IN THE YOUTH JUSTICE COURT OF NOVA SCOTIA
Citation: *R. v. W.(D.) and B.(T.)*, 2017 NSPC 13

Date: March 16, 2017
Docket: 8031567 and 8031568
Registry: Halifax

Between:

Her Majesty the Queen

v.

W.(D.) and B.(T.)

RESTRICTION ON PUBLICATION:
Section 110*, Youth Criminal Justice Act*

Trial Decision

Judge:	The Honourable Judge Anne S. Derrick
Heard:	January 17, February 8, and March 10, 2017
Decision:	March 16, 2017
Charges:	Section 355(a), *Criminal Code*
Counsel:	John Nisbet, for the Crown
	Josh Bearden, for W.(D.)
	Jamie Violande, for B.(T.)

By the Court:

Introduction

[1] W.(D.) and B.(T.) are charged with unlawfully having in their possession on October 17, 2016 a stolen 2016 Acura MDX belonging to Danette Pottle. They say the Crown has failed to prove beyond a reasonable doubt that they were ever in the Acura and that, even if I am satisfied they were, there is no proof beyond a reasonable doubt of them being in unlawful possession of it.

[2] I am going to first examine whether the Crown has proven that W.(D.) and B.(T.) were in the stolen Acura. The issue of what constitutes unlawful possession and whether it has been proven in this case is only relevant if I find the evidence establishes that W.(D.) and B.(T.) were in the vehicle.

The Facts

[3] Ms. Pottle testified that she had reported her SUV stolen on the morning of October 15. It was recovered by police from a driveway at 19 Ernest Avenue in the early morning hours of October 17. A next-door neighbour, Gwen Morrison, had spotted it there around 3:15 a.m.

[4] Ms. Morrison saw three people in the dark, one of whom was significantly taller than the other two, walk calmly away from the driveway. She was unable to see any other identifying features. She assumed they went around the corner on Ernest Avenue as she lost sight of them. Turning the corner would have taken them toward Albro Lake Road.

[5] I find the evidence establishes that a Halifax Regional Police officer saw the Pottle SUV being driven in the area moments before it was parked. Cst. Garrett McCulley, temporarily parked in a neighbourhood parking lot, observed an SUV matching the description of the stolen vehicle drive by. He pulled out of the parking lot to follow. When the SUV failed to stop at a four-way intersection at Ernest Avenue and Albro Lake Road and then slid through a three-way stop Cst. McCulley activated his emergency lights and siren and pursued the accelerating vehicle. After only a short distance his pursuit was called off due to safety concerns. He had been unable to see how many people were in the SUV.

[6] Cst. McCulley later observed the SUV located in the driveway at 19 Ernest Avenue. It was similar in make and colour – a distinct colour - to the vehicle he had pursued. I am satisfied it was the same vehicle.

[7] The police were on the scene very quickly following the call about the SUV in the driveway at 19 Ernest Avenue. Gwen Morrison testified that the police arrived "very fast" she said, "the fastest [she] had ever seen." Csts. Anderson and MacDonald were at the scene by around 3:30 a.m. They had heard Cst. McCulley's dispatch about the SUV he had been following. Cst. Anderson called for a K-9 unit.

[8] To this point, no one – not Ms. Morrison or any of the police officers on scene – had seen anyone in the area other than the three individuals Ms. Morrison spotted walking away from her neighbour's driveway.

[9] Cst. Cooke, a Halifax Regional Police dog handler responded to the call for a K-9 unit and arrived with his police service dog, Recon, at 3:40 a.m. Cst. Cooke was qualified, with the consent of Defence counsel, to give opinion evidence about the handling of a police service dog and the interpretation of the dog's behaviour while tracking.

[10] Cst. Cooke brought Recon to the front driver's side of the SUV, as close to the vehicle as he could get, where Recon immediately picked up a fresh scent.

[11] Recon had been trained to track the freshest scent leaving the scene. The evidence establishes that no one other than the three individuals observed by Ms. Morrison had been around the SUV in the time immediately preceding the arrival of the police. Cst. Cooke testified that Recon strongly communicated "a whole lot of scent". Fresh scent indicated to him that "we are not that far behind these people we are trying to track."

