

CANADA / JUDGMENT

R. v. Schirmer

2019 BCSC 297

COURT

Supreme Court of British Columbia

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2019 BCSC 297 R. v. Schirmer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Schirmer,

2019 BCSC 297

Date: 20190201

Docket: 170268

Registry: Victoria

Regina

v.

Horst Francisco Schirmer

John Macdonald Mclean Turner

Before: The Honourable Mr. Justice Ehrcke

Oral Reasons for Judgment

Re: Accused Horst Francisco Schirmer

Counsel for the Crown:

O.L. Bick

M.J.E. Wheeler

Counsel for the Accused H.F. Schirmer:

D.J. McKay

J.D.E. Langwith

Place and Date of Hearing:

Victoria, B.C.

October 25,26,29-31, 2018

November 1,5-7, 2018

January 21-25,28,29,31, 2019

February 1, 2019

Place and Date of Judgment:

Victoria, B.C.

February 1, 2019

Introduction

[1] Horst Francisco Schirmer is charged with six counts of possession of various controlled substances for the purpose of trafficking on February 9, 2017, contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA].

[2] Section 5(2) of the CDSA provides:

5(2) No person shall, for the purpose of trafficking, possess a substance included in Schedule I, II, III, IV or V.

[3] Count 1 of the indictment is in relation to cocaine. Count 2 is in relation to heroin. Count 3 is in relation to GHB. Count 4 is in relation to heroin and fentanyl. Count 5 is in relation to MDMA. Count 6 is in relation to methamphetamine.

[4] Each of the drugs mentioned in Counts 1 to 6 of the indictment is included in Schedule I of the CDSA.

[5] The charges stem from the execution of a search warrant at the apartment of John Turner, Suite 106-2925 Qu'Appelle Street, Saanich, British Columbia. A search warrant was also executed on Mr. Schirmer's apartment, Suite 10-741 Admirals Road, Esquimalt, British Columbia. As well, Mr. Schirmer's Cadillac Escalade automobile was searched after he was arrested while driving it with three other passengers on February 9, 2017, at about 22:40 hours.

[6] At Mr. Turner's apartment on Qu'Appelle Street, the police found drugs in a number of locations, but the largest amount was in a large Honeywell safe, which contained cocaine, heroin, a mixture of heroin and fentanyl, MDMA, and methamphetamine. As well, bottles containing GHB were found in the freezer compartment of the refrigerator in Mr. Turner's kitchen.

- [7] The Crown has stated that the charges on Counts 1 to 6 relate to the drugs found in the large Honeywell safe and the GHB found in Mr. Turner's freezer. The six counts do not relate to any other drugs, whether found at the apartment on Qu'Appelle Street or at Mr. Schirmer's residence on Admirals Road.
- [8] Issues of identity, date, jurisdiction, and the nature of the substances have all been admitted. As well, counsel for Mr. Schirmer has stated that if the Crown proves Mr. Schirmer's possession of the drugs beyond a reasonable doubt, then he does not contest that the possession was for the purpose of trafficking.
- [9] Accordingly, there is only one real issue on this trial and that is whether the Crown has proven beyond a reasonable doubt that Mr. Schirmer was in possession of some or all of the drugs found in the large Honeywell safe and in the freezer of Mr. Turner's apartment.

The meaning of possession

[10] Possession is defined in s. 4(3) of the Criminal Code, R.S.C. 1985, c. 46, as follows:

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 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.

[11] This definition is incorporated in the CDSA by virtue of s. 2(1) of that Act. According to this definition, possession may be personal, constructive, or joint. In this case, the Crown says that Mr. Schirmer had constructive possession of the drugs, or that he had joint possession of them along with Mr. Turner.

