

Action No.: 121449417Q2
E-File No.: CCQ15MCMILLAND
Appeal No.: _____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

HER MAJESTY THE QUEEN

v.

DANIEL JAMES MCMILLAN

Accused

P R O C E E D I N G S

Calgary, Alberta
February 19, 2015

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1 Proceedings taken in the Court of Queen's Bench of Alberta, Calgary Courts Centre, Calgary,
2 Alberta

4 February 19, 2015

Morning Session

6 The Honourable
7 Mr. Justice Jeffrey

Court of Queen's Bench
of Alberta

9 D. Szabo

For the Crown

10 T. H. Dahlem

For the Accused

11 C. Zadorozniak

Court Clerk

12 D. Nosal

Court Clerk

13 M.J.H. Smith, CSR(A)

Official Court Reporter

16 **Reasons for Judgment**

18 THE COURT:

Good morning. Please be seated.

20 Counsel, I wanted to start by commending you both for the focused approach you took to
21 this trial, different ways from each side but admitting or conceding things for which you
22 thought there was no point in contesting either way. It's the way it's supposed to be
23 done. It seems so rare now, unfortunately. But thank you both.

25 MR. DAHLEM:

Thank you, Sir.

27 MS. SZABO:

Thank you.

29 THE COURT:

And I'll start with this caveat. This is an oral
30 decision, and so I reserve the right, if a transcript is requested, to edit it, clean it up a bit,
31 to correct a cite, add a cite, that sort of thing. I won't be changing the result, but it will
32 be my desire to make it clearer at that time. So, right now I'm working from my notes.

34 Daniel McMillan is charged with one count of possession for purposes of trafficking a
35 CDSA Schedule III substance contrary to s. 5(2) of that Act. The sole issue for
36 determination is the matter of possession.

38 Mr. McMillan admits all the other elements of the offence the Crown must prove but says
39 "possession for the purpose" has not been proven beyond a reasonable doubt - not
40 constructive possession, joint possession, or what I'll call possession simpliciter.

41

1 On May 28, 2012, the RCMP executed a search warrant at a residence in Banff National
2 Park shared by three adults, including the accused. There it found, among other things,
3 250 pills in seven Ziploc bags containing the prohibited drug
4 trifluoromethylphenylpiperazine, or TFMPP, which I will refer to it as henceforth. These
5 are the drugs the Crown says Mr. McMillan possessed for the purpose of trafficking.
6

7 I will summarize the law applicable to this issue and then the facts.
8

9 *R. v. Pham*, a decision of the Ontario Court of Appeal of December 2, 2005, was affirmed
10 by the Supreme Court of Canada in a one-sentence decision in which it said it agreed with
11 the majority decision in the Ontario Court of Appeal. I say that because I am going to
12 quote now from the Ontario Court of Appeal decision, but the Supreme Court of Canada
13 reference is [2006] 1 S.C.R. 940.
14

15 In *Pham*, at paragraphs 15 and 16, the majority of the Ontario Court of Appeal said,
16 omitting the cites:
17

18 [15] In order to constitute constructive possession, which is
19 sometimes referred to as attributed possession, there must be
20 knowledge which extends beyond mere quiescent knowledge and
21 discloses some measure of control over the item to be possessed
22 . . .
23

24 [16] In order to constitute joint possession pursuant to section
25 4(3)(b) of the *Code* there must be knowledge, consent, and a
26 measure of control on the part of the person deemed to be in
27 possession . . .
28

29 I looked up "quiescent" in the Canadian Oxford Dictionary, where it says:
30

31 - motionless, inert, temporarily inactive, silent, dormant.
32

33 I take "quiescent" in this context to mean silent or quiet.
34

35 The Supreme Court of Canada in *Morelli*, 2010 SCC 8, at paragraph 17 said:
36

37 Constructive possession is established where the accused did not
38 have physical custody of the object in question, but did have it "in
39 the actual possession or custody of another person" or "in any
40 place, whether or not that place belongs to or is occupied by him,
41 for the use or benefit of himself or of another person." . . .

