

CANADA / JUDGMENT

R. v. Kovacs

2025 BCSC 1761

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Supreme Court of British Columbia

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2025 BCSC 1761 R. v. Kovacs

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Kovacs,

2025 BCSC 1761

Date: 20250710

Docket: 94017-6

Registry: Kelowna

Rex

v.

Kirsten Arlene Amundrud

Desiree Kaylee Tamantha Kovacs

Jordy Kyle

Before: The Honourable Justice Hewson

Oral Reasons for Judgment

(re Accused D.K.T. Kovacs)

Counsel for the Crown:

J.M. Le Dressay

Counsel for the Accused, D.K.T. Kovacs:

P.S. McMurray

Place and Dates of Trial/Hearing:

Kelowna, B.C.

April 24, 25, June 10 and 11, 2025

Place and Date of Judgment:

Kelowna, B.C.

July 10, 2025

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[1] THE COURT: These are reasons for judgment on Kelowna indictment 94017-6.

Nature of the Case

- [2] Desiree Kaylee Tamantha Kovacs is charged with six counts of possession of drugs and firearms. The charges arise out of an investigation conducted in Kelowna ending on June 18, 2021.

Parties

- [3] Ms. Kovacs was originally one of three people charged on this Indictment. Shortly before the trial began, Kirsten Amundrud and Jordy Moyan pleaded guilty to the counts of the Indictment on which they were charged. Ms. Kovacs was the only person remaining to go to trial.

General Outline

- [4] After providing a general background of the circumstances of the case, I will set out the issues. I will deal with the issue of the credibility and reliability of the evidence first, and then whether the evidence that I accept is sufficient to prove any of the offenses beyond a reasonable doubt.

Overview

Background

- [5] At the end of May, 2021, the police in Kelowna commenced a drug trafficking investigation. Their investigation became focused on a residence at 623 Tomby Court. The residence is a split-level, with three bedrooms on the top floor. The residence was under surveillance from the end of May until June 18.
- [6] Constable Poschenrieder applied for and was granted a warrant to search the residence. The warrant was executed at 10 a.m. on June 18, 2021. Constable Poschenrieder was the first police officer to enter the residence.
- [7] The police search team moved through the house quickly. When Constable Poschenrieder reached the second floor, he saw two women coming out of the bedroom. He identified the two women as Desiree Kovacs and a woman named Baranec.
- [8] The search of the residence included a search of the bedroom the two women had been leaving. During the search of that bedroom, the police found thousands of dollars worth of fentanyl, carfentanil, methamphetamine and cocaine. In the bedroom, the police also found a pink sawed-off shotgun, and a flare gun with a shotgun shell in the chamber.

Issues

- [9] Ms. Kovacs conceded that the Crown's evidence established the elements of the drug possession and firearms possession charges laid against her, save and except the element of possession itself. As a result, the two issues remaining to be decided are the credibility and reliability of the evidence heard at trial and whether the evidence at trial is sufficient to prove she was in possession of any of the drugs and firearms found at the residence.

General Review of Testimony

- [10] At the trial, the Crown called four police officers and the owner of the residence. The police officers were Constable Poschenrieder, Corporal Goodwin, Sergeant Woodcox and Constable Holmes. The owner of the residence is Greg Ballentine.
- [11] The defence also called evidence. Ms. Kovacs elected to testify on her own behalf, and she called Jordy Moyan to testify as well.

Overview of Applicable Law

- [12] The most important principle of law applicable to this case is the presumption of innocence. Ms. Kovacs is presumed to be innocent and the presumption of innocence remains throughout the case unless the Crown, on the totality of the evidence, proves beyond a reasonable doubt that she is guilty.
- [13] Two rules flow from the presumption of innocence. One is that the Crown bears the burden of proving guilt. The accused, Ms. Kovacs, does not have to prove that she is not guilty. She does not have to prove anything.
- [14] The second is that guilt must be proved beyond a reasonable doubt. A reasonable doubt is not an imaginary or frivolous doubt. It is not based on sympathy for or prejudice against anyone involved in this case. Rather, it is based on reason and common sense. It is a doubt that arises logically from the evidence or from an absence of evidence.

