CITATION: R v [redacted] 2016 ONSC 6872
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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: R. v. [redacted]

BEFORE: E.M. Morgan J.

COUNSEL: *Andrew Stastny*, for the Applicant (Defendant)

Peter Campbell, for the Respondent (Crown)

HEARD: October 31, 2016

APPLICATION FOR WRIT OF CERTIORARI

[1] On December 11, 2014, [redacted] and [redacted] were stopped while driving in [redacted] car. When the police saw what appeared to be crack cocaine in a clear plastic bag visible on the centre console of the car, the two of them were searched and charged with various drug offenses.

[2] Two of the offenses with which [redacted] was initially charged were eventually stayed. After a preliminary inquiry presided over by Ritchie J. of the Ontario Court of Justice, [redacted] was committed for trial on charges of possession of cocaine for the purpose of trafficking and simple possession of cocaine. He now seeks to quash the committal for trial.

[3] The charges against [redacted] relate to the 6.2 grams of crack cocaine that was found by the police on the centre console of the car. The crack cocaine was in plain view of the officer that pulled them over and made the arrest. [redacted] was seated in the front passenger seat and the cocaine was immediately to his left, within easy reaching distance; [redacted] was seated in the driver's seat and the cocaine was immediately to his right, within equally easy reaching distance.

[4] Section 2 of the *Controlled Drugs and Substances Act* adopts the definition of "possession" found in s. 4(3) of the *Criminal Code*. The section creates three types of possession – personal possession, constructive possession, and joint possession – as follows:

> (3) For the purpose 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 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 the 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.

[5] The Court of Appeal described the relevant tests for possession in *R v Pham* (2005), 77 OR (3d) 401, at paras 15-16: "In order to constitute constructive possession, which is sometimes referred to as attributed possession, there must be knowledge which extends beyond mere quiescent knowledge and discloses some measure of control over the item to be possessed… In order to constitute joint possession pursuant to s. 4(3)(b) of the Code there must be knowledge, consent, and a measure of control on the part of the person deemed to be in possession."

[6] A substantial amount of drugs were found on [redacted] person and hidden away in various spots in the car, all of which led to separate charges against [redacted]. The preliminary inquiry judge stated that the driver of the car had an "ambulatory illegal drug store". On the other hand, [redacted], the passenger in the car, is charged only with respect to the small amount of drugs that were exposed on the console at the time of the search.

[7] The preliminary inquiry judge found that the charges against [redacted] met the test in *USA v Shephard*, [1977] 2 SCR 1067, and that with respect to the 6.2 grams of crack a reasonable jury, properly instructed, could return a guilty verdict. As he put it in his conclusion, "In other words, based on the evidence I have heard, a jury could conclude that there was joint possession of the crack cocaine by [redacted] and [redacted] in the PT Cruiser."

[8] Counsel for [redacted] submits that there was insufficient evidence from which to infer that the drugs on the centre console of [redacted] car belonged to or were in the possession and control of [redacted] He observes that the reasons of the preliminary inquiry judge were brief and uninformative, and contends that the judge did not explain how he arrived at his conclusion. As a result, I have to look at the case and determine if there was a valid inference. If the inference could not be drawn by a reasonable jury, the judge exceeded jurisdiction: *R v Lambrinos*, 2007 CanLII 37357, at para 12 (SCJ), citing *R v Arcuri*, [2002] 2 SCR 828.

[9] Mr. [redacted] counsel has brought to my attention that s. 94(1) of the *Criminal Code* provides for a specific offense if a person is an occupant of a motor vehicle and knows that there is a firearm in the vehicle. There is no analogous offence of knowingly being in a vehicle with cocaine. He submits that if Parliament wanted to criminalize the situation in which [redacted] found himself, it would have enacted an offence for drugs that parallels s. 94(1) for firearms.

[10] This submission is in line with the observations of Hill J. in *R v Anderson-Wilson*, 2010 ONSC 489, at para 76, where he stated that, "A vehicle driver who knows a legally prohibited item is in a vehicle is not in the same position as a passenger who may merely acquiesce to another's, i.e. the driver's possession… a driver, operating the vehicle with the owner's consent, determines what is permitted to enter and stay in the vehicle and can 'control access to the vehicle and exclude others from the vehicle'". Counsel for [redacted] argues that the crack cocaine on the centre console of the car cannot be presumed to be in Mr. Ali's possession or control simply because he knew it was there; there must be some actual evidence on which this inference can be made.

[11] Counsel for the Crown bases his response to this argument on *R v Savory*, [1996] OJ No 3811, where the Court of Appeal stated, at para 7, that, "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 Chambers* (1985), 20 CCC (3d) 440 (Ont CA), the court held that the right to grant or withhold consent to drugs being stored in a bedroom was sufficient to constitute control… 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." The Crown contends that the fact that the drugs were in close proximity to [redacted], such that he could have picked them up in his hand at any time, suffices to establish control even though he did not in fact pick up the drugs and take possession of them.

[12] Counsel for the Crown concedes that, as Justice Hill stated in *Anderson-Wilson*, it is generally the driver, not the passenger, who is deemed to be in control of the car and all of its contents. Crown counsel contends, however, that the facts here lead to a different inference. That is, the fact that [redacted] had a larger quantity of drugs hidden on himself and in the car gives rise to the inference that he was differentiating the drugs that were not hidden and that he was sharing them with [redacted]

[13] The truth is that the record does not provide any indication of what either party's relationship was to the drugs that were openly exposed in the car. The Crown might be correct, and [redacted] may have told his passenger to 'help yourself' to the drugs that were placed on the console; on the other hand, it is equally plausible that [redacted] told his passenger not to touch the drugs that he had placed on the console.

[14] As was stated in *R v Munoz* (2006), 86 OR (3d) 134, at para 31, "…the requirement of reasonable or logical probability is meant to underscore that the drawing of inferences is not a process of subjective imagination, but rather is one of rational explication." The fact that the drugs were situated in the middle of the two seats gives rise equally to an inference that they were being shared and an inference that they were not being shared. It is not the court's task to imagine scenarios where an inference of control or possession is possible; it is the court's task to draw inferences from logical probabilities that flow from the actual facts in evidence.

[15] Counsel for [redacted] correctly explains that the problem with the Crown's analysis is that it blends opportunity for control with actual control. He characterizes this as a misreading of the *Savory* case. What [redacted] has is the opportunity to control something only in the sense that one might have the opportunity to grab another person's cell phone when he or she puts it down for a moment. This does not amount to control or possession in a joint sense, a constructive sense, or any other sense. It certainly does not make the other person's cell phone one's own by virtue of physical proximity alone.

[16] On the state of the evidence proffered at the preliminary inquiry, one could no more infer that [redacted] was in control or possession of the 6.2 grams of crack cocaine on the console of the car than one could infer he was not in control of the 6.2 grams. Under the circumstances, the inference that he was indeed in control of those drugs was speculative at best. If one eliminates speculation on matters not in evidence, no reasonable jury properly charged could have convicted [redacted] of either possession for the purpose of trafficking or simple possession of the 6.2 grams of crack cocaine.

[17] Accordingly, the preliminary inquiry judge exceeded his jurisdiction in committing [redacted] for trial on these charges. The order committing [redacted] to stand trial for the charges of possession for the purposes of trafficking cocaine and possession of cocaine is hereby quashed.

Morgan J.

Date: November 3, 2016