

CANADA / JUDGMENT

R. v. West

2020 BCSC 1927

COURT

Supreme Court of British Columbia

DECIDED

23 November 2020

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2020 BCSC 1927 R. v. West

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. West,

2020 BCSC 1927

Date: 20201123

Docket: 16260-2

Registry: Powell River

Regina

v.

John Darcy West

Before: The Honourable Madam Justice Iyer

(Appearance via videoconference)

Oral Reasons for Judgment

Counsel for the Crown:

D.A.S. Peltier

Counsel for the Accused:

C.L. Hodson

Place and Date of Trial:

Powell River, B.C

August 17-21, 2020

November 5, 2020

Place and Date of Judgment:

Powell River, B.C.

November 23, 2020

Introduction

[1] John Darcy West is charged with three counts of possession for the purposes of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act. S.C. 1996, c. 19 [CDSA]. Count 1 alleges that Mr. West possessed fentanyl for the purpose of trafficking; Count 2 alleges that Mr. West possessed cocaine for the purposes of trafficking; and Count 3 alleges that Mr. West possessed methamphetamine for the purposes of trafficking. At the outset of the trial, I held a blended voir dire to determine whether Mr. West's right to counsel under s. 10(b) of the Charter had been infringed and whether a statement he made to the police was voluntary. I determined that the statement was voluntary and that Mr. West's constitutional right to counsel had not been infringed. My reasons on the voir dire are reported 2020 BCSC 1780. The parties agreed that when the police searched Mr. West in the early morning hours of December 20, 2018, they found cash, methamphetamine, cocaine, and fentanyl on him. There is no dispute that Mr. West possessed these items. The central issue in this trial is whether the Crown has proved that Mr. West possessed these drugs for the purposes of trafficking. Mr. West testified at the trial. I also heard expert evidence from Cst. Paul Jones on the use, pricing, packaging, and distribution of fentanyl, cocaine, and methamphetamine in the Lower Mainland, Powell River, and the Courtenay/Comox area. Below, I set out the undisputed facts followed by the applicable legal principles. I will then consider whether the Crown has proved that Mr. West possessed one or more of fentanyl, cocaine, or methamphetamine for the purposes of trafficking.

Facts

[2] Mr. West is 42 years old. He has struggled with drug addiction since he was 12 and has used hard drugs since his teens. His parents were drug involved. His drugs of choice are heroin and/or fentanyl and methamphetamine. He also uses cocaine, particularly if methamphetamine is not available. Prior to his arrest in December 2018, Mr. West was living in Powell River with his spouse and her two daughters. Mr. West and his spouse operated a small garden and landscaping business on a cash basis. Mr. West describes himself as a functioning addict with a stable routine of using drugs throughout the day. He took a small amount of fentanyl or heroin in the morning to avoid feeling sick. He used methamphetamine throughout the day to keep himself focused and energetic at work. He used crack cocaine in the evening to get high often with his spouse or friends.