Issue 1: What Evidence is Credible and Reliable?

Law of Credibility

- [15] Reasonable doubt applies to the issue of credibility. On any given point, the court may believe a witness, disbelieve a witness, or be unable to decide. The court need not fully believe or disbelieve a particular witness or a group of witnesses. If the court has a reasonable doubt about the guilt of the accused arising from the credibility of the witnesses, then the accused will be found not guilty.

- [16] This is a case in which there is testimony from numerous witnesses. The Crown called five witnesses, and introduced admissions of fact. Ms. Kovacs and her witness, Jordy Moyan, also testified. Various parts of that body of testimony are in conflict. There are issues of credibility and reliability.
- [17] In *R. v. W.(D.)*, [1991] 1 S.C.R. 742, a framework was developed which was intended to explain what reasonable doubt means in the context of conflicting testimony where the credibility of that testimony is at issue. As further developed by subsequent judicial authorities, the *W.(D.)* framework is:
- a) First, if the court believes the evidence inconsistent with the guilt of the accused, it must acquit.
 - b) Second, if the court does not believe evidence inconsistent with the guilt of the accused but it is left in reasonable doubt by it, it must acquit.
 - c) Third, even if the court is not left in doubt by the evidence inconsistent with the guilt of the accused, it must ask whether, on the basis of the evidence which it does accept, it is convinced beyond a reasonable doubt by that evidence of the guilt of the accused.
- [18] In some cases, a fourth possibility is addressed: If, after careful consideration of all of the evidence, the court is unable to decide what evidence to believe, it must acquit: see, for example, *R. v. C.W.H.*, 1991 CanLII 3956 (B.C.C.A.).
- [19] The *W.(D.)* framework is not a magic incantation and it does not need to be followed sequentially. What is important is that, in applying the concept of reasonable doubt to the issue of credibility, the principles underlying the framework are followed.
- [20] Given the nature of the testimony in this case, the underlying principles I must keep in mind are that if I cannot decide whether to believe evidence inconsistent with guilt, there is a reasonable doubt and I must acquit. If I entirely disbelieve evidence inconsistent with guilt, the mere rejection of that evidence does not prove guilt and the accused should not be convicted unless the evidence that I do believe proves beyond a reasonable doubt that the accused is guilty: see, generally, *R. v. S.S.M.*, 2024 BCCA 417 at paras. 104-111.
- [21] The assessment of testimony requires consideration of credibility and reliability. Credibility refers to a witness' honesty or truthfulness. Reliability refers to the witness' accuracy. These concepts are related but different. An honest witness may be mistaken about what they believe they observed or heard.
- [22] The test for assessing both the credibility and the reliability of any witness was set out many years ago in a decision called *Faryna v. Chorny*, 1951 CanLII 252 (B.C.C.A.) at p. 357:

The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[23] The assessment is informed by a variety of factors. They include:

[67] . . . the opportunity and capacity of the witness to observe or perceive the events; the ability to remember those events; whether, or the extent to which, a witness can resist being influenced by an interest in a particular outcome when recalling those events; inconsistency in the witness's evidence at trial or between prior accounts; whether the witness's evidence harmonizes with, or is contradicted by, other reliable evidence; whether the evidence seems unlikely, unreasonable, or improbable in light of the probabilities affecting the case; and the witness' demeanour, meaning the way they presented while testifying:

see: S.S.M. at para. 67.

[24] It is well recognized that basing a finding of credibility or reliability solely or heavily on the demeanour of a witness carries a significant risk. The court is looking for the best evidence, not the best actor.

Findings of Credibility

[25] Turning, at last, to the testimony of the witnesses. Most, but not all, of the evidence inconsistent with guilt came from the accused and her witness, so I will begin with Ms. Kovacs and Mr. Moyan.

