

CANADA / JUDGMENT

R. v. Lamont

2024 BCSC 1822

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Supreme Court of British Columbia

DECIDED

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2024 BCSC 1822 R. v. Lamont

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Lamont,

2024 BCSC 1822

Date: 20240916

Docket: 183207-2

Registry: Victoria

Rex

v.

James Mathew Lamont

Before: The Honourable Justice Giaschi

Oral Reasons for Judgment

Counsel for the Crown:

M. Adams

Counsel for the Accused:

C.A. Massey

Place and Date of Trial/Hearing:

Victoria, B.C.

September 9-11, 2024

Place and Date of Judgment:

Victoria, B.C.

September 16, 2024

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- [1] THE COURT: The accused is charged with five counts of possession of controlled substances for the purposes of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act. The drugs alleged to have been possessed are: Fentanyl (Count 1); Fentanyl and Etizolam (Count 2); Cocaine (Count 3); Dilaudid (Count 4); and Oxycodone (Count 5).
- [2] The alleged offences occurred on January 8, 2022, at or near the City of Victoria.
- [3] At the hearing before me, the Crown advised that in respect of Counts 4 and 5 (Dilaudid and Oxycodone), it is seeking a verdict of guilt on only the lesser included offence of simple possession.

Facts

- [4] Three witnesses testified at the trial: Constable Ben Sawyer, the arresting officer; Constable Ramsay, who attended at the scene after the arrest and assisted in the search of the vehicle; and Constable Scott Eddy, who gave expert evidence in respect of the various drugs seized in relation to pricing, packaging, consumption, methods of trafficking, jargon, and paraphernalia associated with the use of the drugs. I will observe that although the qualifications of Constable Eddy to give such expert evidence was originally objected to, the defence eventually conceded that he was qualified.
- [5] The basic facts were testified to by Constables Sawyer and Ramsay and, with some minor exceptions, are not in serious dispute.

Constable Sawyer

- [6] On January 8, 2022, just after 1:00 a.m., Constable Sawyer was on patrol when he observed a Mazda CX5 in the parking lot of 310 Gorge Road East, a former hotel and now a temporary housing facility or shelter. At 1:04 a.m., he pulled up behind the Mazda in his marked police cruiser. He observed two people in the vehicle: the driver and a female passenger. As he pulled up behind the Mazda, two things happened in quick succession. First, the female passenger exited the vehicle on the passenger side and ran inside the shelter. Second, the Mazda exited the parking lot heading east on Gorge Road. Constable Sawyer followed the Mazda and conducted a traffic stop at 1:06 a.m.
- [7] Constable Sawyer approached the Mazda and asked the driver for his licence. Constable Sawyer looked inside the vehicle and saw a plastic baggie in the armrest pocket of the driver's door. The baggie contained a green rock-like substance, which Constable Sawyer believed to be fentanyl and which was later confirmed to be five grams of fentanyl. Constable Sawyer then arrested the accused, read him his Charter rights, and searched his person. He then placed him in the police cruiser.
- [8] During the search of the accused's person, Constable Sawyer found a wallet, keys, and a cellphone. He did not find any drugs or cash on the accused.

Constable Ramsay Arrives

- [9] Constable Ramsay had heard over the police radio that Constable Sawyer was conducting a traffic stop. Knowing Constable Sawyer was alone, he attended at the scene. When he arrived, he was told by Constable Sawyer that the accused had been placed under arrest. Constable Ramsay was asked by Constable Sawyer to assist in the search of the vehicle.
- [10] Constable Sawyer and Constable Ramsay searched the vehicle together. Constable Sawyer searched the driver's side and rear seat of the vehicle. Constable Ramsay searched the passenger side and the trunk of the vehicle.

