

No. 9803-1600-C4

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

HER MAJESTY THE QUEEN

- v -

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REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE ACTON

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THE COURT: This is my decision in the matter
of [REDACTED].

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[REDACTED] is a charged with
unlawfully trafficking in a controlled substance;
namely, methamphetamine, contrary to Section 5 of the
Controlled Drugs and Substances Act. The allegation
is that he committed the offence on the early morning
hours of July 12th, 1997.

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Crown and defence counsel agree to admit that a
substance analyzed as methamphetamine was sold by
someone to an undercover constable; namely, Constable
Debra Brown of the Edmonton Police Service, in the
early morning hours of July 12th, 1997, in the town
Hinton, Alberta.

1 The only issue before this Court is the
2 identification of the accused as being the person who
3 sold the drugs to Constable Brown. Four witnesses
4 were called to give evidence, all of them police
5 officers either with the Royal Canadian Mounted
6 Police or with the Edmonton Police Service. Corporal
7 Greg McIntyre was the resident constable in Hinton on
8 July 12th, 1997, and was assisting with an undercover
9 sting operation being conducted in Hinton at that
10 time. The three other witnesses; Corporal Harvey
11 Jones, Constable Debbie Brown, and Constable Kimberly
12 Ross formed one of the undercover teams which had
13 traveled to Hinton to assist in the sting operation.
14 Corporal Jones and Constable Ross were with the RCMP
15 in Edmonton, and Constable Brown was with the
16 Edmonton Police Service. Constable Kimberly Ross was
17 training for undercover work during this particular
18 operation. Corporal Jones had been operating as an
19 undercover drug investigation officer for 17 years in
20 1977, and he headed up the team in this instance.

21 On the night of July 12, 1997, Corporal McIntyre
22 was parked in a Suburban motor vehicle, which was
23 operated by Corporal Kevin Wedick, who was the
24 coverman for the undercover operation. Corporal
25 McIntyre testified that he was primarily an observer.
26 He took brief notes in the notebook while sitting in
27 the back of Suburban when it was parked approximately

1 30 meters back from the Hinton Hotel, which was a
2 targeted location in this operation. He was seated
3 in the right-hand side back seat of the Suburban when
4 the events in question took place.

5 He testified that he observed the three
6 undercover officers standing outside of the hotel
7 talking to a male person. Corporal McIntyre observed
8 the male leave the three undercover officers and walk
9 towards him. The male was talking into a cell phone
10 as he was walking towards the Suburban. He walked
11 straight towards the Suburban and stopped at about 15
12 feet. He then turned and went back to speak with the
13 three officers.

14 The next step in the operations which involved
15 Corporal McIntyre occurred at approximately 2:55 a.m.
16 on July 12, 1997, when he met with the undercover
17 team at their hotel room. At that time, he received
18 an RCMP exhibit bag with Constable Brown's initials
19 on it and he placed his initials on the bag. The
20 undercover team gave Corporal McIntyre directions to
21 an apartment and Corporal Jones told Corporal
22 McIntyre to get the names and addresses of any
23 persons residing there and the names of any persons
24 who owned vehicles which were parked outside of the
25 apartment. Corporal McIntyre received these
26 instructions at approximately an hour and a half
27 after the undercover team had been in the apartment

1 with the drug dealer.

2 Corporal McIntyre did as he was instructed, and
3 at approximately 4 a.m. on the same morning, he
4 observed three vehicles parked outside of the
5 premises at number 93, Hillcrest Apartments. He took
6 down license numbers, went back to the detachment and
7 obtained registered owner information using those
8 license numbers.

9 Corporal McIntyre was able to obtain photographs
10 of two of the registered owners by checking the names
11 in the detachment files. He testified that he
12 recognized Mr. [REDACTED] in the photographs. He
13 recognized Mr. [REDACTED] as being the person outside of
14 the hotel using the cell phone. Accordingly, he
15 attended at the hotel where the three undercover
16 officers were staying and presented photographs of
17 Mr. [REDACTED] to the group to see if they recognized the
18 accused. The group positively identified Mr. [REDACTED]
19 as the person they had seen and with whom Constable
20 Brown had concluded the drug transaction by looking
21 at these photographs.

22 Under cross-examination, Corporal McIntyre
23 testified that he did not make any detailed notes at
24 the time and the notes that he did make did not
25 contain a single observation about the facial
26 characteristics of this person, neither did he make
27 any notes with respect to height and weight. Under

1 cross-examination, he admitted that there were ten or
2 more people milling around the outside entrance to
3 the Hinton Hotel. He also admitted that he could not
4 say specifically who was talking to whom. Corporal
5 McIntyre admitted that he had never seen that male
6 person, the one who had walked toward the Suburban,
7 before even though Corporal McIntyre had been
8 stationed in Hinton for two years.