[26] Ms. Kovacs testified that she was a drug addict who had relapsed after a period of sobriety. She said that she had come to Kelowna from her home in Abbotsford about a week or so before the search warrant was executed, and that she was at the residence on Tomby Court to buy drugs. She also said that she had come to the residence at the request of her friend Jordy Moyan, to help remove another tenant named Nikki Swanson.

[27] Ms. Kovacs said that she was not a tenant and was not living at the residence. She said she was living in her car with her dog. She said that on June 18, the morning that the search warrant was executed, she had come to the residence at dawn. She was in the bedroom on the second floor to get high. She said that Greg Ballentine would yell at her if she was getting high in the hallway. The room was not her room.

[28] She denied being in possession of any of the drugs or firearms in the bedroom, or of items like the jewellery box with the initials "DK" on it. She said that her documents, including a notebook, many business cards, a receipt and information form from a storage facility, and a violation ticket notice of dispute, were in the room because she had given them to Jordy Moyan for safekeeping. Mr. Moyan was arrested asleep in a bed on the main floor. She said Moyan was in the process of moving from a living space on the main floor into the bedroom

she and her documents were found in on the second floor.

- [29] Ms. Kovacs called Jordy Moyan to testify for the defence. He said that he had pleaded guilty to possession of drugs and firearms in other parts of the house, but that he was also the person who was in possession of the drugs and firearms found in the bedroom that Ms. Kovacs was found in.
- [30] Mr. Moyan said that Ms. Kovacs was not living at the residence. She was moving from Abbotsford to Kelowna, and when the search warrant was executed on June 18 she was living with his friend, George, in a mobile home. He said that she had given him the business cards and other documents. He said she needed someone reliable to hold onto them.
- [31] He said that on June 18 he was in the process of moving his property from the living space on the main floor of the house up to the bedroom that Ms. Kovacs was found leaving by the police. He said that his girlfriend, Kirsten Amundrud, wanted a bedroom with a lock on the door because things were being stolen from them.
- [32] Mr. Moyan said that Ms. Kovacs was not using methamphetamine. He said he was selling drugs, but he had not sold any to her. He said she was drinking alcohol, not using drugs.
- [33] There were several features of Ms. Kovacs's testimony that supported her credibility. She appeared able to remember events. Her demeanour on the stand was candid and straightforward and she was not drawn into disputes while in cross-examination. She was quick to admit discreditable facts, like her criminal record, her drug use and her role in removing Nikki Swanson from the residence on Tomby Court.
- [34] However, significant parts of her testimony seemed unlikely, unreasonable or improbable. It seems improbable that she would entrust Jordy Moyan, who was known to her as a drug dealer, with possessions that she claimed had great importance to her. It seems improbable that Ms. Kovacs was really concerned with the security and confidentiality of her business cards, given that by their nature they are meant to be distributed. It seems improbable that Mr. Moyan would store them in a bedroom that he had not, according to both Ms. Kovacs and Mr. Moyan, finished moving into. The improbability of this choice is underlined by the fact that he had continued to keep his own identification documents in the space in which he was found sleeping. It seems unreasonable that Ms. Kovacs would sleep in her car, with no bathing or toilet facilities, when the bedroom that she had removed Nikki Swanson from was available. It seems improbable that she would store her dog's dog food in a bathroom in the house, when she was sleeping with the dog in the car.
- [35] Both Ms. Kovacs and Mr. Moyan gave evidence that was inconsistent with other evidence or inconsistent with things that they had said previously. Ms. Kovacs said that she had relapsed and was consuming large amounts of methamphetamine for days before the search warrant was executed. She said she purchased the drugs from Mr. Moyan in the bedroom, in the backyard and downstairs. Mr. Moyan said that she did not purchase or consume drugs at all,

but that she was drinking alcohol. Ms. Kovacs said that her address in Abbotsford was "2440 Baldwin". The address on the violation ticket notice of dispute is "2770 Baldwin Rd., Abbotsford, BC". She said she was living in her car. He said she was living in a mobile home with his friend George. On the afternoon of his first day on the stand, Mr. Moyan said that George lived in Winfield. On the morning of the second day, he said that George lived in Peachland.