- [11] Constable Sawyer testified that, in addition to the plastic baggie containing fentanyl that was located in the armrest pocket, he also found a second baggie on the driver's side floormat containing what he believed was crack cocaine and which was later confirmed to contain 5.76 ounces of cocaine.
- [12] There is a dispute as to whether the baggie containing cocaine was in fact located on the driver's side floor mat at the commencement of the search of the vehicle. In chief, Constable Sawyer testified that he found this baggie at the location depicted in Photograph 3 of Exhibit 2. That photograph depicts the baggie in the middle of the floormat on top of the vehicle logo. However, in cross-examination, Constable Sawyer acknowledged three facts that raise doubts as to whether the baggie of cocaine was, in fact, located where it is depicted in Photograph 3. First, Constable Sawyer acknowledged that Photograph 3 was taken after Photograph 1 of Exhibit 2. Second, he acknowledged that the floormat logo can be seen in Photograph 1. Third, he acknowledged that the baggie of cocaine cannot be seen in Photograph 1. Constable Sawyer had no explanation for this discrepancy, other than to affirm that the baggie was always where he photographed it and that he did not move it.
- [13] Based on the photographic evidence and Constable Sawyer's evidence in cross-examination, I find as a fact that when the search of the vehicle commenced, the baggie containing 5.76 ounces of cocaine was not, in fact, in the location where it is depicted in Photograph 3 of Exhibit 2. If it had been there, it would be visible in Photograph 1 of Exhibit 2. This means that the baggie in question was elsewhere in the vehicle when the search commenced.
- [14] Constable Sawyer additionally found a bag of beige or light brown coloured rubber bands in the backseat of the vehicle.
- [15] Constable Ramsay testified as to his searches of the passenger side and trunk of the vehicle. He testified that there were two satchels on the passenger seat of the vehicle. One satchel was tan in colour, the other was a camouflage pattern. The tan-coloured satchel had nothing of note in it. The camouflage-patterned satchel, however, contained cash and several types of drugs in various packaging and amounts.
- [16] Constable Ramsay additionally testified in examination in chief that he found bags of caffeine, a cutting agent, on the passenger seat. In cross-examination, Constable Ramsay was taken to a report he had previously prepared where he had stated the two bags of caffeine were located inside the camouflage satchel. He acknowledged in cross-examination that this report was more accurate than his memory and he conceded that the bags of caffeine had been located inside the camouflage-patterned satchel.
- [17] Constable Ramsay also testified to the items found in the trunk of the vehicle. These included teacups, jewellery, purses, women's clothing, high-heeled shoes, women's boots, and a hair curling iron. Constable Ramsay agreed in cross-examination that what he observed was consistent with the accused helping someone else move their belongings.

[18] Constable Ramsay testified that the trunk of the vehicle also contained a safe. He testified that the accused was asked for the combination to the safe. The accused said the safe was not his and that he did not have the combination, but could get it. The accused was given his phone so that he could call the person to whom the safe belonged. Constable Ramsay spoke with the person who the accused called. That person was female and she gave Constable Ramsay the combination code to the safe. The identity of the female was not ascertained. The safe was opened using the combination given, but it contained nothing of interest.

Seized Items

[19] The parties have agreed on the items seized from the vehicle. They are:

- 1) the plastic bag found in the driver side armrest pocket containing five grams of fentanyl;
- 2) the plastic bag allegedly found on the driver side floormat containing 5.76 grams of cocaine;
- 3) the items found within the camouflage-patterned satchel which were:
 - i. 161.66 grams of cocaine packaged in six different bags, five of which contained roughly 29 grams and one of which contained roughly 14 grams;
 - ii. 28.43 grams of fentanyl and caffeine in two plastic bags of approximately 16 grams each;
 - iii. 14.02 grams of fentanyl, etizolam, and caffeine in a single bag;
 - iv. 30.44 grams of fentanyl in a plastic bag;
 - v. five plastic bags containing in total approximately 33 grams of cocaine;
 - vi. two plastic bags containing a mixture of fentanyl and cocaine, one of which contained 2.81 grams and the other 1.69 grams;
 - vii. 95 Dilaudid pills;
 - viii. 248 Oxycodone pills; and
 - ix. two bags containing 144.52 grams and 86.71 grams of caffeine.

[20] In addition, the camouflage-patterned satchel contained \$18,060 in the following denominations: 37 \$100 bills; 96 \$50 bills; 446 \$20 bills; 44 \$10 bills; and 40 \$5 bills. These bills were in various bundles, many of which were held together with coloured elastic bands.

[21] It is perhaps noteworthy that no score sheets were found in the vehicle, no drug paraphernalia was found in the vehicle, and no scales were found in the vehicle.

Constable Eddy

[22] Constable Scott Eddy was called as an expert witness. Among other things, he opined that the quantity of drugs found, the packaging of the various drugs, the presence of cash in the satchel and the denominations, and the presence of caffeine, a common cutting agent for drugs, were all indicative of drug trafficking. In cross-examination, he also agreed that some drug users consume their drugs at home.