[12] What is essential for either form of possession is that the Crown prove that the accused had the requisite degree of knowledge and control. As Smith J.A. explained at para. 24 of *R. v. Fisher*, 2005 BCCA 444:

[24] As is evident from my summary of the law, neither constructive possession nor joint possession requires proof of manual handling. To establish constructive possession, it was incumbent upon the Crown to prove beyond a reasonable doubt that the appellant knew of the presence of the cocaine and that he had some measure of control over its location. To establish joint possession, the Crown was required to show that someone other than the appellant had possession of the cocaine with his knowledge and consent and that he had some measure of control over it.

- [13] The concepts of knowledge and control necessary for possession were discussed by Frankel J.A. in *R. v. Webster*, 2008 BCCA 458 at paras. 42 to 44:
- [42] Turning to "consent and control", what must be kept in mind is that for a person to be deemed to be "in possession" of an item, he or she need not have in fact exercised power over it; all that is required is an ability to exercise some power. This is discussed in *R. v. Savory* (1996), 94 O.A.C. 318, leave refused, [1997] 2 S.C.R. xv, upholding the conviction of a driver of a van in relation to drugs another person had concealed in the vehicle. *Savory* was cited with approval by this Court in *R. v. Abdel-Malek* (1997), 90 B.C.A.C. 147 at para. 10.
- [43] As reproduced in paragraphs 3 and 4 of *Savory*, the jury in that case asked the following question after deliberating for several hours:

My lady, we, this jury, understand that possession constitutes both knowledge and control. We would request clarification of what constitutes control. If Terrell had primary possession of cocaine and *Savory* (a) knew this and (b) allowed him to remain in his van and drive around, does that constitute control?

And received the following answer:

First of all, you are correct. Possession requires both knowledge and control. There must be knowledge that the cocaine is in the van and as I told you this morning, control means that a person could exercise a directing or restraining power over the article, over the cocaine. So, control means that a person could exercise a directing, guiding or restraining power over the cocaine. I also explained this morning -- it's a long time ago, wasn't it? --- to establish actual possession in the case, you will have to find that David *Savory* knew the cocaine was concealed in the van and that he was able to exercise a directing, guiding or restraining power over it.

In other words, members of the jury, did the accused have a sufficient level of control that you are satisfied beyond a reasonable doubt that he, too, was in possession.

- [44] The Court of Appeal, referring to the definition of possession in s. 4(3)(b) of the Code, held that this instruction was sound:
- [6] The appellant submitted that the trial judge erred in her recharge on constructive possession and specifically, in her explanation of the meaning of consent. Counsel agreed that consent means "some measure of control", but disagreed that "some measure of control" means that the appellant "could" or "was able to" exercise directing, guiding or restraining power over the drugs. The appellant submitted that control means that the appellant did in fact exercise control over the drugs or intended to exercise control over the drugs. Neither mere passive acquiescence to his passenger's possession of drugs, nor merely consorting with the passenger nor having control of the car was sufficient to constitute control.
- [7] Control for the purpose of constructive possession does not require that the accused did in fact exercise control over the object in question. In *R. v. Terrence* (1980), 47 N.R. 13; 55 C.C.C. (2d) 183 (Ont. C.A.), affd. [1983] 1 S.C.R. 357, 47 N.R. 8; 4 C.C.C. (3d) 193, the Supreme

Court accepted that control means power or authority over the object in question. Similarly, in *R. v. Chambers* (1985), 9 O.A.C. 228, 20 C.C.C. (3d) 440 (C.A.), the court held that the right to grant or withhold consent to drugs being stored in a bedroom was sufficient to constitute control. Again, control is established if there is the right to grant or withhold consent. It is not necessary that the consent in fact be granted or withheld.

- [9] The trial judge's recharge on control was consistent with the above authority. She correctly asked the jury to determine whether the appellant was able to exercise a directing, guiding or restraining power over the drugs. It was not necessary for the jury to find that the appellant did in fact exercise a directing, guiding or restraining power over the drugs.

[Emphasis in original.]