1 Constructive possession is thus complete where the accused: (1)
2 has knowledge of the character of the object, (2) knowingly puts
3 or keeps the object in a particular place, whether or not that place
4 belongs to him, and (3) intends to have the object in the particular
5 place for his "use or benefit" or that of another person.
6

7 The control required to be proven beyond a reasonable doubt is a "measure of control, not
8 exclusive control nor predominant control": *R. v. Terrence* [1983] 1 S.C.R. 357.
9

10 So the critical elements to be proven, as both counsel acknowledged through the course of
11 the trial, are both knowledge and control. There is also the matter of consent, and I will
12 come to that in due course.
13

14 Each case is fact-specific. This case that I have heard has both similarities and
15 differences with the individual cases referred to me by counsel.
16

17 All of the evidence here is circumstantial. Therefore, any inference of knowledge or
18 control must be the only reasonable inference from the evidence. Inference is not
19 conjecture or speculation.
20

21 In respect of that lack of circumstantial evidence, I will quote from two paragraphs of the
22 Alberta Court of Appeal decision in *R. v. Dipnarine*, 2014 ABCA 328, at paragraphs 22
23 and 25:
24

25 [22] Circumstantial evidence does not have to totally exclude
26 other conceivable inferences. If the trier of fact infers guilt
27 because the alternatives do not raise a doubt in his or her mind,
28 the verdict is not thereby rendered unreasonable, *ipso jure*. It is
29 still fundamentally for the trier of fact to decide if any proposed
30 alternative way of looking at the case is reasonable enough to raise
31 a doubt in the mind[s] of that trier.
32

33 [25] But the logic of the circumstantial evidence analysis is that if
34 a trier of fact considers a postulated alternative interpretation of
35 the circumstances taken as a whole to be unreasonable or
36 irrational, the trier of fact is not bound to give effect to that
37 alternative just because it is impossible to exclude it entirely.
38

39 The facts of this matter, then, are as follows: A search warrant was executed at 429
40 Marten Street in Banff Townsite in a lower-level unit of a four-plex on May 28, 2012.
41 Among the items discovered were TFMPP pills on a shelf above a desk just outside the

1 bedroom used by the accused, Daniel McMillan.

2

3 The apartment had three occupants at the time the search warrant was executed:
4 Mr. Jordan Romaine, Ms. Kyla Nygard, and the accused Daniel McMillan. All three were
5 in the apartment at the time. Each had a separate sleeping space within that unit. Messrs.
6 Romaine and McMillan had separate bedrooms; Ms. Nygard had a
7 curtained-off-from-the-living-room space that she used.

8

9 I find each had access to the desk area where the drugs were found.

10

11 Kyla Nygard pleaded guilty and admitted possession for the purpose of trafficking of all
12 illegal drugs found in the apartment, including those on the desk for which the Crown
13 says Daniel McMillan possessed for the purpose of trafficking. Her having done so does
14 not preclude, of course, Mr. McMillan also bearing responsibility criminally if he is found
15 to have possessed those drugs.

16

17 Jordan Romaine pleaded guilty to possession for purposes of trafficking and admitted
18 possession for purposes of trafficking of identically-looking TFMPP pills found in his
19 bedroom space.

20

21 Mr. McMillan had been away for at least the day prior to the day of the commencement
22 of the search warrant being executed. He had returned an hour or so prior to the RCMP
23 executing the search warrant. He had changed his clothes upon his return and, I find, had
24 emptied his pockets on the desk to the left of the laptop. I accept that he had changed his
25 clothes upon return and recently prior to the search warrant being executed. I believe his
26 testimony in that respect because on top of the bed in his bedroom were a pair of pants
27 that it appears he had removed after the last time he had used the bed for sleeping.

28

29 Mr. McMillan testified in his defence, denying knowledge of the subject pills and denying
30 control of the subject pills. He admitted a past conviction for possession for the purpose
31 of trafficking and admitted having used illegal drugs personally. He admitted having used
32 them since successful completion of the conditional sentencing order resulting from his
33 prior conviction.

34

35 Mr. McMillan knew that Mr. Romaine sold drugs. Mr. McMillan admitted that he bought
36 drugs from Mr. Romaine. Mr. McMillan knew that Ms. Nygard used drugs.
37 Mr. McMillan did not, I find, make Mr. Romaine get rid of his drugs or strongly
38 encourage him to do so.

39

40 There was an envelope with \$80 cash near Kyla Nygard's sleeping area, and on that
41 envelope was handwritten the numbers "525" preceded by a dollar sign.

1
2 Mr. McMillan did not make Ms. Nygard keep her drug items out of the apartment.

3
4 I accept that he may have cautioned both Ms. Nygard and Mr. Romaine about his recent
5 completion of the CSO and the frequent attendances of RCMP officers during the time of
6 his performing the CSO terms, but either he did not force them to keep their drug items
7 and drugs from the house, or he could not, or they were in his possession and he was
8 trafficking them.

9
10 So found in the office desk area just outside Mr. McMillan's bedroom door were two
11 blotters, green pills (said Officer Zinck) or brownish-purple pills (said Officer Cook).
12 There were those pills, crushed powder underneath those pills, and \$260 cash on the shelf
13 right below the shelf with the pills, and also on that shelf beside the cash was a mailing to
14 Mr. McMillan from Capital One. The pills on that shelf I find to have been in plain
15 sight.