- [36] In summary, despite Ms. Kovacs' appearance of credibility on the witness stand, I do not believe she was telling me the truth. Her testimony regarding what she was doing in Kelowna and the contents of the room contain a version of events that is improbable, unreasonable and entirely unlikely. It is not credible.
- [37] Mr. Moyan's testimony is even more difficult to believe. He claimed that all of the drugs and weapons were his, and that his drugs were spread around the house. He had so much drugs in the house, he said, it was hard to keep track of. "Easy come, easy go." That all seems highly improbable. Mr. Moyan was in the business of trading drugs for money. This was a house with a half dozen tenants and numerous other visitors "just chilling." It is no more likely that Moyan would leave his inventory scattered around a house like that than it would be for a Bernard Street shopkeeper to leave his goods on the sidewalk when he went home for the night. Even if Mr. Moyan was a credible, reliable witness, his testimony contained many assertions which were inconsistent or in contradiction to the evidence of Ms. Kovacs. I reject his evidence as wholly unbelievable.
- [38] The owner of the house was Greg Ballentine. He was present during the execution of the search warrant. He said that the Director of Civil Forfeiture was seeking an order of forfeiture for his house. He said Ms. Kovacs had been staying at the house for two weeks at the time of the search, but that he knew nothing about any drugs or weapons in the house. He was aware that if the Director could prove that he was aware of or wilfully blind to the sale of drugs in his house, it would be liable to forfeiture. His self-interest was obvious. His evidence was entirely unreliable.
- [39] On the other hand, the evidence of Constable Poschenrieder, Corporal Goodwin, Constable Woodcox and Constable Holmes was largely unchallenged. There were examples of evidence in which they were in error. For example, Constable Poscehnrieder testified that Ms. Kovacs went back into the house to get cat food. According to several witnesses, she owned a dog and went back for dog food. However, I am satisfied that their evidence is credible and reliable with respect to the observations made during the search, the items seized and their recollections of the places the items were seized from.

Conclusion on Issue 1

- [40] I turn now to my conclusions on the credibility of the evidence as a whole.

[41] I am satisfied that the drugs, weapons and people found in the house were found in the places and in the condition described by the police. I reject the evidence of Jordy Moyan entirely. The evidence of Desiree Kovacs describing what she was doing in Kelowna, denying her connection to the room she was found leaving, and denying possession of the drugs and firearms found is not credible.

Issue 2:

Nature of the Issue

[42] Guns and drugs were found in the course of the search. The second issue is whether Ms. Kovacs was in possession of them. The fact that I have rejected Ms. Kovacs' denial of knowledge or control of the drugs and firearms does not relieve the Crown of the burden of proving beyond a reasonable doubt, on evidence which is accepted, that they were in her possession.

Positions of the Parties

[43] The Crown concedes the evidence is circumstantial, but says it is more than sufficient to prove that she was in possession.

[44] Ms. Kovacs says that even if the evidence inconsistent with guilt is not believed, the remaining evidence does not prove possession to the high standard of proof beyond a reasonable doubt.

Legal Test

[45] Possession is defined in s. 4(3) of the Criminal Code. That section reads:

4(3) For the purposes of this Act,

(a) a person has anything in possession when he has it in his personal possession or knowingly:

(i) has it in the actual possession or custody of another person or

(ii) has it in any place, whether or not that place belongs to or is occupied by him for the use or benefit of himself or another person; and

(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.

[46] A person who knowingly puts or keeps a thing in any place for her benefit, or for the benefit of someone else, while having some measure of control over it, is in constructive possession of that thing: see *R. v. Pham*, 2006 SCC 26, affirming (2005), 203 C.C.C. (3d) 326 (Ont. C.A.).