[12] Cst. Cooke testified that the atmospheric conditions in the early morning of October 17 were ideal for preserving a human scent track. The temperature was 13 degrees Celsius, there was high humidity, no sunlight, and little wind. Furthermore, the urban environment in which he and Recon were operating with its curbs, grass, shrubs, and a lake, was an excellent environment for capturing and retaining scent.

[13] Recon set off on a scent track that took him and Cst. Cooke in the direction of Pinecrest Drive and Albro Lake Road. The track travelled into back yards and through privacy hedges and over fences and along Little Albro Lake, a small lake

close to Ernest Avenue. At the intersection of Pinecrest and Albro Lake Road, nine minutes from the time of Recon's deployment, he indicated the track had been lost. Police officers at the intersection advised there had been a foot chase in the area and two suspects were in custody. The foot chase and the deployment of another police service dog made it no longer feasible for Cst. Cooke and Recon to try and pick up the track they had been following.

[14] It was Cst. Cooke's evidence that Recon's actions informed him they were tracking human scent. And although Recon can determine how many scent contributors there are in a track he cannot communicate that. Recon is only able to indicate if the track "picture" changes, either because someone leaves or someone joins the track, something that did not happen during this particular tracking.

[15] During the tracking Cst. Cooke did not observe anyone else in the area other than the police officers at 19 Ernest Avenue and at the intersection of Pinecrest and Albro Lake Road. He formed the opinion based on Recon's tracking behaviour that someone travelled from the SUV in the driveway to the intersection at Pinecrest and Albro Lake Road.

[16] While Cst. Cooke and Recon were tracking, other police officers set up containment. Containment is the stationing of police officers and police vehicles around the area in which the tracking is occurring so that if anyone is flushed out by the tracking they will be flushed out into the arms of the waiting officers. Cst. Jim Smith and Cst. Jonathan Hovingh chose a position at Albro Lake Road and Sheridan Street. Cst. Smith identified this location in blue on Exhibit 2, a Google map of the area. It was a short distance away from the intersection of Pinecrest and Albro Lake Road.

[17] Cst. Hovingh testified that the position he and Cst. Smith had assumed in their marked police vehicle enabled them to see down both Sheridan Street and Albro Lake Road. He wasn't asked about the blue marking made on Exhibit 2 by Cst. Smith during his testimony but he did say that he parked at the corner of the two streets which is what Cst. Smith's marking on Exhibit 2 indicates.

[18] From their position Cst. Smith and Cst. Hovingh had a full view of Albro Lake Road. They waited in their police vehicle with the emergency lights activated. Cst. Smith observed three males walking from Pinehill Road where it becomes Pinecrest

Drive. Pinehill Road is at one end of Little Albro Lake and Ernest Avenue is the street closest to the other end of the lake.

[19] The approaching males were within a few feet of each other and visible in the light cast by the streetlights. They were headed in the direction of Cst. Smith and Cst. Hovingh but were walking on the other side of the street. At first they were walking casually until Cst. Hovingh drove the police vehicle toward them to within 10 to 15 feet at which point two of them ran off. Cst. Hovingh chased after them. The third – B.(T.) – stayed behind and Cst. Smith arrested him. B.(T.) did not run when Cst. Smith identified himself as police and was not aggressive. Cst. Smith identified B.(T.) seated in the prisoner's dock in the courtroom.

[20] Cst. Smith also identified W.(D.) in the courtroom, seated in the prisoner's dock. He saw him in Cst. Hovingh's custody at the scene. He had met W.(D.) and his parents previously.

[21] Cst. Hovingh testified to seeing the three males walking in a group within 30 to 60 seconds after parking at the corner of Albro Lake Road and Sheridan Street. It appeared to him that they were together. His evidence was consistent with Cst. Smith's: the males came from Albro Lake Road. Cst. Hovingh saw them come from a yard on the east side of the road. They crossed the road and continued toward the police car in which Cst. Hovingh and Cst. Smith were seated.