- [3] On December 19, 2018, Mr. West took a preplanned trip with a friend to Courtenay/Comox intending to buy some Christmas gifts, spend some time at the casino, and buy drugs. Mr. West brought \$650 in cash with him. They took his friend's car and got the 8:00 a.m. ferry. They went shopping first as the casino did not open until 10:00 a.m. They spent several hours at the casino where Mr. West had a good day winning about \$3,000. He contacted a regular supplier and arranged to meet him outside the casino. Mr. West explained that he prefers to buy drugs in Courtenay rather than in Powell River because prices are lower and drug quality is better there. Mr. West negotiated a package with his supplier for \$1,400 or \$1,500. He purchased half an eight-ball of fentanyl, seven grams of methamphetamine, and 14 grams of cocaine powder. He wanted more methamphetamine, but as quantities were low agreed to buy more cocaine instead. Mr. West explained that he bought more drugs than he usually does both because he had won so much money and because that would enable him to avoid having to go back to Courtenay over the Christmas break. He estimated that he could make the fentanyl last for about three weeks. He said that he intended to "have a hurrah" over Christmas sharing the other drugs with his spouse and friends.
- [4] Mr. West explained that he divided his cash into a package of \$1,500 and one of \$650. The \$1,500 represented half of his day's winnings which he intended to give to his spouse because they always shared their earnings. The \$650 was the amount he had started the day with.
- [5] Mr. West and his friend caught the evening ferry back to Powell River and returned to her house at about 9:30 p.m. They cooked most of the cocaine powder turning it into crack cocaine. Mr. West, his friend, and a couple of others at the house smoked some of the drugs and got high. Mr. West also gave his friend some crack cocaine to thank her for the ride. He put the methamphetamine in a pocket in his sweatpants and put the rest of the crack cocaine, cocaine powder, and fentanyl in a small black pouch which he placed in a pocket in his underwear. He explained that he did this to keep the drugs safe. He said that if he put them in his backpack, there was a risk someone else in the house could steal them.
- [6] Sometime after midnight, the Powell River RCMP arrived at the house to arrest Mr. West on outstanding warrants acting on an anonymous tip that he was there. When Constable McRae searched Mr. West outside the house, he found the \$1,500 cash in the pocket of Mr. West's sweatpants along with 6.57 grams of methamphetamine in a glass vial. Constable McRae also found a wallet containing \$650 cash in his Mr. West's cellphone shoulder holster. Constable McRae arrested Mr. West for possession for the purposes of trafficking and drove him to the Powell River RCMP detachment.
- [7] There, Cpl. Hamilton authorized a strip search of Mr. West. As Mr. West initially resisted the search, he was handcuffed. When Cst. McRae pulled down Mr. West's sweatpants, he saw the pocket on the outside front of Mr. West's underwear that contained the small black pouch. The pouch contained a vial holding 1.72 grams of fentanyl, a vial holding 1.35 grams of crack cocaine, a baggie of 2.97 grams of powder cocaine, and a baggie with 6.48 grams of crack cocaine. Mr. West said he did not have anything else on him and the search was stopped at

that point. Corporal Hamilton asked Mr. West why he had initially resisted the strip search. Mr. West responded, "Christmas is coming and I had bills to pay."

Applicable Law

- [8] Section 2 of the CDSA defines "trafficking" to mean, "To sell, administer, give, transfer, transport, send or deliver the substance." In this case, that means I must decide whether Mr. West possessed the fentanyl, cocaine, and/or methamphetamine for the purpose of selling or giving it to others. As Mr. West testified that he bought the drugs for his personal use, not for the purposes of trafficking in them, my assessment of the evidence in this case is guided by the framework set out by the Supreme Court in *R. v. W.(D.)*, [1991] 1 SCR 742 as interpreted by the Court of Appeal in *R. v. C.W.H.*, [1991] B.C.J. No. 2753 at para. 23:

First, if you believe the evidence of the accused, obviously you must acquit. Secondly, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Thirdly, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

- [9] In *C.W.H.* at para. 24, the Court of Appeal added an instruction after the first question:

If, after a careful consideration of all of the evidence, you are unable to decide whom to believe, you must acquit.

- [10] Where, as here, the Crown's case is based on circumstantial factors, I must be satisfied beyond a reasonable doubt that Mr. West's possession of the drugs for the purposes of trafficking is the only reasonable inference from the facts, *R. v. Villaroman*, 2016 SCC 33, at para. 35. There is no onus on Mr. West to advance an alternative theory or to prove anything. A reasonable doubt arises if the evidence admits of other rational inferences, *R. v. Hynes*, 2019 BCSC 1930, at paras. 60 to 64. Finally, the assessment must be of the whole of the evidence, not each piece of it, *R. v. Morin*, [1988] 2 S.C.R. 345, and *R. v. J.M.H.*, 2011 SCC 45, at para. 31.

Did Mr. West possess the drugs for the purposes of trafficking?

- [11] The Crown's primary theory is that Mr. West intended to sell some or all of the drugs that he purchased in Courtenay. It relies on Mr. West's resisting the strip search, the statement he made to Corporal Hamilton, and the expert opinion of Constable Jones. In closing submissions, the Crown submitted that Mr. West's own evidence demonstrated that he possessed at least some of the drugs for the purposes of giving them to others including the friend who had given him the ride and others he intended to socialize with over Christmas. I will address each argument in turn.

