

CANADA / JUDGMENT

R. v. Zimmerscheid

2002 BCCA 158

COURT

British Columbia Court of Appeal

DECIDED

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2002BCCA0158 Citation: R. v. Zimmerscheid Date: 20020225 2002 BCCA 158 Docket: CA027897
Registry: Vancouver COURT OF APPEAL FOR BRITISH COLUMBIA ORAL REASONS FOR
JUDGMENT Before: The Honourable Madam Justice Southin February 25, 2002 The Honourable
Madam Justice Huddart The Honourable Mr. Justice Smith Vancouver, B.C. BETWEEN: REGINA
RESPONDENT AND: RICHARD ZIMMERSCHIED APPELLANT M. Tammen appearing for the
Appellant P. Eccles appearing for the (Crown) Respondent

- [1] SMITH, J.A.: The appellant appeals from a conviction by the Honourable Judge Burdett in Squamish for possession of marihuana for the purpose of trafficking.
- [2] The background circumstances are as follows. The relevant events took place during the period July, August and September of 1999. Mr. Tammperre, who testified for the Crown, was in charge of a business known as Okanagan Aviation Services Limited, based in Pemberton, British Columbia. Mr. Tammperre was a commercial pilot and a flight instructor, and was in charge of renting out a Cessna aircraft, a four-passenger airplane. In July 1999, the appellant was checked out on that plane by Mr. Tammperre and expressed a desire to rent the aircraft in future. In early August of 1999 the appellant did rent the aircraft from Mr. Tammperre and the logbook entries filed in evidence indicate that he flew the plane to Squamish then to Mount Baker, and then back to Squamish with two passengers on board.
- [3] On September 7, 1999, the appellant again rented the aircraft from Mr. Tammperre and stated that it was his intention to fly first to Squamish and then to Vancouver International Airport. After discussion with Mr. Tammperre about landing fees he changed his mind and said that he would fly to Pitt Meadows instead of Vancouver. He told Mr. Tammperre that he intended to pick up a passenger or passengers en route. It is not disputed that the appellant landed in Squamish after he had taken possession of the airplane and flown it away from Pemberton, and that he picked up a passenger in Squamish, the co-accused Williams. Upon leaving Squamish airport, the plane flew a short distance, experienced mechanical problems, and crashed beside the highway. Both Mr. Williams and the appellant were injured and were taken to hospital after the crash. A number of private citizens arrived at the crash scene, as well as emergency personnel, the investigating police officers, firefighters and investigators from the National Transport Safety Board. The police found a large duffel bag in the plane,

occupying the entire backseat. Police officers ascertained that it contained about \$125,000 worth of marihuana. The bag also contained a number of rocks on the bottom to lend it weight. The duffel bag was not in the plane when Mr. Tammperre turned over possession of the plane to the appellant in Pemberton.