- [14] The issue to be determined in this trial, therefore, is whether the Crown has proven beyond a reasonable doubt that Mr. Schirmer had the requisite knowledge and control of the drugs listed in Counts 1 to 6 of the indictment. In satisfying its burden of establishing these matters beyond a reasonable doubt, the Crown may rely both on direct and on circumstantial evidence: *R. v. Villaroman*, 2016 SCC 33.

The evidence at trial

- [15] The Crown relies on the evidence of a number of police officers who testified at trial, including Cst. Pollock, S/Sgt. Philip, Cst. Gill, Cst. Brown, Cst. Ferris, Cst. Bruce, Cst. Roy, Cst. Moore, Cst. Watson, Cst. de Wit, Cst. Robinson, and finally Cst. Jorgensen, who was qualified to give expert opinion evidence on the use, distribution, price, and packaging of these drugs in the Victoria area in February 2017.
- [16] The defence elected not to call any evidence at trial.
- [17] The testimony of the police witnesses included a great deal of surveillance evidence of Mr. Schirmer's activities in late January and early February 2017, as well as the circumstances of the arrest and the execution of the search warrants. Particularly significant is the surveillance evidence that shows Mr. Schirmer's association with John Turner's apartment on Qu'Appelle Street. Mr. Schirmer, or automobiles associated with Mr. Schirmer, were seen in and around the parking lot for that building on several occasions. These sightings were sometimes followed by activity that the police considered to be consistent with a drug transaction.
- [18] On January 27, 2017, Mr. Schirmer was observed at the 2925 Qu'Appelle Street apartment building. Cst. Watson saw Mr. Schirmer go into Suite 106. He entered without a key. Twenty to 25 minutes later, Mr. Schirmer left Suite 106 along with John Turner. Mr. Schirmer was carrying a small blue camping cooler, which he then placed in the trunk of his car.
- [19] Cst. Jorgensen gave expert evidence explaining the typical packaging and pricing of various drugs and the common slang expressions used in the drug subculture. He explained that cocaine is often referred to as "coke", "soft", "hard", or "crack", and may be called "up" or

"shirts". The latter two words are in reference to the fact that cocaine is a stimulant or upper. In contrast, heroin is often called "pants" or "down", because it is a depressant. Methamphetamine is sometimes called "side". MDMA may be called "molly" or "ecstasy". GHB is a clear liquid and therefore may be called "water".

- [20] Cst. Jorgensen testified that drug dealers sometimes store their drugs at a location away from their own residence. This is called a stash house.
- [21] A number of exhibits were entered as evidence at trial. Exhibits 1 and 15 were admissions. Amongst other things, the admissions set out the important items that the police found as a result of their searches. The search of Mr. Schirmer's Cadillac Escalade that he was driving at the time of his arrest resulted in police finding a black taser in the foot well of the driver's seat and a score sheet found in the glove compartment. Some keys on a red lanyard were also found.
- [22] The admissions, as well as the testimony of the police officers, established the following in relation to the search of Mr. Turner's apartment on Qu'Appelle Street. The police found two Honeywell safes in the hall closet of Mr. Turner's apartment. They were able to open the smaller of the two safes on an upper shelf of the closet by using a key from a key ring that they found in Mr. Turner's bedroom. The smaller Honeywell safe contained drugs, most of which were already packaged for street distribution. In particular, it contained some cocaine, some heroin, some heroin mixed with fentanyl, some crystal methamphetamine, some MDMA powder, and some methamphetamine, as well as an electronic scale, a score sheet, four white envelopes containing \$1,000 in Canadian currency, one envelope containing \$1,490 in Canadian currency, loose currency totaling \$1,705, and three keys.
- [23] One of the keys from inside the smaller Honeywell safe opened the larger Honeywell safe, which was at the bottom of the hall closet. The larger Honeywell safe contained the bulk amount of drugs, as well as four notebooks with score sheets, and a white envelope with \$1,000 in Canadian currency.
- [24] Specifically, as set out in the admissions, the large Honeywell safe contained:
- a) a white Five Star notebook containing score sheets;
 - b) a small black notebook containing score sheets;
 - c) a large black notebook with white stitching containing score sheets;
 - d) a Pattern Play notebook containing score sheets;
 - e) a white envelope containing \$1,000 in Canadian currency;
 - f) a large PC brand plastic bag labelled "36" containing a small plastic bag marked "28" containing 28 grams of methamphetamine;