9 Corporal McIntyre was clear that he did not go
10 leafing through photographs to see if he could
11 recognize anyone. He specifically went to find a
12 photograph with the registered owner's name on it.
13 He admitted that he did not prepare a photographic
14 lineup to take to the three undercover officers.
15 Corporal McIntyre had not been trained as an
16 undercover operator or as a coverman. Corporal
17 McIntyre testified that he told the team how he had
18 obtained the photograph, and he made a note that the
19 team made a positive identification. He admitted
20 that before he even showed the photograph to the
21 team. He advised them as to how he had obtained it.
22 There was no evidence that any one of the trained
23 officers suggested any safeguard procedures that
24 might be appropriate before the picture was shown to
25 the members of the undercover team. Corporal
26 McIntyre further admitted that he never attended at
27 the actual door of unit number 93, nor did he

1 follow-up to see if the accused had ever been on
2 those premises.

3 Later on July 12, 1997, Corporal McIntyre
4 prepared the drug offence and disposition report form
5 recording the accused's address as 101 Lodgepole
6 Drive, Hinton, which he believes came from the
7 registered owner of the motor vehicle information
8 search that he had conducted. He testified that he
9 had never made any attendance at 101 Lodgepole Drive,
10 Hinton with respect to this matter and that he had
11 looked at a photocopy of the photograph prior to
12 testifying at the trial during which he positively
13 identified Mr. [REDACTED] as the person he saw outside
14 the Hinton Hotel on the night in question.

15 Corporal Harvey Jones, who was the head of this
16 undercover team, testified that the accused
17 approached him outside of the Hinton Hotel offering
18 to sell him some grit, which I gather is slang for
19 methamphetamine, although there was no evidence to
20 that effect. Corporal Jones and the vendor had a
21 discussion with respect to costs after which the
22 vendor walked away, at which time he appeared to be
23 talking on a cell phone. The vendor returned and
24 told the officers to meet him at Green Square. The
25 three undercover officers got into their Chevrolet
26 half-ton truck and met the vendor who got into the
27 cab of the truck with them. The transaction was

1 concluded and the vendor introduced himself as No
2 Name. The officers asked the vendor where they might
3 go to use the drugs, and the vendor said they could
4 go to his place and directed them to number 93
5 Hillcrest Apartments.

6 All three officers agreed that the vendor used a
7 key to enter that premise and they went into a
8 second-story room supposedly to use the drugs.
9 Corporal Jones then advised that he wanted to use the
10 drugs intervenously, and the vendor said, not in his
11 house, at which point three officers left and
12 returned to their hotel room.

13 Shortly after, Corporal McIntyre arrived and the
14 events involving the photographs, as I described
15 earlier, took place.

16 Constable Debbie Brown testified that the
17 photograph that she stapled into her notebook is one
18 of two photographs that Corporal McIntyre brought to
19 the hotel on the night of July 12, 1997. Constable
20 Ross also had stapled into her notebook a separate
21 photograph of Mr. Lavoie, which she had received from
22 Corporal McIntyre. Constable Brown testified that
23 after receiving the information from Corporal
24 McIntyre, the team went out and did another drug
25 deal, after which all three of them retired to sleep.

26 Constable Brown testified that she made her
27 notes after she woke up in the afternoon of July 12,

1 1997. Constable Ross testified that she commenced
2 making her notes at approximately 2:30 p.m. on July
3 12, 1997, after having slept. Both of the female
4 officers had stapled into their notebooks the
5 photographs they had received. Each of these
6 photographs was marked as Exhibits 4 and 5
7 respectively in the trial proceedings.

8 Corporal Jones testified that, indeed, Corporal
9 McIntyre attended at the hotel room at 3 a.m. on July
10 12, 1997 and brought the photographs of Mr. Lavoie to
11 the team. Corporal Jones testified that this is how
12 he does it all the time. He emphasized that single
13 photographic identification is done all the time, and
14 on that occasion, Corporal McIntyre simply had
15 brought the correct photographs. He acknowledged
16 that he had examined one of the photographs of
17 Mr. [REDACTED] just before testifying at the preliminary
18 inquiry because the photograph was stapled into
19 Constable Ross's notebook and he had looked at that
20 photograph to refresh his memory. He further
21 testified that he looked at the photograph 12 hours
22 after the drug purchase and signed his name on the
23 back of that photograph at the time. He testified
24 that he had never been wrong in the identification of
25 a witness and posed the question what better way to
26 identify someone than to identify a photograph of him
27 12 hours after the drug transaction. But to be fair,

1 he did not testify that he could never be wrong.

2 After he viewed the photograph provided by
3 Corporal McIntyre, he then made his own notes with
4 respect to the accused. While he testified that the
5 accused had a unique smile which he described as a
6 smirk at the trial, this smirk was never mentioned in
7 his notes or at the preliminary inquiry. None of the
8 undercover officers made any notes with respect to
9 the drug vendor's facial features. There were no
10 entries with respect to eye colour, smile, voice
11 characteristics or jewelry that the drug dealer was
12 wearing that night. Each of the officers testified
13 that they had looked at the photograph prior to the
14 preliminary inquiry and prior to the trial to refresh
15 their memories.