Analysis

- [47] Constable Poschenrieder was involved in surveillance of the residence from the end of May to June 18. He had not seen Ms. Kovacs at the residence during surveillance. She was not a target of the search.
- [48] On June 18, when the search was conducted, he was the first investigator to enter the residence. When he reached the top floor of the split-level building, he saw two women coming out of a bedroom. They were a Ms. Baranec followed by Ms. Kovacs. There were no names on the exterior of the door.
- [49] Corporal Goodwin, Constable Poschenrieder and other officers searched the bedroom Ms. Kovacs had been leaving. In that bedroom, the officers found:
- a) a drink cup with a baggie of drugs in it;
 - b) a jewelry box that contained drugs;
 - c) a music box with the initials DK.;
 - d) a violation ticket and a dispute notice dated February 24, 2021, both in the name of Desiree Kovacs;
 - e) storage receipts;
 - f) numerous business cards in the name of Desiree Kovacs, in various places around the room;
 - g) one electric scale on the bed, and another on the table;
 - h) a notebook, apparently belonging to Desiree Kovacs;
 - i) a flare gun with a 12-gauge shotgun shell in the breach in plain view on the bed (the flare gun was modified to accept optical sites);
 - j) a sawed-off shotgun, coloured pink, in the closet, along with shotgun shells capable being fired from the pink shotgun.
- [50] In addition to those things, the police found various articles of women's clothing in the room.
- [51] In total, the police seized 12 grams of red fentanyl, 11 grams of blue fentanyl and 11 grams of pink fentanyl. The total weight of the fentanyl seized was 34 grams. There was 25 grams of methamphetamine and 43 grams of crack cocaine.
- [52] Sergeant Woodcox was qualified as an expert witness. He estimated that the street value of the fentanyl seized was \$7,600, and the street value of the methamphetamine was \$2,000. He said the cocaine would have a street value of \$4,300. He concluded that a supply of drugs in those quantities was consistent with street-level or mid-level trafficking.

- [53] The scales could be used by a drug trafficker for quality assurance. Sergeant Woodcox said that it was odd that there was no cell phone seized.
- [54] Sergeant. Woodcox was referred to several pages of the notebook bearing the name of Desiree Kovacs. He interpreted the markings on particular pages as references to controlled substances, their quantities and their prices. He said that the numbers were consistent with the pricing of drugs in the Kelowna market at the time of the investigation. He said that there were only three types of drugs mentioned in the book, and the three types were the same as the three types of drugs found in the bedroom.
- [55] Following her arrest, Ms. Kovacs was escorted back into the house. She went into the bedroom to get pet food, and a "bubble", which is a small glass pipe used to consume crystal methamphetamine.
- [56] In *R. v. Emes*, 2001 CanLII 3973 (Ont. C.A.), the Ontario Court of Appeal affirmed a decision of Mr. Justice Hill, who had relied on the circumstantial evidence of the presence of personal documents to infer that an accused person was resident in a place, and consequently had knowledge and control of the items found in that place.
- [57] Personal documents like notebooks, business records like business cards and storage receipts and legal papers like violation tickets and dispute notices are all generally kept in a place to which a person has ready access and secure control. The discovery of other documents, like the score sheets in the notebook, suggest strongly that the same person as has access and control of them, as well as knowledge of their presence. This inference is a matter of logic and human experience, not speculation.
- [58] I have rejected the evidence of Ms. Kovacs and Mr. Moyan, to the effect that Mr. Moyan was in possession of the drugs and firearms in the bedroom and that the personal documents, business records and legal papers belonging to Ms. Kovacs were in the bedroom by coincidence, only because he was holding them for her and not because she had control over the bedroom and the drugs and firearms within it.

Conclusion on Issue 2

- [59] The cumulative effect of the circumstantial evidence is that the only reasonable conclusion remaining is that Ms. Kovacs had knowledge and control of the drugs and firearms found in the bedroom.

Conclusion

Summary

- [60] All of the other elements of the offenses have been established by evidence or admissions of fact. I am satisfied that the Crown has proven beyond a reasonable doubt that Ms. Kovacs is guilty of the offenses charged.

"Hewson J."

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