- g) a vacuum-sealed Food Saver bag containing nine separate bags marked "28", each containing 28 grams of methamphetamine for a total of 252 grams; and
- h) a plastic bag marked "HH20" containing:
 - i) six bags of cocaine marked "HH", each weighing 28 grams;
 - ii) a sandwich bag containing one large rock of crack cocaine weighing 57 grams;
 - iii) a vacuum-sealed bag marked "10 oz" containing 280 grams of crack cocaine;
 - iv) a vacuum-sealed bag marked "10 oz" containing 56 grams of crack cocaine;
 - v) a PC brand bag containing 14 vacuum-sealed bags, each labelled "28 CH" and containing 28 grams of crack cocaine for a total of 392 grams; and
 - vi) a PC brand bag containing various other bags as follows:
 - A. a green zip-locked bag marked "M5", containing six bags of brown MDMA powder weighing a total of 68 grams;
 - B. a sandwich bag marked "CP" containing three plastic bags marked "14", containing a total of 42 grams of heroin;
 - C. a knotted sandwich bag marked "42 pure down" containing 105 grams of a mixture of heroin and fentanyl; and
 - D. a knotted sandwich bag containing 22 grams of heroin.

Knowledge and control

- [25] The Crown theory is that Mr. Schirmer was a high-level drug trafficker who used Mr. Turner's apartment as his stash house.
- [26] The defence disputes this theory and submits that the evidence is equally consistent with Mr. Turner being the drug trafficker and Mr. Schirmer merely being a customer of Mr. Turner.
- [27] Of course, showing that Mr. Turner was in possession of the drugs at his apartment would not be inconsistent with the Crown's theory that Mr. Schirmer possessed them because, as set out above, the law recognizes the possibility of joint possession.
- [28] As the Crown's position is that the six counts on the indictment relate only to the drugs found in the larger Honeywell safe and the GHB in Mr. Turner's freezer, the question for determination is whether the Crown has proven beyond a reasonable doubt that Mr. Schirmer had the required knowledge of the drugs at those locations and whether he had control of them, that is, the ability to exercise control.

- [29] From a consideration of all the evidence, I am satisfied beyond a reasonable doubt that Mr. Schirmer had the required degree of control of the drugs in the large Honeywell safe. The most important point in this regard is the evidence that Mr. Schirmer possessed one of the two keys that were capable of opening the large Honeywell safe.
- [30] It is clear that Mr. Schirmer occupied the bedroom at Apartment 10-741 Admirals Road, that the police found to be locked when they executed the search warrant. That bedroom contained several documents in Mr. Schirmer's name, including his passport. As well, the clothing in the closet included a black hooded sweatshirt with distinctive white lettering that the surveillance officers had seen Mr. Schirmer wearing on previous occasions. There can be no doubt that that was Mr. Schirmer's bedroom.
- [31] Cst. Ferris testified that in the early morning of February 10, 2017, after Mr. Schirmer had been arrested, he went to 741 Admirals Road. Emergency response team officers cleared Apartment 10, and four individuals were removed. Cst. Ferris entered the apartment, and at 3:00 a.m., he found keys hanging on a lanyard in Mr. Schirmer's bedroom. He took those keys to Mr. Turner's apartment on Qu'Appelle Street, and along with Cst. Moore, they found that one of those keys opened the large Honeywell safe. The lanyard with that key has been marked as Trial Exhibit 5.
- [32] In his testimony, Cst. Moore agreed that the large Honeywell safe was opened with the key that Cst. Ferris brought to Qu'Appelle Street from Admirals Road.
- [33] Counsel for Mr. Schirmer submits that this evidence is unreliable because the finding of the key in Mr. Schirmer's bedroom and the opening of the large Honeywell safe with that key have not been documented with photographs, and we therefore have to rely only on the evidence of the two officers.
- [34] In retrospect, it would have been wise for the police to document this aspect of the investigation by taking photographs, but despite this, I am satisfied of the reliability of the testimony of Cst. Ferris and Cst. Moore that the key from Mr. Schirmer's bedroom opened the large Honeywell safe at Qu'Appelle Street. Their testimony in this regard was not shaken in cross-examination.
- [35] Although there is no evidence that Mr. Schirmer possessed a key for Mr. Turner's apartment, the surveillance evidence from January 27, 2017, shows that he was allowed entrance into that apartment. I am satisfied that Mr. Schirmer's possession of one of the two keys that could open the large Honeywell safe is sufficient to establish that he had the requisite degree of control of the contents of that safe for the purpose of establishing possession, provided that the Crown can also prove that he had knowledge of the contents of that safe.
- [36] Considering the totality of the evidence, I am also satisfied beyond a reasonable doubt that Mr. Schirmer had knowledge of the contents of the large Honeywell safe. Particularly important in this regard are the score sheets that were found in Mr. Schirmer's car and in his bedroom on Admirals Road.