Positions of the Parties

[23] The Crown submits that in respect of Counts 1 through 3, it has proven the accused had possession of the respective drugs for the purposes of trafficking. In respect of Counts 4 and 5, the Crown concedes that possession for the purposes of trafficking has not been proven, but says the accused is nevertheless liable for the included offence of simple possession.

[24] The Crown says that there are two issues to be determined:

- 1) did the accused possess any of the drugs; and
- 2) if so, did he possess them for the purposes of trafficking.

[25] The Crown concedes that the accused did not have actual personal possession of any of the drugs, but submits that the evidence supports an inference that the accused had knowledge of the drugs and a measure of control over them and therefore had constructive possession. The Crown agrees that it relies on circumstantial evidence to establish such knowledge and control.

[26] The Crown addressed the fentanyl found in the driver's side door pocket and the cocaine allegedly found on the driver's side floormat separately from the drugs found inside the camouflage-patterned satchel.

[27] In respect of the fentanyl found in the driver's side door pocket and the cocaine allegedly found on the driver's side floormat, the Crown submits that knowledge and control can be inferred from the proximity of those drugs to the accused and the fact they were in plain sight.

[28] In respect of the drugs found in the camouflage-patterned satchel, the Crown essentially submits that knowledge and control on the part of the accused can be inferred from the fact the camouflage satchel was in the vehicle driven by the accused, that the female passenger who fled the vehicle would never have left behind the satchel if it was hers, and from the presence of the bag of rubber bands found in the rear of the vehicle.

[29] The accused did not argue against a finding of simple possession in respect of the five grams of fentanyl found in the driver side armrest pocket.

- [30] In respect of the baggie with the 5.76 grams of cocaine, the accused submits that the Crown has not proven this baggie was in fact located on the driver's side floormat at the time of arrest, and therefore says that knowledge and control cannot be inferred from the alleged location.
- [31] In respect of the remaining counts relating to the drugs in the camouflage-patterned satchel, the accused submits that there are alternative reasonable inferences to be drawn from the evidence. Principally, he submits that a reasonable possibility is that the satchel belonged to the female passenger who fled the vehicle. He additionally relies on the fact that the accused has not been shown to be the owner of the vehicle, and the vehicle contained many items apparently belonging to a female, including the safe.

Legal Principles

Code Provisions

- [32] Section 5 of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA] addresses trafficking in controlled substances. Section 5(1) prohibits trafficking in such substances and s. 5(2) prohibits a person from possessing such substances for the purpose of trafficking.

5(1) No person shall traffic in a substance included in Schedule I, II, III, IV or V or in any substance represented or held out by that person to be such a

- (2) No person shall, for the purpose of trafficking, possess a substance included in Schedule I, II, III, IV or V.
- (3) Every person who contravenes subsection (1) or (2)
 - (a) if the subject matter of the offence is a substance included in Schedule I or II, is guilty of an indictable offence and liable to imprisonment for life;
 - (b) if the subject matter of the offence is a substance included in Schedule III or V,
 - (i) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years, or
 - (ii) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months; and
 - (c) where the subject-matter of the offence is a substance included in Schedule IV,
 - (i) is guilty of an indictable offence and liable to imprisonment for a term not exceeding three years, or
 - (ii) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding one year.

- [33] The terms "traffic" and "possession" are defined terms in s. 2 of the CDSA as follows:

possession means possession within the meaning of subsection 4(3) of the Criminal Code

. . .

traffic means, in respect of a substance included in any of Schedules I to V,

- (a) to sell, administer, give, transfer, transport, send or deliver the substance,
- (b) to sell an authorization to obtain the substance, or
- (c) to offer to do anything mentioned in paragraph (a) or (b),

otherwise than under the authority of the regulations.

[34] Section 4(3) of the Criminal Code defines "possession" as follows:

- (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 of 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.

