibly be argued were for the personal use of the listed purchaser. On all of the evidence I

find beyond a reasonable doubt that the accused was engaged in a mid-level trafficking operation in which he was peddling multiple substances to sub-dealers, including fentanyl.

- [17] Defence counsel focussed his submissions more or less exclusively on the question of whether the accused should be fastened with knowledge about the location and contents of the pouch of fentanyl located behind the clothes dryer. While it has only a glancing impact on my findings elsewhere on the evidence about the accused's criminal conduct overall, I am prepared to accept, although perhaps not terribly enthusiastically, that in all of the circumstances he may not have known it was there, even though he seemed to be aware that a pouch of money was stashed right beside it.
- [18] As I have said already, the accused elected not to testify. All that I know concerning his version of events comes from his April 14, 2018 police statement led into evidence by the Crown. The contents of this interview, once admitted, became evidence both for and against the accused: *R. v. Higgins* (1829), 3 Car. & P. 603 at 604; *R. v. Hughes*, [1942] S.C.R. 517 at 521; *R. v. Knox* (1968), 2 C.C.C. 348 at 360 (B.C.C.A.). It is for me to decide what weight to attach to his statements to the police. I can accept all, part or none of what he said.
- [19] Furthermore, the approach set out in *R. v. W.(D.)*, [1991] 1 S.C.R. 742 at para. 28 and *R. v. C.W.H.* (1991), 68 C.C.C. (3d) 146 at 155 (B.C.C.A.), is not limited to situations where the accused gives sworn evidence at trial. It is also applicable to situations where an accused's statement is tendered as part of the Crown's case: *R. v. B.D.*, 2011 ONCA 51 at paras. 105 and 114; *R. v. Grant*, 2013 MBCA 95 at paras. 31-33; *R. v. McDonald*, 2014 BCSC 477 at para. 58.
- [20] The burden of proof is on the Crown to establish the accused's guilt beyond a reasonable doubt with respect to every material averment in the indictment. The accused is never required to prove his innocence or disprove the Crown's case. If I believe the accused's police statement, denying knowledge about the location and contents of the pouch of fentanyl behind the clothes dryer, or if I am unable, based on all of the evidence that I do believe, to accept the Crown's contrary theory about this, then I must accord the accused the benefit of that doubt.
- [21] This is not a matter, I should like to stress, of examining the evidence piecemeal or of applying the standard of proof beyond a reasonable doubt to individual items of evidence. I have the totality of the evidence firmly and freshly in mind. I have already said that, on my evaluation of the whole of the case, the Crown has proved beyond a reasonable doubt that on and around the date of his arrest the accused was doing business as a mid-level drug dealer. I hereby find the accused guilty of Counts 1 to 3 of the indictment on the basis of the surveillance evidence, his possession of the backpack and my findings about his clear knowledge of its contents, the evidence derived during the search of 5768 Linyard Road, and his warned police statement.
- [22] In fairness to the accused, as I have already said, in realistic and practical terms he has never made any bones about most of this at any stage of the game. The one and only thing, really, that he has ever denied was knowledge of the pouch of fentanyl behind the clothes

dryer. This denial came into the trial record by means of a police statement adduced by the Crown, which the Crown has urged me to consider must be true in every other respect. Other than this the accused has not disputed the basic proposition that in association with others he was intimately involved in a drug dealing operation moving thousands of dollars of product per day.