[22] As Cst. Smith had testified, when Cst. Hovingh drove toward the males, they reacted. Cst. Hovingh recalls all three of them starting to run away even before he identified himself but it was apparent from his evidence that he was focused on one in particular – W.(D.). I am satisfied he may not have noticed what Cst. Smith noticed, which was that B.(T.) stayed behind. Indeed, Cst. Hovingh testified that he did not see where the other two went.

[23] Cst. Hovingh pursued one of the males into the backyard of a house right by where he had parked the police car. At a fence in the backyard his quarry lay on the ground and put his hands behind his back. Cst. Hovingh handcuffed him. It was W.(D.)

[24] Cst. Hovingh testified that after W.(D.) had been cuffed, two women and a man approached them in the backyard. Cst. Hovingh did not know these people. He

and W.(D.) were in the backyard of the house they had come out of. He later learned they were W.(D.)'s father and mother and grandmother.

[25] Mr. Nisbet advised the Crown does not dispute Mr. Bearden's submission that W.(D.) was apprehended by Cst. Hovingh in the backyard of the home where he was living with his parents.

[26] Other than the males and then the people in the backyard, Cst. Hovingh had not seen anyone else in the area.

[27] Just before the foot chase involving Cst. Hovingh and W.(D.), Cst. Walsh had been driving to Ernest Avenue after being dispatched on a recovery of a stolen vehicle call. His route from the Dartmouth police station took him on to Pinecrest Drive toward Albro Lake Road. Travelling southbound on Pinecrest he saw, at the intersection of Pinecrest Drive and Jackson Road, three individuals running across the next intersection which was Pinecrest Drive and Albro Lake Road. As Cst. Walsh continued southbound, the three individuals were on the south side of the intersection, the Pinehill Road side, and running west on Albro Lake Road. By the time Cst. Walsh reached Albro Lake Road and turned left he observed that Cst. Smith had a person in custody at the entrance of [civic number] Albro Lake Road, W.(D.)'s home.

[28] Cst. Walsh had lost sight of the three individuals by the time he reached Albro Lake Road and could not say if the males who were arrested – B.(T.) by Cst. Smith and W.(D.) by Cst. Hovingh – were the individuals he had just seen. Cst. Walsh also did not see anyone else in the vicinity. I note that he observed the three individuals at 03:40 hours. Cst. Hovingh testified that he had set up his and Cst. Smith's containment position at 03:39 hours. As I indicated, almost immediately he saw the three males walking on Albro Lake Road.

[29] Cst. Walsh noted on Exhibit 2 where he was when he saw the three individuals, the location of the three individuals on Albro Lake Road when he saw them, and the general area where he observed Cst. Smith with B.(T.) in custody. His indications are consistent with what Cst. Smith and Cst. Hovingh said about where they saw and interacted with B.(T.) and W.(D.). Cst. Walsh testified that he witnessed Cst. Hovingh in the backyard of [civic number] Albro Lake Road with

W.(D.) He did not see the two women and the man who Cst. Hovingh described coming into the back yard.

[30] B.(T.) and W.(D.) don't dispute the encounter with police.

Circumstantial evidence

[31] This is a circumstantial case. No direct evidence connects either W.(D.) or B.(T.) to the stolen SUV. Where there is no direct evidence it is necessary to determine what reasonable inferences can be drawn from the circumstantial evidence.

[32] The Supreme Court of Canada has recently discussed circumstantial evidence and how it is to be factored into the analysis of the Crown's burden to prove guilt beyond a reasonable doubt. In *R. v. Villaroman*, [2016] S.C.J. No. 33 the high court indicated that in order to convict, the trier of fact must be satisfied that the only reasonable inference that can be drawn from the circumstantial evidence is that the accused is guilty. "If there are reasonable inferences other than guilt, the Crown's case does not meet the standard of proof beyond a reasonable doubt." (*paragraph 35*)