Circumstantial Evidence

[35] The parties are in agreement that this is a case of circumstantial evidence and are in agreement on the principles applicable when the Crown relies on circumstantial evidence to prove the commission of an offence. Those principles are set out in *R. v. Villaroman*, 2016 SCC 33 at paras. 35-43. In summary:

- a) When assessing circumstantial evidence, the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt;
- b) If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt;
- c) The Crown may need to negative these reasonable possibilities but does not need to negative every possible conjecture, no matter how irrational or fanciful; and

- d) The test for distinguishing between a plausible theory or reasonable possibility and a fanciful theory or merely speculative possibility is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty or, put differently, to justify a conviction, the circumstantial evidence assessed in light of human experience should be such that it excludes any other reasonable alternative.
- [36] In *R. v. Richardson*, 2023 BCCA 29, at para. 26, Justice Horsman recently summarized the principle as follows:
- [26] Where the Crown relies on circumstantial evidence to prove the offence, the trier of fact must be satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from the evidence as a whole. If a reasonable inference other than the guilt of the accused may be drawn, then the Crown has not met its burden of proof beyond reasonable doubt . . .
- [37] Although the parties agree on the principles applicable, they disagree on the application of those principles to the facts. They have each referred me to cases in support of their respective positions. The Crown has referred me to *Richardson*, *R. v. Russell*, 2011 BCCA 277, *R. v. Wells*, (July 2, 2019) Courtenay Reg. (B.C.S.C.), and *R. v. Howell*, 2014 BCSC 2290. The accused has referred me to *R. v. Lincoln*, 2012 ONCA 542, *R. v. Amado*, [1996] B.C.J. No. 1943, *R. v. Iturriaga*, [1993] B.C.J. No. 2901, *R. v. Wilson*, 2014 BCCA 245, *R. v. Tetvedt*, 2017 BCSC 2477, and *R. v. Lee*, [1996] B.C.J. No. 1196. I do not intend to address these various cases as they all turn on their own particular facts and are of limited assistance.

Analysis

- [38] As the parties have done, I will address the plastic bag containing five grams of fentanyl found in the driver's armrest pocket and the bag of 5.76 grams of cocaine allegedly found on the driver side floormat separately from the drugs found in the camouflage-patterned satchel.

5 grams of fentanyl found in armrest pocket

- [39] Concerning the plastic bag containing five grams of fentanyl found in the armrest pocket, the accused essentially concedes that he had knowledge and control of these drugs.
- [40] In my view, he clearly had both knowledge and control of these drugs and therefore had possession of same. These drugs were readily visible to him and were located inches from him in the armrest pocket of his door.
- [41] Accordingly, I find the accused had possession of the five-gram bag of fentanyl found in the driver's side armrest pocket.

5.76 grams of cocaine on the floor

- [42] I now turn to the plastic bag allegedly found on the driver's side floormat and containing 5.76 grams of cocaine.
- [43] The Crown says that, like the five-gram bag of fentanyl, this baggie was in open view and in very close proximity to the accused, and that he therefore had both knowledge and control over it.
- [44] The Crown's submission would have much greater force if I was satisfied that the baggie containing the 5.76 grams of cocaine was in fact located on the driver's side floormat when Constable Sawyer first approached the vehicle and arrested the accused. However, as I have indicated, I am not so satisfied. The baggie of cocaine was not initially on the floormat of the vehicle but was elsewhere in the vehicle. How it got to the location depicted in Photograph Number 3 is not known. It could have fallen to the driver's side floormat during the search of the vehicle or it could have been moved during the search.
- [45] I cannot infer that the accused had knowledge and control of the contents of the baggie based on its location, when its original location is unknown. The possibility that the baggie of cocaine belonged to the female who departed the vehicle cannot be ruled out and is not fanciful or speculative. It is a distinct reasonable possibility that has not been negated by the Crown.

Drugs in the Camouflage Satchel

- [46] I now turn to the drugs found in the camouflage-patterned satchel.
- [47] I agree with the defence that the Crown has not proven the accused had possession of these drugs because there are reasonable inferences that can be drawn from the totality of the evidence that are inconsistent with his guilt.
- [48] First, the satchel was not open but was zipped shut. The contents of the satchel were, therefore, not visible to the accused.
- [49] Second, and most importantly, the possibility that the satchel belonged to the female who exited the vehicle when Constable Sawyer pulled up behind them is not fanciful or speculative. Constable Sawyer was clear in his evidence that the female exited the vehicle immediately and ran to the nearby shelter. In my view, this is indicative of someone fearing capture and fleeing the police. It is possible, of course, that she was purchasing drugs from the accused and fled for this reason. It is equally possible, however, that she was selling drugs to the accused from the satchel and this possibility has not been negated by the Crown.
- [50] I note that in *R. v. Howell*, Justice Griffin, as she then was, addressed the possibility of found drugs belonging to a passenger who had recently exited a vehicle. She discounted that possibility noting that there was no threat of imminent arrest. At para. 60, she wrote:

- [60] There is no suggestion in argument or on the evidence that the passenger left the drugs in the car and walked away because he was trying to distance himself from the drugs, fearing imminent arrest. There is no evidence he suspected the police were nearby, and indeed, if he did, one would think he would have behaved differently if knowing about the drugs, by taking steps to close the bags with illicit material in them and hide the open liquor at his feet so as to avoid a reason for a search.
- [51] Unlike in Howell, in this matter, there was a threat of imminent arrest.
- [52] Third, although the accused was driving the vehicle, there is no evidence that he was the owner of the vehicle.
- [53] Fourth, from the evidence of Constable Ramsay, it is clear that the vehicle contained many items that most likely did not belong to the accused. This included the safe, the combination for which Constable Ramsay obtained from an unknown female using the accused's phone. It also includes the women's shoes, purses, and jewellery.
- [54] I note that the Crown submits that the female would not have fled the vehicle without the satchel if it had belonged to her, given that it contained over \$18,000 in cash and drugs having a value of between \$34,000 and \$46,000. I disagree. A person might well leave behind valuable drugs and cash to avoid capture and possible imprisonment. If confirmation of this is needed, Constable Eddy testified that drug traffickers will abandon valuable drugs or throw them away to avoid capture and penitentiary time.
- [55] The Crown further submits that the package of rubber bands found in the rear seat of the vehicle connect the accused to the contents of the satchel. In particular, the Crown relies on the fact that the cash in the satchel was bundled using rubber bands. This is something I have considered, but there are two problems with the Crown's submission. First, rubber bands are extremely common and used for multiple purposes. Second, the rubber bands in the package were beige or light brown in colour, whereas the rubber bands used to bundle the cash were red, blue, orange, and yellow. In my view, it would be highly speculative to infer any connection between the existence of the package of the rubber bands found in the rear seat with the contents of the camouflage-patterned satchel.
- [56] The Crown further submits that the light green colour of the fentanyl in the driver side armrest pocket, which I have found was in the possession of the accused, is the same colour as some of the fentanyl found in the satchel. The Crown suggests that this somehow indicates the accused would have had knowledge and control of what was in the satchel. Again, I disagree. First, I do not know how prevalent or rare light green fentanyl is. Second, the weight of the baggie from the driver side door, five grams, is unlike the weights of the fentanyl baggies found in the satchel which were either much heavier or much lighter. Third, even if the fentanyl in the driver's side door baggie is the exact same as the fentanyl in the satchel, it does not follow that the accused had possession of the satchel. He could simply have purchased the fentanyl from the female.

- [57] Finally, the Crown says that the satchel was found on the passenger seat of the vehicle and submits that it must have been put there by the accused after the female passenger left, as she could not have been sitting on it. This is certainly a possibility. However, it is equally possible that the female could have tossed the satchel onto the passenger seat when she hurriedly exited the vehicle. Moreover, Constable Ramsay's evidence of the precise location of objects was somewhat suspect. For example, he was mistaken as to the location of the caffeine-cutting agent. He initially testified that the caffeine was also on the passenger seat, but he later agreed it was inside the satchel.
- [58] Considering all of these circumstances and the totality of the evidence, I am not satisfied that the Crown has proven the accused knowingly had possession of the drugs in the camouflage-patterned satchel.

Trafficking

- [59] In view of my findings concerning possession, I need not consider whether the accused was in possession of the drugs for the purposes of trafficking. The Crown rightly concedes that if the accused is found to be in possession of only the fentanyl in the driver side armrest pocket, he can only be found guilty of the included lesser offence of simple possession.

Verdict

- [60] Mr. Lamont, please stand. On Count 1 of the indictment, I find you not guilty of possession of fentanyl for the purposes of trafficking, but guilty of the lesser included offence of possession of a controlled substance contrary to s. 4(1) of the CDSA.
- [61] On Counts 2 through 5 of the indictment, I find you not guilty.

"Giaschi J."

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