COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***R. v. Silver***
2007 YKCA 4

Date: 20070531
Docket: 05-YU559

Between:

Regina

Respondent

And

Daniel Raymond Silver

Appellant

ORAL REASONS FOR JUDGMENT

Before: The Honourable Chief Justice Finch
The Honourable Madam Justice Huddart
The Honourable Mr. Justice Low

D. St Pierre — Counsel for the Appellant

M. Cozens — Counsel for the Respondent

Place and Date of Hearing: Whitehorse, Yukon
May 29, 2007

Place and Date of Judgment: Whitehorse, Yukon
May 31, 2007

Oral Reasons by:
The Honourable Mr. Justice Low

Concurred in by:
The Honourable Chief Justice Finch
The Honourable Madam Justice Huddart

Reasons for Judgment of the Honourable Mr. Justice Low:

[1] This is an appeal of convictions for possession of cocaine for the purpose of trafficking, and two firearms offences recorded by Chief Judge Faulkner of the Territorial Court of The Yukon Territory. The appellant contends that the trial judge erred in failing to find that his apprehension and detention by a police officer in a motor vehicle he was driving was in breach of his right under s. 9 of the *Canadian Charter of Rights and Freedoms* not to be arbitrarily detained; that the judge erred in failing to find that ensuing searches by the police of his person were in breach of his rights under s. 8 of the *Charter* to be secure against unreasonable search or seizure; and that the judge erred in not excluding evidence of the cocaine and firearms located in the searches.

[2] Alternatively, the appellant contends that the evidence did not support the conclusion of the trial judge that the cocaine he possessed was for the purpose of trafficking. He says that he should have been convicted of simple possession only on the cocaine count.

[3] Around 4:20 p.m. on 2 October 2004, Constable Scott Bell of the RCMP in Whitehorse received a tip from an informant, who had previously given reliable tips with respect to illicit drug trafficking and other crimes in the community, that the appellant was then driving a silver Subaru with a black hood making deliveries to “crack shacks” and hotels in Whitehorse. The constable knew from other officers that the appellant was connected to the drug subculture and that he had previously

seen the appellant driving a silver Honda, not a Subaru, with a black hood. He also knew that there was an outstanding warrant for the arrest of the appellant on a marijuana cultivation charge in British Columbia. He knew the vehicle to be registered to Michael Carrier, who was a known local cocaine dealer. The constable testified that the hood of the car was a "composite type" and was unique.

[4] Members of the RCMP drug section spread out to attempt to find the car and the appellant. Constable Bell was on the Alaska Highway when he saw a silver vehicle with a black hood heading down a hill toward downtown Whitehorse, where the known cocaine-vending sites were located. He was unable to identify the driver so he radioed for uniformed officers to stop the vehicle. Constable Warner did just that at the bottom of the hill, shortly before 6:00 p.m.

[5] Constable Bell arrived at the scene of the apprehension and identified the appellant as the driver. Constable Warner arrested the appellant at the direction of Constable Bell. Constable Warner found a semi-automatic Colt .45 pistol in the waistband of the appellant's pants. There were seven rounds of ammunition in the magazine of the pistol.

[6] During a search of the appellant at the police station, nine separate packages containing crack or powder cocaine were found in the appellant's underwear that had been modified to create a storage pocket. The total weight of the cocaine was 59.3 grams. It had a street value of $5,000 to $6,000. The appellant also had on his person $105 in cash and a cell phone.

[7] The facts I have summarized were established by evidence led in a *voir dire*. The appellant asserted that the physical evidence was obtained by the police in violation of his s. 8 and s. 9 *Charter* rights. Therefore, the Crown had to establish on a balance of probabilities that Constable Bell had reasonable and probable grounds to arrest the appellant.

[8] The trial judge began his ruling by citing the applicable law:

> [5] In *R. v. Debot*, [1989] 2 S.C.R. 1140, the S.C.C. dealt with the issue of weighing evidence provided by informants and relied on by police to justify an arrest or warrantless search. The oft-quoted decision of Wilson, J. sets out three factors to be considered.
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> > In my view, there are at least three concerns to be addressed in weighing evidence relied on by the police to justify a warrantless search. First, was the information predicting the commission of a criminal offence compelling? Second, where that information was based on a "tip" originating from a source outside the police, was that source credible? Finally, was the information corroborated by police investigation prior to making the decision to conduct the search? I do not suggest that each of these factors forms a separate test. Rather, I concur with Martin J.A.'s view that the "totality of the circumstances" must meet the standard of reasonableness. Weakness in one area may, to some extent, be compensated by strengths in the other two.

[9] The judge found that the police had reasonable and probable grounds to find the appellant and arrest him. He also found that Constable Bell, after he saw a vehicle that fit the unique description of the vehicle he was looking for, had articulable cause to direct other police officers to stop the vehicle and detain its occupants. He stated his final conclusion as follows:

> [20] Having regard to all the circumstances, I am satisfied beyond doubt that the police had (both subjectively and objectively)

> reasonable and probable grounds to make the arrest and conduct the subsequent search. The details of the tip combined with the observations of the police were sufficient to remove any real possibility of innocent circumstance. The accused was not arbitrarily detained or unreasonably searched. The application to exclude the evidence thus obtained is dismissed.

[10] The trial judge briefly considered s. 24(2) of the *Charter* in the alternative by stating:

> [21] If I am wrong in my analysis on the issue of the reasonableness of the search, and there was a *Charter* breach, I find that I would not have exercised my discretion to exclude the evidence in question. Although an unreasonable arrest and intrusive search of the person would be a serious breach, the evidence obtained was real evidence and its admission would not affect the fairness of the trial. The police, I find, acted in good faith, and not in ignorance or disregard of the law as in *R. v. Klimchuk*, cited by the defence. Moreover, the charges are extremely serious. In the circumstances, I find that admitting the evidence would not bring the administration of justice into disrepute.