16
17 Also found in that office desk area was Mr. McMillan's wallet, a silver case or
18 silver-looking case with tools in it that could be used for dividing pills, a straw that could
19 be used for ingesting drugs, plastic Ziploc bags, a container with "Juicy Fruit" marked on
20 the outside, a plastic bag with "Nutro Healthy Treats" marked on the outside.

21
22 Mr. McMillan's bank card, Mr. McMillan's ID, including his driver's license, as I
23 indicated earlier, were just to the left of the laptop, which was central on the desk surface.

24
25 To the left of the desk and near its surface was a hat belonging to Mr. McMillan. Also in
26 the office area were two pages of handwritten names and phone numbers. The Crown
27 suggests this was a customer list used for marketing the drugs, probable purchasers of the
28 drugs says the Crown. Mr. McMillan says, to the contrary, it was his list of phone
29 numbers. Under the terms of the CSO, he was prohibited from having a cell phone, so he
30 had all of his contacts still written on paper.

31
32 His restriction from owning a cell phone ended a year prior, but there was no cell phone
33 indicated as having been found in all of the items in the apartment belonging to
34 Mr. McMillan. I also notice on the list of names and phone numbers a number beside the
35 word "Lawyer" and a phone number beside the words "Raft Tour." I note that some of
36 the numbers were long-distance numbers. I am not persuaded a reasonable inference to
37 be drawn from the list of names and phone numbers is that it was a list used for purposes
38 of trafficking drugs. Such an inference is not compelled, even on consideration of the
39 remainder of the evidence.

40
41 Just with respect to the bag, and only because I asked about it during the evidence, the

1 bag in the silver-looking case that I thought at first glance had "Spitz" on it, which I
2 happen to know are sunflower seeds, the bag in fact said "Nutro" on it. Anyone that
3 owns a pet likely knows that those Nutro products are marketed as healthfood pet treats.
4

5 I looked through all the photographs for any evidence of a pet, a dog or a cat, in the
6 apartment. I found none. Perhaps a girlfriend or boyfriend of one of the occupants has a
7 pet. In any event, I have no knowledge of what's inside the bag. The bag might hold
8 something else entirely than pet treats, just like the Altoids tin held roaches, not Altoids.
9 The bottom line is that I am not able to draw any inference from the existence of that bag
10 in the silver-looking case. Ironically, there was a Spitz bag in a different photo, but it's
11 beside Ms. Nygard's purse and passport in photo number 44.
12

13 On the matter of knowledge, Mr. McMillan contradicted himself in testimony, saying at
14 first, referring to Mr. Romaine, he always had drugs and then, just moments later, saying
15 he had no idea how much Romaine had or if he had them all the time. Mr. McMillan
16 said he did not know the TFMPP pills were in the house. He did not see the bags of pills
17 before the officers arrived. He admitted that pills could have been there a long time. He
18 said that, I take it, to be consistent with saying he didn't know they were there; but saying
19 they could have been there a long time makes his denials of knowledge of them even
20 more implausible. They were so front and centre, obvious and virtually impossible to
21 miss, even if only walking past the desk area.
22

23 I find Mr. McMillan had knowledge. I do not believe he did not notice the pills. It
24 would be virtually impossible not to notice them, especially in the course of setting down
25 some items beside the laptop from out of his pockets. If he is correct that he had no
26 knowledge of them and they were a recent arrival, their appearance would have been all
27 the more noticeable.
28

29 I find it implausible that the drugs had suddenly accumulated over the period of
30 McMillan's one or two days' absence, given the amount of cash in different locations in
31 the apartment, the drugs, the bags, the silver-looking case with the scale in it, the case
32 containing the pill-dispensing or counting tools, and other paraphernalia in the case
33 consistent with packaging for commercial distribution of drugs. I simply do not believe
34 Mr. McMillan in his denials. His evidence does not leave me with any reasonable doubt
35 on the point of knowledge, and the entirety of the evidence beyond that similarly does not
36 leave me with any doubt, let alone a reasonable doubt on the element of knowledge.
37

38 On the element of control, I do have a reasonable doubt, not because of whose box the
39 silver-looking case is. I have a doubt that the case belongs to Kyla Nygard as McMillan
40 maintains. There are pipe-cleaning tools in it, pill-separating tools in it, straws for use in
41 it; but spoons and marijuana use paraphernalia were not in the box. There are some of

1 those over by Ms. Nygard's space. That gives me a doubt that the case is Ms. Nygard's.
2 I don't know the contents of the gum cylinder or the pet treats. Frankly, I can't do more
3 than speculate as to whose case that might be. It could be Ms. Nygard's. It could be any
4 of the occupants' of the apartment.