16 It is trite to say that the Crown must prove
17 identification beyond a reasonable doubt. This
18 particular case is a classic example of how an
19 undercover drug case should not be conducted by
20 police officers.

21 The identification issue really turns on the
22 identification of Mr. [REDACTED] from two photographs of
23 him which were on file at the detachment in Hinton
24 and which Constable McIntyre was able to locate once
25 he had determined that a vehicle parked outside of
26 the address he was given was registered to Darrel
27 Lavoie. The photograph was obtained by Corporal

1 McIntyre on the basis of a name search. It was then
2 presented to the undercover team before they made
3 their notes and without any other similar photographs
4 to ensure that any other identification had attached
5 to it some circumstantial guarantee of
6 trustworthiness. Even though I heard four witnesses
7 say that is the man, this is not good enough in law
8 because none of the witnesses recorded sufficient
9 evidence to support their identification of this
10 witness under these circumstances.

11 In the case of *R. v. Beretta*, 1999 British
12 Columbia Judgment number 2257, the British Columbia
13 Supreme Court reviews the tests that the courts must
14 apply when considering identification evidence.
15 While a picture may be worth a thousand words in the
16 advertising industry, in the eye of the courts it
17 requires corroborative safeguards to insure such a
18 photograph accurately reflects the truth.

19 Mr. Justice Owen Flood sets out the law in
20 paragraphs 18 to 23 of the *Beretta* decision,
21 summarizing other decisions on this important issue.

22 In short, it is clear that Corporal Jones should
23 have directed that Corporal McIntyre return to the
24 detachment and prepare a photo lineup and bring that
25 back for presentation to the undercover officers.
26 Second, the photo lineup should have been presented
27 to each of the undercover officers separately in

1 order that they not influence each other in choosing
2 the photograph of the person they believed to be the
3 criminal in these circumstances. If such a procedure
4 is not followed, there is a risk that it is the
5 photograph that is eliciting the memory rather than
6 the face which was viewed at the time of the crime.

7 In the undercover courses they are offered,
8 officers are taught to note all the physical features
9 from the top of the head and the face down and
10 specifically to note anything that might be
11 particular to the accused individual. In this
12 circumstance, the notes are sorely lacking and do not
13 provide a solid anchorage for identification in this case.

14 The Alberta Court of Appeal in *R. v. Attfield*,
15 1983, 25 A.L.R. (2d), 97. At pages 98 to 99,
16 comments on the importance of testing the reliability
17 of eye-witness evidence of identity, and I quote.

18 "The authorities have long recognized that the
19 danger of mistaken visual identification
20 lies in the fact that the identification
21 comes from witnesses who are honest and
22 convinced, absolutely sure of their
23 identification and getting surer with time,
24 but nonetheless mistaken. Because they are
25 honest and convinced, they are convincing,
26 and have been responsible for many cases of
27 miscarriages of justice through mistaken

1 identity. The accuracy of this type of
2 evidence cannot be determined by the usual
3 tests of credibility of witnesses, but must
4 be tested by a close scrutiny of other
5 evidence. In cases where the criminal act
6 is not contested and the identity of the
7 accused as the perpetrator the only issue,
8 identification is determinative of guilt or
9 innocence; its accuracy becomes the focal
10 issue at trial and must itself be put on
11 trial, so to speak. As is said in
12 *R. v. Turnbull*, 63 Criminal Appeal Reports,
13 132, the jury (or the judge sitting alone)
14 must be satisfied of both the honesty of the
15 witness and the correctness of the
16 identification. Honesty is determined by
17 the jury (or judge sitting alone) by
18 observing and hearing the witness, but
19 correctness of identification must be found
20 from evidence of circumstances in which it
21 has been made or in other supporting
22 evidence. If the accuracy of the
23 identification is left in doubt because the
24 circumstances surrounding the identification
25 are unfavorable, or supporting evidence is
26 lacking or weak, honesty of the witnesses
27 will not suffice to raise the case to the

1 requisite standard of proof, and a
2 conviction so founded is unsatisfactory and
3 unsafe and will be set aside.

4 It should always be remembered that in the
5 famous *Adolf Beck* case, 20 seemingly honest
6 witnesses mistakenly identified Beck as the
7 wrongdoer."

8 In this case it is my view that what everyone
9 has been able to identify is the photograph of [REDACTED]
10 [REDACTED]. Having said that, this does not say that
11 they have identified the accused. Accordingly, this
12 Court cannot convict in this circumstance as it is
13 unsafe to enter a conviction under the circumstances
14 of an investigation which, in my view, was clearly
15 defective. Accordingly, I must acquit the accused.

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17 Delivered orally at the Law Courts, Edmonton, Alberta on
18 the 15th day of November, 2000.

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20 V. Myers, Esq.

21 For the Crown

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23 P. Fagan, Esq.

24 For the Accused

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26 G. Debenham, CSR (A)

27 Official Court Reporter