[33] The Court's decision in *Villaroman* is a reminder to judges to avoid too readily drawing inferences of guilt. Judges and juries must "…guard against the risk of "filling in the blanks" by too quickly overlooking reasonable alternative inferences." "…an inference of guilt drawn from circumstantial evidence should be the only reasonable inference that such evidence permits…" (*paragraph 30*)

[34] The *Villaroman* decision also reminds judges that when we are assessing circumstantial evidence, we should consider "other plausible theories" and "other reasonable possibilities" which are inconsistent with guilt. The Crown is required to "negative" reasonable possibilities "but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused." (*paragraph 37*) In other words, possible explanations for the circumstantial evidence have to be answered by the Crown but every possible reason for the circumstantial evidence consistent with innocence that can be conjured from the imagination does not have to be explained by the Crown.

[35] “Plausible theories” or “other reasonable possibilities” for the circumstantial evidence must be based, not on speculation, but on logic and experience applied to the evidence. (*paragraph 37*)

[36] The Supreme Court of Canada went on to say that a conviction based on circumstantial evidence, “assessed in light of human experience”, can only be justified if “it excludes any other reasonable alternative.” (*paragraph 41*) Inferences alternative to guilt have to be reasonable inferences not just possible inferences. (*paragraph 42*)

Analysis

[37] Is the only reasonable inference to be drawn from the evidence that W.(D.) and B.(T.) had occupied the stolen Acura? I find the answer to be “yes.” I find the circumstantial evidence supports no other reasonable possibility.

[38] The circumstantial evidence in this case is:

- Cst. McCulley observed an SUV matching the description of a stolen vehicle being driven well over the speed limit and unsafely;
- Three individuals are seen by Ms. Morrison next to an unfamiliar SUV and leaving the Ernest Avenue driveway;
- The SUV had just driven by Cst. McCulley supporting the inference that it had just been pulled into the Ernest Avenue driveway;
- Recon picked up a scent trail right next to the driver’s side of the SUV. He and his handler, Cst. Cooke, had arrived on the scene within about 15 minutes after the three individuals had been seen by Ms. Morrison;
- Recon followed that trail to the intersection at Pinecrest and Albro Lake Road;
- A foot chase of two males had just occurred at that intersection;
- B.(T.) was one of three males who had been at that intersection but had not run away when approached by police. His two companions, observed by Csts. Smith and Hovingh had. One of those companions was W.(D.) who was chased and apprehended by Cst. Hovingh;
- W.(D.) ran into the backyard of his home where Cst. Hovingh caught up to him;

- During all this time, none of the police officers had seen anyone else in the area except Cst. Jeff Brown who saw two individuals walking on Pinehill Road. Ms. Morrison had also not seen anyone else in the neighbourhood.

[39] Defence counsel have argued that an inference consistent with innocence can be drawn from the facts in this case: W.(D.) and B.(T.) and an unidentified third individual were just walking around the neighbourhood, minding their own business and with no connection to the SUV. Naturally enough they were in the vicinity of W.(D.)'s home, and W.(D.) in fact ran into his own backyard. And W.(D.)'s flight from police? Defence submit that was unrelated to the SUV and indicative only that W.(D.) wanted to avoid contact with the police officers. B.(T.)'s passive reaction to the police approaching from their containment position suggests he was not worried about an encounter with the officers. This could support the inference that he and W.(D.) had nothing to do with the SUV.

[40] The problem with these inferences is that when considered in light of all the evidence, they are not reasonable. W.(D.) and B.(T.) were in the neighbourhood where the stolen SUV had just been abandoned. Three individuals had walked away from that SUV. The fresh scent of the individuals was tracked by a trained service dog to the intersection where three individuals had just run away from police. B.(T.) and W.(D.) were quickly apprehended. The tracking did not follow the route that an innocent late night stroll would be expected to follow; it took Recon and Cst. Cook through backyards and hedges and over fences. It was the middle of the night. No one else was around except for the two individuals Cst. Brown saw a little later on. The fact that W.(D.) was almost home when he encountered the police officers does nothing to undermine the only reasonable inference permitted by the evidence - that W.(D.) and B.(T.) had been in the Acura.

