Action No.: 1508835360[redacted]
E-File No.: CCQ17[redacted]
Appeal No.: _____

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

HER MAJESTY THE QUEEN

v.

[redacted]

Accused

T R I A L
EXCERPT

Calgary, Alberta
May 5, 2017

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

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May 5, 2017	Afternoon Session
The Honourable Mr. Justice Wilson	Court of Queen's Bench of Alberta
C. Williams	For the Crown
P. Fagan, Q. C.	For the Accused
A. Gault	Court Clerk
D. Youngblood, CSR(A)	Official Court Reporter

THE COURT: Thank you. Please be seated.

Okay. We are here on the [redacted]ecision.

Something came up as I was reading my remarks here. I just needed some clarification. Part of the argument had been that you had advanced, Mr. Williams, that Buys 2, 3, and 4 involved someone other than the accused, and somehow in my copy of Exhibit 2 I have only got the notes in that regard for Buys 2 and 3.

MR. WILLIAMS: I -- I think --

THE COURT: Now, did you tell me --

MR. WILLIAMS: It's 2 and 3. 2 and 3.

THE COURT: Okay. It's the same.

MR. WILLIAMS: 2 and 3.

THE COURT: Okay. I just thought that --

MR. WILLIAMS: We didn't lead evidence in relation to 4. So it's 2 and 3.

THE COURT: Okay. That is what I wanted.

And at the end of this decision, I want to talk to you about that other case management

matter. I think your office contacted my assistant, the Red Deer case, just as a followup to it, but that's after I give my decision.

MR. FAGAN:

THE COURT: That sounds right, yes. So if you can remind me before we rise.

MR. FAGAN: Yes, Sir.

THE COURT: So between the two of us we can turn our attention to it. Are you on that case because I was told both Crown and defence were --

MR. WILLIAMS: No. Is it a federal matter?

THE COURT: It's a drug case; isn't it?

MR. FAGAN: Yes. I think Shelley Tkatch is on it now.

THE COURT: Okay. I just thought if you were both on it, then hallelujah.

MR. WILLIAMS: No. But if there's something I -- if either I need to get a hold of Ms. Tkatch or something you want me to sit in on as --

THE COURT: No. It was just that in order to where to go next on this case management, then if you were here, we could do that easily, but you're not, so we can't. Sorry for bothering you.

Reasons for Judgment

THE COURT: I am able to give a decision on the application that I heard in the last several days. My decision is handwritten; therefore, I reserve the right to be able to edit my remarks for comprehension, for proper spelling, obviously, any and all sorts of needs for punctuation, proper citations, and misstatements. Sometimes the reality is that what I thought I wrote down I guess I did not write down or I will misread it. That is just the reality of my penmanship.

Introduction

The accused has pleaded guilty before me upon an amended Count 1 on the indictment

which reads:

> Between the 17th day of March, 2015, and the 20th day of July, 2015, both dates inclusive, did unlawfully traffic in a controlled substance, to wit: cocaine, contrary to Section 5(1) of the *Controlled Drugs and Substances Act*.

The facts admitted confirm the accused was involved in a dial-a-dope operation leading to a total of six drug sales to undercover police officers occurring within the time span alleged in the indictment.

The facts admitted were filed as Exhibit 1 notwithstanding the exhibit is headed "Proposed Agreed Facts". I conducted a necessary restricted Section 606(1.1) inquiry and was satisfied that the accused's guilty plea was valid in law. The agreed facts make it absolutely clear that the Crown had proven beyond a reasonable doubt that the accused had committed all the essential elements of the offence, see *R. v. Mack*, [1988] 2 SCR 903, at paragraph 146.

Attention was then turned to the accused's application for a stay of proceedings based upon the defence of entrapment being violative of the accused's constitutional right guaranteed by Section 7 of the *Charter*.

Counsel agreed that the "evidence" heard on this application would be, in the main, simply various police officers' notes of their investigative activities on this case which were collectively filed as Exhibit 2. Three police officers were called solely to give further related information not detailed in Exhibit 2 or to better explain entries found in Exhibit 2.

At this point, I should digress to express the Court's sincere appreciation to counsel for their time-saving and focussed approach to presenting the evidence. It not only reflects upon their professionalism, but it also reflects the recent comments from the Supreme Court of Canada in *R. v. Jordan* that we all must refocus our approach to the manner to be followed in the leading of evidence when it is noncontroversial. Unnecessary and time-wasteful practices must stop. In this case, counsel have demonstrated their commitments to achieving a "new order" in the conduct of criminal litigation, and I wish to publicly commend them for doing so.