Did Mr. West intend to sell the drugs?

- [12] Mr. West expressly denied that he purchased any of the drugs for the purposes of selling them. On cross-examination, he said that he did not resist the strip search because the police would find drugs he intended to sell, but because finding those drugs would likely mean that he would be in custody over Christmas. Mr. West could not remember having told Cpl. Hamilton in answer to being asked why he had resisted the search, "Christmas is coming and I have bills to pay." Mr. West speculated that he would have been referring to the cash he was carrying. This is not credible. The cash was not found in Mr. West's underwear. The drugs were. I do not accept Mr. West's explanation of his statement.
- [13] Constable Jones' expert opinion was that the quantities of drugs found on Mr. West were within the range of personal consumption. However, he opined in his report that Mr. West possessed the drugs for the purposes of trafficking based on the following:
- (a) no drug paraphernalia was found on Mr. West which would have indicated personal use;
 - (b) he had three different drugs whereas personal users tend to have a drug of choice;
 - (c) the drugs were in "bulk" amounts rather than the dose-to-dose amounts typical of most street purchases for personal use;
 - (d) some drugs were in a pocket in Mr. West's underwear which is typical of street-level dealers; and
 - (e) Mr. West had a large amount of cash in two segregated amounts mostly in \$20 bills which is typical of street traffickers.
- [14] Except as expressly noted, I found Mr. West's evidence credible and reliable. He was forthright and detailed in answering questions and his answers were consistent whether given in examination in chief or on cross-examination. Mr. West's evidence provides a full explanation for the first four circumstantial factors informing Cst. Jones' opinion and undermines the Crown's theory that Mr. West intended to sell the drugs found on him. First, Mr. West explained that he kept his methamphetamine pipe in his backpack which was left at the house when he was arrested. The arresting officers did not search the backpack or take it from the house. Constable Jones acknowledged in cross-examination that the fact that Mr. West did not have any paraphernalia associated with trafficking such as scales or scoresheets militates against an inference of trafficking.
- [15] Second, Mr. West explained why he used three different drugs. Constable Jones agreed that each drug user has their own idiosyncrasies. While most of the drug users he arrests have one drug on them, he acknowledged that users may have two or three different drugs of choice.
- [16] Third, I accept Mr. West's explanation that he bought greater quantities of drugs on December 19, 2020, than was his normal practice because he had just won a lot of money and doing so would enable him to avoid a trip to Courtenay over Christmas. Mr. West testified that he regularly buys drugs in Courtenay rather than in Powell River because of

better price and quality and that he only buys drugs in Powell River when there is no other option. This is consistent with Cst. Jones' evidence that Powell River is more remote than Courtenay affecting both price and supply and his evidence that users buy more when they have more money.

- [17] Fourth, Mr. West's explanation for his use of a "crotch pocket" to keep his drugs safe from others or from getting lost is reasonable and believable. That would be an effective way of ensuring that no one could take them without Mr. West's noticing. Constable Jones' evidence that he is unaware of anyone other than traffickers using such pockets, that doing so would be uncomfortable, and that users want their drugs to be more readily available to them is not persuasive in these circumstances.
- [18] I am not persuaded by Mr. West's explanation of the amount of cash found on him. He explained that he started the day with \$650 in cash and that he got some stocking stuffers at Walmart and lunch for himself and his friend at the casino. He said that he won \$3,000, half of which he spent on drugs and the other half of which he kept in a bundle to give to his spouse. However, this does not explain why Mr. West still had exactly \$650 in his wallet when he was arrested. That fact is not consistent with having made the purchases he said he had made that day.
- [19] In summary, the only two circumstantial factors that support the Crown's theory that Mr. West bought the drugs intending to sell them are the absence of a credible explanation of his statement to Cpl. Hamilton and his inadequate account of the amount of cash that he had with him. The discrepancy in Mr. West's account of the cash is not probative of whether he intended to sell the drugs. That leaves Mr. West's statement. Considering all of the circumstances, this single statement does not persuade me beyond a reasonable doubt that Mr. West intended to sell the drugs. The drugs in the pouch were fentanyl and cocaine. As I have said, I believe that Mr. West bought the fentanyl exclusively for personal use to tide him over the Christmas break. In light of that, his general reference to having bills to pay in answer to being asked why he resisted the search might have referred to his needing to stay out of jail in order to work. The intention to sell the drugs is not the only inference to be drawn from his statement. I find that the Crown has not proved beyond a reasonable doubt that Mr. West possessed the drugs for the purposes of selling them.