5
6 It was suggested to be Ms. Nygard's by the defence to raise a doubt that the office space
7 was Mr. McMillan's alone and for his use alone, as the Crown suggested. I am satisfied
8 that the computer was used by all three occupants and, therefore, all three made use of the
9 desk space. Further, it's a small apartment. That desk space was in ready access of all
10 occupants of the apartment. They each had, it appears, exclusive use of their own
11 bedroom (or, in Nygard's case, bedroom-like space), but the rest of the apartment was
12 used by all three occupants. Therefore, I find that the desk space was not solely used by
13 Mr. McMillan.

14
15 Further, Mr. McMillan had two jobs. He was in the apartment less often than a person
16 with one job and therefore reduced opportunity to exercise control.

17
18 The apartment was in an extraordinary state of disarray, but least so in Mr. McMillan's
19 exclusive (bedroom) space. Therefore, Mr. McMillan did not exert any effective control
20 over the other two regarding the cleanliness or orderliness of the common space. That
21 militates against him also exercising any degree of control over the pills, if theirs or one
22 of theirs alone, and the office space.

23
24 Each occupant paid the same amount of rent, again militating against any one of them
25 having any more control over the others in general or Mr. McMillan specifically with
26 respect to their possessions, including perhaps the pills.

27
28 Taken in total, the evidence is consistent with the three occupants acting in consort
29 criminally in respect of the pills, but also equally consistent with them not, and further
30 equally consistent with Mr. McMillan not having any control over the drugs owned by the
31 other two occupants. It would be conjecture or speculation for me to conclude one of
32 those possibilities over the others on this record.

33
34 Here there are reasonable alternate explanations for the circumstantial evidence on the
35 issue of control. For example, the cash most proximate to Mr. McMillan's activities in
36 the space could be from music festival ticket sales. I am satisfied from the bus, its
37 occupants, the map, the calendar and the testimony of Mr. McMillan that that was a
38 genuine plan for the ensuing months. Mr. McMillan also received cash for festival ticket
39 sales, as evidenced by the specific tickets and cash in his space.

40
41 A further reasonable alternate explanation is that the drugs were either or both of

1 Ms. Nygard's or Mr. Romaine's alone, without any mere exercise of control by
2 Mr. McMillan. They were the same in appearance and content as the ones found in
3 Romaine's room and for which he admitted possessing. They were the very pills that
4 Nygard admitted possessing.

5

6 Mr. McMillan had quiescent knowledge, but I have a reasonable doubt he had any
7 measure of control over those pills. I need not, as a consequence, consider the third
8 element of consent for s. 4(3)(b) of the *Code*.

9

10 Therefore, Mr. McMillan, would you please stand. I acquit you of the charge that you
11 have faced in court through this trial.

12

13 THE ACCUSED: Thank you, Your Honour.

14

15 MR. DAHLEM: Sir, thank you.

16

17 THE COURT: Thank you.

18

19 **Discussion**

20

21 MR. DAHLEM: I understand the Court intends to revise its
22 reasons.

23

24 THE COURT: If a transcript is requested, the draft usually
25 comes to me, and I'll just do an edit.

26

27 MR. DAHLEM: Well, the only reason why I suggest that, My
28 Lord, is, with the greatest of respect, on the point of the guns, you may have
29 misapprehended the evidence --

30

31 THE COURT: Okay.

32

33 MR. DAHLEM: -- in that I assume you're making reference to
34 the firearms in photograph 5.

35

36 THE COURT: Yes.

37

38 MR. DAHLEM: Constable Zinck testified that those were replica
39 firearms, so they're effectively plastic airsoft pistols, Sir.

40

41 THE COURT: Thank you. I missed that. And that was all of

1 those items?

2

3 MS. SZABO:
4 friend brought it up --

Yes, Sir. I can confirm. I'm glad that my

5

6 THE COURT:

Thank you.

7

8 MS. SZABO:
9 effectively --

-- because it was an issue. They are

10

11 MR. DAHLEM:

They're toys.

12

13 MS. SZABO:
14 themselves --

While they look like guns, they are not

15

16 THE COURT:

They certainly do. And the Samurai sword is

17 just plastic or rubber or what is that?

18

19 THE ACCUSED:

Yeah, it was just all toys, plastic.

20

21 MS. SZABO:
22 such items.

They appear -- they have the appearance of real

23

24 THE COURT:

They might make a useful threat.