- [23] With respect to this one specific disputed allegation, that the fentanyl pouch behind the dryer was his, or that he knew it was there, the accused has urged upon me, and I accept, perhaps only barely, that there is a reasonable alternative possibility: namely, that Windsor Nguyen or another of his associates put it there without immediately notifying the accused. I have already said that the police observed Windsor Nguyen around the house a couple of weeks before the accused's arrest, and there were lengthy gaps in surveillance during which, for all I know, he might have returned there any number of times, including on March 13, 2018, either before or after the accused was arrested.
- [24] I would emphasise, as well, that there was an unopened box in the master bedroom with Windsor Nguyen's name on it, addressed to a residence in East Vancouver, leading to the possible inference that he brought it there himself; in other words, that Windsor Nguyen had been inside the house, and in the master bedroom more particularly, on some occasion in the not too distant past. When it comes to the scoresheets, furthermore, it seems clear enough that "Dayton" is a downstream drug seller, and that he works for the author of the records who is referred to therein as "Me". As the Crown's drug trafficking expert observed, the common-sense inference is that "Dayton" and "Me" are different people. I have decided that the likeliest interpretation to be put on all of this evidence is that Mr. Kirk, or "Dayton", was an employee of "Me", who was likely Mr. Nguyen. This accords fully with the police working theory from the very beginning based on source information that Windsor Nguyen was the boss of the operation and that the accused "Dayton" was distributing for him.
- [25] In all of the circumstances, therefore, it does not seem to be much of a stretch to suppose that Windsor Nguyen stashed the pouch of fentanyl behind the clothes dryer, or to be outside the realm of reasonable possibility that the accused may not have known about it. I note that the interrogating police officer himself, a seasoned narcotics investigator with intimate knowledge of the investigation and all of its details, readily accepted the accused's denial of knowledge about this pouch of fentanyl, and while I am not prepared to go as far as that perhaps, I cannot say in all of the circumstances that his denial is demonstrably false, especially considering the alacrity with which he conceded all other aspects of his involvement in this sorry affair.
- [26] Of course, none of this alters my firm conclusion, on all of the evidence, that large quantities of multiple substances -- fentanyl, powder cocaine, crack cocaine, methamphetamine, and marihuana -- were being distributed from 5768 Linyard and that the accused, at the very least, was a mainstay of the operation. I find, in effect, that he was the shipper/receiver of a de facto drug depot, and that he was up to his neck in a high-volume wholesale drug trade to street level dial-a-dopers. The fact that he may not have been aware of this specific inventory

of fentanyl found behind the clothes dryer is no great claim to innocence.

- [27] What I mean by this is that, even if the accused might reasonably or plausibly claim to have had no knowledge of that specific stash of fentanyl, I cannot doubt on all of the evidence that he must have been expecting an imminent delivery of that very substance along with others to be made in the ordinary course of his high-volume business and partnership with Mr. Nguyen. I also think it certain that, if the accused had not been arrested on April 13, 2018, his employer would swiftly have issued instructions, with which the accused would promptly have complied, to retrieve this very inventory of fentanyl from its hiding place and to separate it into scores upon scores of spitballs for distribution to street-level dealers without any concern for the damage to life, health and community that he would cause thereby.
- [28] The remaining count to be dealt with alleges unsafe storage of a 22-calibre rifle found in the master bedroom of 5768 Linyard Road. The accused has admitted that the item in question in a non-restricted firearm that was not properly stored in accordance with the requirements of the relevant regulation. Unlike the pouch of fentanyl, which was hidden from sight and would not have been visible even to somebody using the clothes dryer behind which it was concealed, the rifle was in plain view in the accused's bedroom in circumstances where, by his own admission there were drugs, money and imitation firearms strewn about elsewhere.
- [29] In all of the circumstances, however, for reasons not substantially different from those appertaining to the fentanyl, and having to do with resort to the house by people other than the accused, including Windsor Nguyen and associates, I am not prepared to draw the inference that the accused's possession of this firearm is the only available inference to be drawn from the established facts. I also bear in mind, to a far lesser degree, the possibility based in police evidence that this item might have been moved inadvertently by investigators during the search. I find the accused not guilty of Count 5.
- [30] Stand up, please, Mr. Kirk.
- [31] In summary, for the reasons already given, and on all of the evidence, including the surveillance investigation of which you were the target, evidence of your arrest and searches incidental to it, especially the evidence found in the knapsack on the rear seat of your vehicle, which I find belonged to you, and that you knew perfectly well what was inside, and on the evidence of the drugs taken from Mr. Mazerall, and the fruits of the search of the residence which you admitted to be yours at 5768 Linyard Road, I hereby find you guilty on Count 1, possession of fentanyl for the purpose of trafficking, on Count 2, possession of cocaine for the purpose of trafficking, and on Count 3, possession of methamphetamine for the purpose of trafficking. Counts 4 and 5, for the reasons given, are dismissed.
- [32] That is all. You may be seated.

"Baird J."

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Prepared on 27 October 2026 · Esheria