By agreement of counsel, and notwithstanding that defence carries the burden of establishing the defence of entrapment, the Crown called the three police witnesses and defence cross-examined. For his part, defence called no witnesses.

Evidence

Sometime in November 2014, someone phoned a tip into Crime Stoppers. Sometime between November 2014 and March 17, 2015, that reported tip was received and read by Constable Coffyne, who was an investigator in the Drug Unit.

By way of background, Constable Coffyne testified that in any given year approximately 100 such drug tips would be passed on to him personally. He testified that for various reasons he would only attempt to investigate approximately 50 percent of those tips. He testified that most of those attempted investigations were unsuccessful.

What was explicitly recorded in the tip is unknown. Police policy, at least at the time, was to subsequently shred the reported tip. Constable Coffyne's notes regarding that reported tip were written on that report and they too, of course, have been shredded. The purpose of the shredding appears to be to better ensure that the identity of the tipster is not inadvertently revealed.

Instead of simply filing the actual recorded tip for the above reason, Constable Coffyne created a record which used language which simply "generalized" the content of the tip. The "generalized" language was to both ensure nothing in the language could inadvertently reveal the tipster's identity and to fairly capture the essence of the tip. What I will therefore describe as the generalized tip was as follows:

> Chris was a drug dealer. Chris's phone number is (587) 969 6060.

In cross-examination, Constable Coffyne agreed to the obvious - nothing in the Crime Stoppers' tip provided information whether "Chris" was a male or female, Chris's age, description, ethnicity, or address, but Constable Coffyne did advise that the content of the Crime Stoppers' tip satisfied him that the tipster's information was firsthand, not second, or third hand, but he was not able to tell the Court how he was able to form that opinion. Constable Coffyne further advised that the content of the Crime Stoppers' tip led him to conclude that any attempt to contact the tipster to obtain further or better intelligence or information on the tip was impossible, but, again, he was unable to tell the Court how he was able to form that opinion.

Armed only with a first name and a phone number, Constable Coffyne's investigative avenues were reduced to one. He checked the phone number against the Calgary Police Service Information Management System (P.I.M.S.) to see if that number had come up in any police investigation, traffic stop, or reported complaint. The result was that nothing was found.

Constable Coffyne's next step was to direct Constable Swanson to take certain action. Constable Coffyne conceded in cross-examination that his direction to Constable Swanson was as recorded in his notes for March 17, 2015, at 21:34 hours, "To contact the phone number to arrange a meet to purchase drugs".

Constable Swanson's notes reveal that at 9:34 PM, he sent a text to the telephone number in question, which read as follows:

> Yo, you around. Need a ball ASAP!

Constable Swanson testified that "a ball" is drug lingo for an eight-ball, meaning one-eighth of an ounce of a drug, i.e. a 3.5-gram quantity. Constable Swanson testified that in sending his text, he was putting in an order to purchase 3.5 grams of cocaine.

Constable Swanson received a reply text at 10:01 which read, "Ye", which the officer interpreted to mean the sender was replying only to the first question, which he then interpreted as meaning "yes, I am around".

At sometime between 9:34 PM and 10:01 PM, Constable Swanson received a telephone call from a blocked number. He answered the call. His notes recorded what was said:

> When I answered, it was a male asking who I was. I gave the male a cover story and asked who he was. The male told me that I just texted him. I told the male I was looking for a ball of soft.

(Which he said was referencing was 3.5 grams of powder cocaine.)

> The male then asked where I got the number from. I told the male that I was asking around and got the number while inside Bootlegger's bar. The male said that's not the number anymore and would text me their new number in a bit. I thanked him and hung up.

Defence counsel puts emphasis on the fact that in this telephone conversation, Constable Swanson had, for the second time, placed a drug purchase order in and had not received an affirmative response.

At 10:06 PM, Constable Swanson received a text from the new number (403) 714-6664. In that text, Constable Swanson indicated he was out and about and asked if he could call

back in approximately 30 minutes, and the originator agreed.

Constable Swanson drove to a bar in northeast Calgary and was directed by Constable Coffyne to contact (403) 714-6664 with the objective of making a drug transaction.

Accordingly, Constable Swanson texted that number. The message's first sentence was:

> Yo, can you hook up a ball?