- [4] Inside the cockpit of the plane was a loaded handgun, a navigational map, and what is called a GPS unit, which is a device for fixing positions on the planet, as I understand it. A number of so-called waypoints had been entered into the GPS, one of which was labeled "drop". The area that had been marked "drop" on the GPS had been circled on the navigational map indicating a location in a rural and unpopulated area near Mount Baker, in Washington State, very close to a road. According to Mr. Tammperre, the map and the GPS unit were not with the airplane nor did he see them in the airplane when he delivered possession of it to the appellant.
- [5] One other piece of relevant evidence is that, about a week after the crash, Corporal Zettler of the Squamish detachment met with the appellant, who had just been released from the Lions Gate Hospital and had attended at the detachment to pick up his belongings retrieved from the airplane. During the course of that meeting Corporal Zettler told him about the marihuana that the police had found on the airplane and the appellant denied any knowledge of the presence of the drugs on the aircraft.
- [6] The appellant and Mr. Williams were tried jointly for possession of marihuana for the purpose of trafficking. The appellant was convicted, as I have already noted, and Mr. Williams was acquitted.
- [7] The appellant contends that the verdict is unreasonable and is unsupported by the evidence, that the trial judge erred in several respects in her finding that the appellant had possession of the marihuana in the duffel bag, and that the trial judge erred in the manner in which she dealt with the statement made by the appellant to Corporal Zettler in which he denied any knowledge of the presence of the marihuana on the aircraft.
- [8] On the issue of whether the appellant had control of the duffel bag containing the marihuana, the trial judge said this:
- [60] The jurisprudence in this area is relatively clear. Under section 4(3)(b), knowledge and consent are integral elements of joint possession, as is the coexistence of some measure of control over the subject matter. *R. v. Dick and Malloy* (1969) 7 C.R.N.S. 75; *R. v. Terrance* (1983) 4 C.C.C. (3d) 193. [61] I turn first to the issue of control. Mr. Zimmerscheid was the person who rented the plane. He was also the pilot. Mr. Rubin has submitted as Mr. Zimmerscheid was not the owner of the plane, a finding of exclusive control of the contents of the plane cannot be made. He argued that a plane rented by a pilot with a commercial pilot licence to carry passengers and cargo can carry no such inference of probable exclusive control. I would agree with Mr. Rubin's argument if the facts here were that Mr. Zimmerscheid was piloting a scheduled commercial flight, if the plane was carrying more than one passenger, and if the baggage section not visible from the cockpit. Usually the issue

of ownership is important. However, in this particular set of circumstances, I find that the fact the plane was rented is not particularly relevant. Given Mr. Tammper's evidence as to the absence of any red duffle bag in the plane prior to handing control over to Mr. Zimmerscheid, and the size and location of the bag, it can hardly be argued that some other renter may have left the bag on the plane unbeknownst to Mr. Zimmerscheid. In all other aspects, Mr. Zimmerscheid had control over the plane. As the pilot he decided who would fly in the plane. As the pilot he could refuse to carry cargo he deemed to dangerous. He controlled who and what went into the plane. [9] I am not persuaded that the trial judge erred in reaching that conclusion. In particular, her conclusion that the appellant, as the pilot, had control of the cargo on the plane seems to me to be an inference that is well supported by the evidence.

- [10] On the question of whether the appellant had knowledge of the contents of the bag, the trial judge said this:
- [62] Has the Crown proven that Mr. Zimmerscheid knew that the duffle bag contained marihuana? Can an inference be drawn from the evidence that Mr. Zimmerscheid knew what was in the duffle bag? If not, does the evidence establish that he was reckless or wilfully blind as to the contents of the duffle bag? [63] As Mr. Justice Bouck stated in *R. v. Amado*, (unreported) [1996] B.C.J. 1943, "not everyone who drives or rides in a car containing concealed illegal objects necessarily knows the nature of the objects." In *Amado*, the two accused were stopped in a car. A bag behind the right front passenger seat contained guns and other items. This bag was not in plain sight. There was no evidence of who put the bags in the car or how long it had been there. There were no fingerprints on the items in the bag. Considering this evidence, Bouck J. concluded that if there was to be a conviction for possession of such objects based on the knowledge of the occupants of the car, the evidence relating to their knowledge must rise above mere suspicion. He found that the Crown had not proven guilt beyond a reasonable doubt. [64] Although the authorities which counsel have cited are helpful, ultimately this is a factual issue. I have considered the following evidence. Mr. Zimmerscheid was the pilot of a small aircraft. Mr. Williams was the passenger. Directly behind them, occupying the entire back seat, was a large duffle bag with \$125,000 of marijuana in it. Also, in the bag were rocks. Apart from being heavy and large, the bag was not suspicious in any other way. Inside the plane's cockpit were an aviation navigational chart and a G.P.S. unit. These are the tools of a pilot. A pilot can enter waypoints into a G.P.S. to assist in navigating the plane to a specific location on the face of the earth. Both fixed and handheld G.P.S. units are used by pilots. Entered into the G.P.S. unit was a waypoint named "drop". The location of that waypoint was an unpopulated area near a road seven miles west of Mount Baker in the United States. The aviation map had this location circled. [65] These facts lead me to the conclusion that Mr. Zimmerscheid was piloting the plane to a specific location in Washington State for the purpose of dropping the bag of marihuana from the plane at the designated spot. The rocks in the bag were placed there to ensure the bag dropped in the correct location. I place little weight on Mr. Zimmerscheid's comment to Cpl. Zettler that he had no knowledge of the presence of the