25

26 MS. SZABO:
27 the meaning of the *Firearms Act*.

But they're not -- they're not firearms within

28

29 THE COURT:

Okay.

30

31 MS. SZABO: The BB guns don't fire faster than 500 feet per
32 second, the projectiles, so they fall into a class that, while they're not actually firearms
33 within the meaning of the Act, they are barreled projectiles. So it's -- there's a fine line
34 between how fast the barrel goes or the speed of the projectile goes and when it becomes
35 covered under the *Firearms Act*.

36

37 THE COURT:

All right. Well, I thank you. I stand corrected.

38 With counsels' consent, I will delete that from the transcript. I think that's the best way
39 to go. That change alone would not change my conclusion on the element of knowledge
40 of the accused. He just had to know that there were all these drugs in the apartment --

41

1 MR. DAHLEM: Very good, Sir. Thank you, Sir.
2

3 THE COURT: -- guns or not. But I thank you for that,
4 Mr. Dahlem. Anything else arising?
5

6 MR. DAHLEM: There should be an order for forfeiture of all
7 items seized.
8

9 MS. SZABO: Yes, Sir.
10

11 THE COURT: So ordered.
12

13 MS. SZABO: And as long as --
14

15 THE COURT: I didn't know if you'd meant there had already
16 been one under the circumstances.
17

18 MR. DAHLEM: Well, no, there was no order out of the
19 Provincial Court because the matter was going up to trial here in this court.
20

21 THE COURT: Okay.
22

23 MR. DAHLEM: So we will need some form of order so that the
24 RCMP can destroy what needs to be destroyed in their possession.
25

26 MS. SZABO: And, Sir, I can draft a form of order to send up
27 to the Court, if you so desire; but typically, even at this level, a simple endorsement on
28 the record of all items seized being forfeited should suffice. We will get the
29 endorsements to send to the police.
30

31 THE COURT: Do those items seized include the cash?
32

33 MR. DAHLEM: There was no cash seized, Sir.
34

35 THE COURT: Thank you. Any other items which ought to be
36 returned and not destroyed?
37

38 THE ACCUSED: Passport.
39

40 MR. DAHLEM: No.
41

1 THE ACCUSED:

My passport.

2

3 MS. SZABO:

Oh, yes.

4

5 THE COURT:

That's pretty huge.

6

7 MR. DAHLEM:

Well, actually, Sir, there's no need for it because there's been a recent change in the policies of the Department of Foreign Affairs, in that seized passports are sent to the Department of Foreign Affairs and no longer kept in the possession of the police. Essentially, what happens is that the Department of Foreign Affairs takes them. I have run into this circumstance with other clients.

12

13 THE COURT:

To your knowledge, does Mr. McMillan need an order of the Court to recover that from the department?

15

16 MS. SZABO:

Sir, I can actually probably assist. I did review the exhibits with Constable Pho. As it turns out, it appears that both of the passports seized in this instance are still retained by the police.

19

20 MR. DAHLEM:

Oh, that's surprising.

21

22 MS. SZABO:

So what I will suggest, then, is that all items seized be forfeited to the Crown with the exception of the passports that were seized in relation to this matter, and that the order be that those passports be returned to their owner upon completion of this matter.

26

27 THE COURT:

Forthwith, upon completion of the matter. And the order should also state any other items on consent of both counsel; so if you discover something else in there, you're not required to destroy it. You'll contact counsel. But I would then make that my order.

31

32 MR. DAHLEM:

Very good, Sir. And then I know Ms. Nygard's counsel. He is a person I have practiced with for many years in Canmore. I'll advise him of what's happened, so he can inform Ms. Nygard about how to reobtain her passport.

35

36 THE COURT:

Anything else, counsel?

37

38 MR. DAHLEM:

No, Sir.

39

40 MS. SZABO:

No, Sir.

41

1 THE COURT:

Thank you. We're adjourned.

2

3

4 PROCEEDINGS CONCLUDED

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1 **Certificate of Transcript**

2

3 I, Marjorie Smith, certify that the foregoing pages are a complete and accurate transcript
4 of the proceedings, taken down by me in shorthand and recorded by a sound-recording
5 machine and transcribed from my shorthand notes to the best of my skill and ability.

6

7

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9

Marjorie Smith, CSR(A)

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Order No. 2620-15-1

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35 Pages: 15

36 Lines: 577

37 Characters: 19986

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39 File Locator: af876250c29011e4b6610017a4770810

40 Digital Fingerprint: fc79571294304b999ba358b49bfd2fba3e110a5d2a298e3f81503f5d859e6322

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Detailed Transcript Statistics	
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