Did Mr. West intend to give the drugs to others?

- [20] The key evidence on this question comes from Mr. West himself. He candidly explained his drug use routines. He bought fentanyl or heroin exclusively for personal use, methamphetamine primarily for personal use to keep him focused, but also for sharing with others, and cocaine mostly for social use to get high and party. He said, "I never use alone." Mr. West stated on direct examination that he gave his friend some of the cocaine that he bought on December 19, 2018, to thank her for the ride. While Mr. West expressly denied that he possessed the drugs for the purposes of trafficking, it is far from clear whether he understood that "giving" drugs to another person falls within the definition of "trafficking" in

the CDSA.

- [21] Mr. West consistently stated that he purchased the fentanyl for personal use and never shared it with others. I believe him. I find that he did not purchase the fentanyl for the purpose of trafficking. I also believe Mr. West's evidence that he regularly shared methamphetamine and cocaine with others and that he gave some cocaine to his friend that evening to thank him for the ride. Is this sufficient to constitute trafficking within the meaning of s. 2 of the CDSA? The facts in this case are very similar to those in *R. v. Beek*, 2014 BCSC 971. In that case, Mr. Beek's evidence was that he used cocaine with friends and would sometimes put some of his crack on the table for others to use. Justice Butler rejected the Crown's submission that this was sufficient to constitute trafficking. He noted that the question of whether a specific drug found on the accused on a specific date was possessed for the purposes of trafficking cannot be answered by evidence of a general practice. The Crown must prove an intention relating to that drug on that occasion:
- [61] The fact that there is a possibility in the future that Mr. Beek will share the cocaine with others while using it himself does not turn his personal possession into trafficking.
- [62] If the Crown's argument was accepted, it would turn almost every personal possession into trafficking. If the Crown need only prove that there is a possibility an accused might share their drug with others when he or she used the drug personally, then most instances of personal possession would become possession for the purposes of trafficking. Both cocaine and marihuana are often shared or passed around during personal use. That reality and the acknowledgement of the drug possessor that he shares his drugs from time to time with others is not, in and of itself, sufficient proof of possession for the purposes of trafficking.
- [63] In that regard, I would refer to the comment of Seaton J.A. in *R. v. Eccleston* which was quoted with approval in *R. v. Greyeyes*. Seaton J.A. observed that to extend "the definition of trafficking so as to encompass conduct that right-minded people would say is not trafficking is damaging and to be avoided". In my view, the argument of the Crown in this case, if accepted, would do just that.
- [22] Recently, in *R. v. Kernaz*, 2019 SKCA 37, at para. 16 to 20, the Saskatchewan Court of Appeal discussed when an intention to share drugs with another will constitute possession for the purposes of trafficking. It is not necessary for the Crown to prove that there is a "settled plan" to share the drugs, but there must be more than a general possibility. Here, Mr. West's intentions with respect to the methamphetamine in his possession are akin to Mr. Beek's possession of cocaine. The possibility or even the probability that he would share it with others at some future point is exactly what Justice Butler warned against in *Beek*. The evidence of Mr. West's intentions with respect to the cocaine is different. He testified that he gave some of it to his friend to thank her for the ride. In my view, that evidence is sufficient to establish possession for the purposes of trafficking as the Court of Appeal has defined it in *R. v. Taylor*, [1974] B.C.J. No. 858, and *R. v. O'Connor*, [1975] B.C.J. No. 1053,

Conclusion

[23] Mr. West, will you please stand.

[24] I find you guilty of possession of cocaine for the purposes of trafficking as set out in Count 2 of the indictment. I find you not guilty of possession for the purposes of trafficking in fentanyl or methamphetamine, Counts 1 and 3, but I find you guilty of the included offences of possession of each of these substances.

[25] That concludes my reasons.

"Iyer J."

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Prepared on 25 October 2026 · Esheria