This third request to make a drug purchase was not responded to at all, so three minutes later Swanson phoned the number. A male answered. Swanson asked for the fourth time if the male could hook him up with a ball, meaning 3 and a half grams of powder cocaine, and the male stated he could.

That conversation and a followup call from the male resulted in Constable Swanson meeting up with two men in their vehicle in a bar parking lot. The driver, an Asian male, sold the officer a ball of powder cocaine for $220. The passenger, identified as the accused, confirmed he was "Chris" and had been the person who had spoken earlier with Constable Swanson.

On May 28, 2015, Constable Swanson contacted the accused by way of the telephone number and arranged for and then completed a cocaine purchase from the accused.

On June 9, 2015, the same contact was made by Constable Swanson, but on this occasion he was joined by an undercover police officer, Constable Telfer, at the drug sale location. Again, a cocaine purchase from the accused occurred.

Then on June 11, July 15, and July 20, Constable Telfer contacted the accused by way of the same telephone number and arranged for and then completed cocaine purchases on each of those dates.

I also heard evidence that on April 1, 2015, and April 29, 2015, Constable Swanson initiated contact using the same telephone number in order to make arrangements to buy cocaine and on those occasions did not speak to or meet up with the accused. In fact, the contact person and vendor was the Asian who was the vendor on the first drug purchase on March 17, 2015.

Crown counsel wished to emphasize that it was thus clear that the telephone number was not just to access the accused in order to purchase drugs; it, in fact, was a telephone number which connected to at least two, if not more, drug traffickers. In other words, the investigation no longer targets Chris, the accused, but has broadened to include other drug

dealers.

The Law

In *R. v. Gladue* 2012 ABCA 143, our Court of Appeal described entrapment at paragraph 9:

> Entrapment may be found when "the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a *bona fide* inquiry": *Mack* at 964. The *bona fide* inquiry exception permits the police to present an opportunity to commit a crime to a person associated with a location where it is reasonably suspected that criminal activity is taking place: *Barnes* at 461. Although a reasonable suspicion that a person is engaged in criminal activity can be developed during the course of an investigation of a tip, it must exist before the opportunity to commit an offence is provided: *R v Imoro*, 2010 ONCA 122, paragraph 16, aff'd 2010 SCC 50.

I find that when Constable Swanson made the first text on March 17, 2015, he only did so at the direction of Constable Coffyne. Neither Constable Swanson or Constable Coffyne had, at that time, a reasonable suspicion that "Chris" was engaged in dealing drugs. While Constable Coffyne, unlike his opposite number in the *Gladue* case, had attempted to investigate the tip, the end result remained the same. He gained nothing from his efforts. The same result had he done nothing.

Repeated overtures by Constable Swanson to purchase drugs were not responded to until the fourth attempt.

Crown counsel submits that all of the contacts prior to the fourth overture reveal that Chris said nothing to suggest surprise, confusion, or uncertainty with what the undercover officer was saying. In other words, that failure on the part of Chris should be interpreted as reflecting not only that Chris understood the drug jargon, i.e. what he was being asked to do, but also that it reflected a willingness to carry on in whatever dialogue might follow, inevitably leading to a sale of cocaine. With respect, I disagree. I find that all that can be made out of Chris's responses is some additional suspicion.

It must be borne in mind that Constable Swanson did not commence his texting with a view to determining the type of business or employment held by that subscriber or user. It was, as the officer candidly admitted, to arrange a meet to purchase drugs. His suspicions

only bore fruit on the fourth attempt to place a drug order, the previous three attempts being unsuccessful.

As our Court of Appeal expressed in *Gladue* at paragraph 11, a reasonable suspicion that the accused was engaged in criminal activity had to exist before that opportunity was provided. Such, I find, did not exist here. Thus, as it relates to the first transaction, I am satisfied, on a balance of probabilities, that the accused's defence of entrapment has been established.

The defence submits that with my finding the accused was entrapped on Transaction 1, that must result in a tainting of all the subsequent transactions such that the entire count must be stayed. The Crown submits that one must yet look at all the subsequent transactions with a realization that the police surely had an awareness of the accused's criminal activities which are well above the reasonable suspicion standard.

I note that the defence's position is supported by the decision of Trotter J. in *R. v. Williams*, 2014 ONSC 2370, which has been appealed to the Court of Appeal but not yet argued. True it is that in that case Crown counsel conceded the issue, but, nevertheless, I point out that Justice Trotter expressed agreement with the concession, see paragraph 30. I find myself in agreement with that result.