[11] While conceding that the information Constable Bell received was from an informant of proven reliability, the appellant argues that the trial judge erred in finding that the police officers acted on reasonable and probable grounds for stopping the vehicle and for the ensuing arrest and search. He says that the information given by the informer was conclusory only and required more detail before the police could lawfully act on it in the manner they did; that the police acted without obtaining corroboration of the tip in any form; and that the trial judge overlooked evidence that a drug dealer named Mike Faulkner was known by Constable Jamie McGowan to be associated with a silver Subaru (not a Honda) with a black hood.

[12] I will deal with the third point first. It is true that Constable McGowan testified about Faulkner being associated with a silver Subaru with a black hood and that Constable Bell associated the appellant with a silver Honda with a black hood. But there is no evidence that Constable Bell knew that Faulkner's silver car had a black hood. Even if he did have such knowledge, and there were two silver cars with black hoods associated with different drug dealers as opposed to several drug dealers using one such car, it cannot be said that the constable acted indiscriminately when he ordered the stopping of the vehicle he had seen going down the hill. That vehicle was silver and had a black hood. To that extent, it fit the description given by the informer and it was heading in the right direction within a reasonably short time after the information was given to Constable Bell. Together with the substance of the tip and the constable's knowledge of the appellant, that was enough in the exigent circumstances of this case for him to have articulable cause for detention of the driver of the vehicle for investigative purposes: see *R.* v. *Lal* (1998), 130 C.C.C. (3d) 413 (B.C.C.A.).

[13] In my opinion, the combination of what the police knew about the appellant, the substance of the information given by the informer, as well as that person's proven reliability, the distinctive appearance of the vehicle the appellant was said to be driving regardless of its manufacture, and the direction in which the vehicle was being driven when first seen, combined, once it was determined that the appellant was the driver, to render the search of the appellant and the seizure of the contraband reasonable. It would have been advisable for Constable Bell to have obtained from the informer a little detail as to how he knew about the appellant's

activity. But the sighting of the appellant in a vehicle that matched the distinctive feature of the vehicle description provided by the informer, plus the direction of travel, amounted to sufficient corroboration of the informer's report to meet the test in ***Debot***.

[14] As the trial judge noted, this was a developing situation. There was no time to obtain a warrant. In my opinion, the arrest, search and seizure were all objectively and subjectively based upon reasonable and probable grounds. I am unable to find any error by the trial judge in applying the law to the facts he found and in ruling the critical evidence admissible. Thus I would not give effect to the first ground of appeal.

[15] The Crown called a police expert to give opinion evidence about the packaging and distribution of cocaine. The trial judge gave no weight to some particulars of the expert's evidence because he found it to be overreaching and not balanced. However, the judge was satisfied beyond a reasonable doubt that the appellant possessed the drugs on the offence date for the purpose of trafficking. He began with his conclusion as to the expert's testimony and then articulated his conclusion as to purpose:

> [13] Thus, the weight of the expert's evidence suffers from the irresistible conclusion that his testimony is far from even-handed.
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> [14] Having said that, there remains in my view, only one conclusion to draw from the circumstances, that being that Mr. Silver was in possession of the cocaine for the purpose of trafficking. Mr. Silver had 41 grams of cocaine on his person. He was not in his residence but in an automobile headed in the opposite direction. The cocaine was packaged in nine separate packages of roughly equal weight. There were two different types of

> cocaine. The drugs were secreted in a slit (obviously purposely made) in his shorts. At the same time, he had a loaded handgun tucked in his pants and readily accessible. He also had a cell phone. Moreover, nothing was found that would indicate that the cocaine was for personal use.
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> [15] It is quite true that some of these factors taken alone, for example, possession of a cell phone, are completely benign. It is also true that some of the factors taken alone would be equally consistent with personal use. For example, the quantity of drug was not beyond what a heavy user could consume in a matter of days. Even possessing a loaded handgun does not, in and of itself prove an intent to traffic.
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> [16] However, if one looks at the circumstances as a whole, a clear picture emerges.
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> [17] The packaging of the drug and the fact that there are two types of cocaine is more consistent with trafficking than with personal use. While a user might also secrete his drugs for transport, in this case, the underwear had been purposely modified to hide drugs, which suggests that the accused was in the habit of transporting drugs in this fashion and that he had not simply stuffed the drugs in his shorts when stopped by the police. Moreover, in my view, the concurrent possession of a loaded handgun is strongly suggestive of an intent to traffic.

[16] The trial judge in the above passage understated the amount of cocaine possessed by the appellant. Crown counsel erred in stating in argument that the appellant was travelling away from his residence when there was no evidence as to where the appellant lived, and this error found its way into the trail judge's reasons. But I think the error was of little importance to the final conclusion and cannot be said to be significant.

[17] In my opinion, the evidence supported the finding of the trial judge. The conduct of the appellant was unlike that of a mere user of cocaine (indeed, there was no evidence that he was or might be a user) and his conduct clearly pointed to

him being a trafficker. In addition to all the other factors viewed cumulatively, arming himself with a loaded pistol was consistent only with trafficking activity.

[18] I would dismiss the appeal.

[19] FINCH C.J.Y.T.: I agree.

[20] HUDDART J.A.: I agree.

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The Honourable Mr. Justice Low