[41] The circumstantial evidence does not support a reasonable inference of W.(D.) and B.(T.) having nothing to do with the stolen SUV. It is not a reasonable inference that the stolen SUV and the boys were coincidentally in the same neighbourhood and nothing more.

[42] There are similarities in this case to the Alberta Court of Appeal decision in *R. v. S.L.R.*, [2003] A.J. No. 566 where the Court held that a young person was "tied to this crime by the dog-tracking evidence." (*paragraph 11*)

[43] The Alberta Court of Appeal explained in their decision that S.L.R. had been "apprehended by a police dog unit after four individuals fled from a stolen truck located in the alley behind the victim's house…The pursuit of the [young person] involved the dog following an apparent trail directly from the truck to the point where [he] was captured." (*paragraph 3*)

[44] The facts here are slightly different from *S.L.R.* in that Recon did not follow a track directly to W.(D.) and B.(T.). However, he followed a track to where the police spotted them. They were soon in police custody – B.(T.) because he did not flee and W.(D.) because Cst. Hovingh was successful in catching him. This scene was only 9 minutes from where Recon had picked up the freshest scent from the stolen SUV that three individuals had been seen walking away from.

[45] I find the only reasonable inference to be drawn from all the circumstantial evidence is that B.(T.) and W.(D.) had been in the Pottle SUV, had just abandoned it and had not yet made it safely away from a rapidly organized police response and cordon.

Unlawful Possession of the Stolen SUV

[46] Having found beyond a reasonable doubt that W.(D.) and B.(T.) had been in the stolen Acura, the remaining question is whether the evidence establishes beyond a reasonable doubt that they were in unlawful possession of it. Possession is made out where there is knowledge or willful blindness and some measure of control. In this case, where there is no evidence W.(D.) and B.(T.) were driving – there is no evidence of who was driving - criminal liability can arise from participation as a party to the unlawful possession of the driver, the driver being the person who had direct control over the vehicle.

[47] I have already found that W.(D.) and B.(T.) were in the vehicle just before it was abandoned in the Ernest Avenue driveway. The evidence of Cst. McCulley that I recited earlier in these reasons about how the Acura was being driven, the fact that this was the middle of the night, the trespassing through backyards and over fences and the flight from the police satisfies me that the occupants knew the SUV was stolen.

[48] The fact that there is no evidence of who was driving does not save W.(D.) and B.(T.) from liability. They were at least passengers in a stolen vehicle. The only reasonable inference is that they were voluntary passengers. And the only reasonable

inference to be drawn from their presence in the stolen vehicle as voluntary passengers coupled with their flight from it once it was hastily abandoned on Ernest Avenue is that they encouraged the ongoing unlawful possession. They therefore are parties to the unlawful possession of the stolen SUV.

[49] I find support for this analysis in *R. v. Barnhardt*, 2001 BCCA 191 where a majority of the British Columbia Court of Appeal held that a voluntary passenger in a stolen vehicle abetted the offence of unlawful possession:

> **81** …The only reasonable inference open to the trier of fact in the circumstances described is that [Barnhardt] was a voluntary passenger in a vehicle he knew to be stolen, and that he thereby encouraged Eck in possessing the stolen property. I am unable to see any other reasonable inference on the evidence and the findings of fact.
>
> …
>
> **83** In my view, the offences of theft and possession of stolen property need not be regarded as contemporaneous. The possession of the stolen vehicle continued after the theft and up to the time of its abandonment. The learned trial judge held the view that the evidence fell short of establishing the identity of the driver and his passenger at the time of theft. But there is no doubt that [Barnhardt] and Eck were the occupants, and in possession, of the vehicle for some period of time prior to abandonment.
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> **84** It was therefore open to the trial judge to find that [Barnhardt] committed the offence of possession of stolen property…

Conclusion

[50] The circumstantial evidence in this case supports only one reasonable inference – that W.(D.) and B.(T.) were in unlawful possession of the stolen 2016 Acura MDX. I am satisfied the Crown has proven the case against W.(D.) and B.(T.) beyond a reasonable doubt and find them each guilty as charged.

Derrick, J.P.C.