In *R. v. Barnes*, [1991] 1 SCR 449, the majority, at page 459, expressed the view that:

> The defence of entrapment is based on the notion that limits should be imposed on the ability of the police to participate in the commission of an offence. As a general rule, it is expected in our society that the police will direct their attention towards uncovering criminal activity that occurs without their involvement.

It is that notion which helps explain that when entrapment is established, that it inevitably brings the administration of justice into such a high degree of disrepute that the only and automatic remedy without any debate or discussion is an automatic stay of proceedings.

In such circumstances, it could not be said that if police entrapping activity warrants such a drastic reaction, that somehow that police activity should be rewarded by then repeatedly buying drugs from that target. It would make a mockery of the law, in my opinion. For what police officer would not be tempted to do precisely what happened here - lose the opportunity to seek a conviction for the first transaction - but comforted in the belief that all subsequent buys would lead to conviction. Why would an officer not willingly engage in such a tradeoff? After all, all that he would lose is one trial and the

chance of seeing a concurrent sentence, in all probability, being imposed. The Court must distance itself from such a result in circumstances such as those at bar.

What of the fact that at an early point the officer's attempted contact with Chris snared instead the Asian chap. Crown counsel fears that a finding of entrapment involving Chris would have the effect of immunizing that telephone number and/or immunizing any other drug seller who might use that telephone number.

I hesitate to be declaratory of such a situation, preferring to await such a third-party case to actually be tried, but it can be noted that the entrapment defence, like any *Charter*-based claim, is unique only to the claimant. Thus, it is difficult to imagine how Mr. Saggu's establishment that he was entrapped could immediately translate into some other user of the phone being able to establish entrapment.

Lastly, Crown advances an argument which parallels what was advanced at the appeal in *Gladue*. From paragraph 12 of that decision I read as follows:

> The Crown argues, for the first time on appeal, that, in calling the dial-a-doper number, the police were engaged in a *bona fide* investigation of a unique digital location similar in concept to the geographic location considered in *Barnes*. In *Barnes* at 461, the Supreme Court said "the police may present the opportunity to commit a particular crime to persons who are associated with a location where it is reasonably suspected that criminal activity is taking place." Assuming, without deciding, that a phone can be equated to a specific physical location, the requirement for a reasonable suspicion must still be met. We have concluded that the reasonable suspicion requirement is not met on the facts of this case. Therefore, this ground of appeal must also fail.

With respect, that is the complete answer here.

One last point. It relates to the Crown's repeated assertion that what had occurred here was itself a bona fide investigation. He wanted to demonstrate why it could not be anything but bona fide if one is able to determine what would not be a bona fide investigation. Counsel commended the Court's attention to Justice Low's decision in *R. v. Gould*, 2016 ONSC 4069, and particularly paragraphs 33 to 36.

With great respect, I disagree with that decision. On his analysis, in my opinion, just about every investigation, like this one, would qualify as genuine and not motivated by caprice or malice and therefore bona fide. That is not the end of the inquiry, however, as

Mack, *Barnes*, and *Gladue* make clear.

Conclusion

The accused has satisfied me that he was entrapped, and, accordingly, I direct a stay of proceedings on Count 1.

Those are my reasons, gentlemen. I believe that concludes everything on this file. Sometimes there is a discussion pending an appeal period about the return of any seizures. Just in case it is something that we should talk about, I am happy to deal with it now or just leave it to the filing of necessary applications for orders. Do you have any thoughts on it one way or t'other, gentlemen? I guess I should go to the Crown first since it's your seizures.

MR. WILLIAMS: And also with the seizures they may well have a bearing on --

THE COURT: I'm sorry.

MR. WILLIAMS: The seizures also may have a bearing on other cases.

THE COURT: Other cases, okay. Then I will make no -- you ask me to make no decision. I make no decision.

I take it there is no application for return of any seizures?

MR. FAGAN: Correct, Sir.

THE COURT: Thank you very much.

PROCEEDINGS CONCLUDED

Certificate of Transcript

I, Deanna Youngblood, certify that the foregoing pages are a true and faithful transcript of the proceedings, taken down by me in shorthand and recorded by a sound-recording machine and transcribed from my shorthand notes to the best of my skill and ability.

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