- [37] A single-page score sheet was found in the glove compartment of Mr. Schirmer's Cadillac at the time of his arrest. As the car was registered in his name and as he was the driver, I am satisfied that he was in possession of this score sheet. That score sheet, which is shown on the last page of Exhibit 11, contains notations that correspond with the contents of the safe. In particular, the score sheet used the notation "CH" several times. The drugs in the safe included 14 sealed bags, each labelled "28 CH", which contained crack cocaine. As well, the score sheet used the notation "Cheap" several times. This matches an apparent drug recipe that was found in a notebook in the safe. That notebook was marked as Exhibit 10 at trial and the "Cheap Recipe" is shown at Tab 3B Loose of Exhibit 11.
- [38] In addition, on top of a dresser in Mr. Schirmer's bedroom, police found a notebook containing score sheets, which was marked Exhibit 6 at trial, and a single-page photocopy of a score sheet that was marked Exhibit 7 at trial. Exhibit 7 is clearly a photocopy of a page from a notebook marked Exhibit 9 found inside the large Honeywell safe. That document uses the notations "CH", "Side", "Pants", and "Water", which corresponds with the cocaine, methamphetamine, and heroin found in the large Honeywell safe, and with the GHB found in the freezer in Mr. Turner's kitchen.

Conclusion

- [39] From a consideration of all the evidence, I am satisfied beyond a reasonable doubt that Mr. Schirmer had the requisite knowledge and control, and was in possession of the contents of the large Honeywell safe located in Mr. Turner's apartment.
- [40] Given the quantity of the drugs and the expert evidence of Cst. Jorgensen, I am satisfied that he possessed the cocaine, heroin, heroin and fentanyl, MDMA, and methamphetamine for the purpose of trafficking. I agree with Cst. Jorgensen that this could be characterized as mid- to high-level trafficking.
- [41] The defence theory that Mr. Schirmer was simply a customer of Mr. Turner and that he had no possession of the contents of the safe does not accord with the evidence and is not a reasonable alternative possibility. That theory does not raise a reasonable doubt in my mind.
- [42] I am not satisfied that Mr. Schirmer was in possession of the bottles of GHB in the freezer. There is nothing in the evidence to show that Mr. Schirmer had control of the contents of the freezer.
- [43] Accordingly, I find Mr. Schirmer guilty as charged on Counts 1, 2, 4, 5, and 6 of the indictment, that is, possession for the purpose of trafficking of cocaine, heroin, heroin and fentanyl, MDMA, and methamphetamine. I find him not guilty of Count 3, which related to possession of GHB.

The Honourable Mr. Justice W.F. Ehrcke

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