drugs. That statement was made nine days after the crash, after he consulted with counsel. Mr. Zimmerscheid knew the police were investigating him. The statement was not under oath. [66] Given the circumstances above, if Mr. Zimmerscheid was not the person who brought the bag onto the plane, he was at the very least, wilfully blind as to its contents. I conclude that he knew that the plan was to throw the bag out of the plane at the drop location. Given those facts, if he did not make inquiries as to the contents of the bag, it was because he did not want to know what was in it. This state of mind is wilful blindness, and constitutes knowledge: *R v. Blondin*, (1970), 2 C.C.C. (2d) 118, *Sansregret v. The Queen*, (1985) 18 C.C.C. (3d) 223, *R. v. Tewari*, 36 C.C.C. (3d) 150, *R. v. Oluwa*, 107 C.C.C. (3d) 236, *R. v. Vautour*, 1 C.C.C. 324 and *R. v. L'Huillie*, (1997) NBJ No. 548. [67] After considering all of the evidence, I find that the Crown has proven Mr. Zimmerscheid guilty beyond a reasonable doubt of the offence of possession of marijuana for the purpose of trafficking.

- [11] Mr. Tammen, in his very capable submission, contended that the trial judge did not consider whether there were other rational inferences to be drawn from the circumstantial evidence, and that the inferences that she drew therefore led her to an unreasonable verdict. In particular, he referred to the fact, as he contended, that there was no evidence to show that the appellant had control over the duffel bag. To that I say again that the trial judge considered that he was the pilot and had control over the cargo on the plane. As well, there was the evidence of the GPS device which had on it the indication of the location in the rural area near Mount Baker that had been circled on the navigational map. Both of those items were found in plain view in the cockpit and it was open to the trial judge to infer from their presence that the appellant, as the pilot, would have knowledge of those two items and would have had reference to them for the purpose of navigating on the flight. I am not able to say that she was wrong in drawing those inferences. Those two items were navigational aids and it seems to me that it is a logical inference to draw that they would be of particular use to a pilot flying through the mountainous terrain of British Columbia and northwestern Washington.
- [12] The appellant also contends that the trial judge erred in finding wilful blindness on the basis that she did not expressly reject the statement made by the appellant to the corporal at the RCMP detachment that he had no knowledge of the drugs on the plane. In that regard, Mr. Tammen referred particularly to the passages in paragraphs 65 and 66 of the reasons for judgment which I have reproduced above. As I read the passages that Mr. Tammen relies upon it seems to me necessarily implicit that the trial judge considered the statement and gave it no weight. What she said at the beginning of paragraph 66 is this: Given the circumstances above, if Mr. Zimmerscheid was not the person who brought the bag onto the plane, he was at the very least, wilfully blind as to its contents. Mr. Tammen says in effect that she erred because she did not say "I reject his statement, that he had no knowledge of the presence of the drugs but, given the circumstances above, if Mr. Zimmerscheid was not the person who brought the bag onto the plane, he was at the very least wilfully blind as to its contents." As I have said, I think it is necessarily implicit that although she did not say the words I have added, that was her process of reasoning.

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- [13] The test that we must employ on considering whether this was an unreasonable verdict is well known and is set out in many cases, the most frequently cited of which is *R. v. Yebe* (1987), 36 C.C.C. (3d) 417 (S.C.C.).
- [14] Having applied that test, I am not persuaded that on the whole of the evidence it can be said that the verdict is unreasonable or cannot be supported by the evidence.
- [15] Accordingly, I would dismiss the appeal.
- [16] SOUTHIN, J.A.: I agree.
- [17] HUDDART, J.A.: I agree.
- [18] SOUTHIN, J.A.: The appeal is dismissed. "The Honorable Mr. Justice Smith"
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