

**PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** R. v. Hiscoe, 2012 NSPC 21

**Date:** 20120215

**Docket:** 2215503

**Registry:** Kentville

**Between:**

Her Majesty the Queen

v.

Jamie Scott Hiscoe

**Judge:** The Honourable Judge Alan T. Tufts

**Heard:** January 24, 2012, in Kentville, Nova Scotia

**Written decision:** March 15, 2012

**Charge:** s. 4(1) CDSA

**Counsel:** Jennifer Young, for the Crown  
Stephen Mattson, Q.C., for the defence

**By the Court:** (orally)

[1] This is the case of *Regina v. Jamie Scott Hiscoe*. The accused is charged under s. 5(2) of the *CDSA (Controlled Drugs and Substances Act)*. It is alleged that he was in possession of crack cocaine for the purpose of trafficking.

[2] The trial was preceded by a *voir dire* to determine the lawfulness of the seizure of the accused's cellphone, certain text messages that were received on the phone which were recovered after the arrest and also the complete data download of the cellphone that Mr. Hiscoe had in his possession at the time of the arrest.

[3] The Court in a previous ruling [2011NSPC84] found that the seizure of the phone and the text messages retrieved were lawful and could be admitted into evidence. The data download was excluded.

[4] Just to summarize the facts, the trial proceeded by way of written admissions, agreements regarding the admission of the *voir dire* testimony, the testimony of some of the officers who were present during the arrest—Constables Campbell and Blouin, and the testimony of the Crown's drug expert, Sgt. Vail. The accused testified in his own defence.

[5] I want to clarify one issue regarding the *voir dire* evidence. During the *voir dire* the Court heard evidence about the accused's prior drug activities. This was hearsay evidence from sources-- police sources. This evidence was available to support the grounds for arrest, which was an issue in the *voir dire*; however, this evidence is not admissible at trial as probative evidence of the accused's guilt or any of the elements of the alleged offence.

[6] The facts are quite straightforward. The police began following the accused as the result of a tip regarding possible drug activities. They followed him for approximately two hours from the Greenwood/Kingston area near Sobeys. Interestingly, the accused said in his own testimony that he saw a car he thought might be the police when he left his home.

[7] In any event the police surveilled the accused until he entered the Cambridge Drive-in Theatre around 6:15 p.m. The drive-in was empty and it was light out at the time. This was August the 18<sup>th</sup>, 2010. The accused arranged to meet another gentleman to purchase drugs. The accused's mother was in the car. The accused was driving. At the drive-in the accused met Mr. Johnson. They positioned their vehicles so that their drivers' doors were next to each other and their windows were down. The police were watching the entire time. The police saw a hand-to-hand exchange. The police moved in and arrested both men. They searched the vehicles.

[8] In the accused's car they found his cell phone, which I had referred to earlier. In Mr. Johnson's car was a considerable amount of drugs and drug paraphernalia. Also tucked in near the driver's seat in Mr. Johnson's car was three hundred and fifty dollars in twenties and tens. Between the two cars was a bag of crack cocaine. Pictures of the cocaine are in evidence, although it is difficult to see it clearly. The Court did, however, have the advantage of seeing the cocaine as an exhibit here in court.

[9] The cocaine was in several lumps and pieces—a couple of large lumps and many tiny ones. The total weight of the crack cocaine was five grams. In the admission, the accused admits the police saw Mr. Johnson hand the accused a package.

[10] It is clear the accused was in the process of purchasing crack cocaine. He gave Mr. Johnson three hundred and fifty dollars and Mr. Johnson was handing the drugs to the accused when the police moved in. The drugs fell to the ground.

[11] The Crown's expert, Sgt. Vail, filed a report. Part of the report deals with the accused's possession of the five grams of crack cocaine. Much of the report deals with Mr. Johnson. Sergeant Vail testified the drugs, i.e. the crack cocaine by itself, was consistent with personal use. He gave very useful testimony about the use of crack cocaine and his report was filed as an exhibit. It is not necessary for me to detail it here again.

[12] Sergeant Vail placed considerable reliance on his interpretation of the text messages retrieved from the accused's phone. They were included in an exhibit before the Court. I will come back to this in a minute.

[13] There were no other indicia of trafficking. Sergeant Vail said that those who purchase drugs for later resale would not buy pre-packaged lots, obviously, but buy in bulk, if you will, and cut the drugs up in some cases in less than advertised portions to increase profit margins. It was possible to do this with the amount of crack cocaine in this case. However, as I indicated, it is the text messages which are the key to Sergeant Vail's opinion and the Crown's case. Indeed, Sergeant Vail acknowledged, as did the Crown, it is for the trier of fact to draw inferences from the text messages, together with all of the other circumstances, to determine if the accused's intent was to sell or distribute these drugs.

[14] Therefore there are two issues which I need to resolve. The first is has the Crown proven beyond a reasonable doubt that the accused possessed the five grams of crack cocaine, and if so did he possess it for the purposes of trafficking?

[15] Just dealing with the first issue. Possession is knowledge and control. Clearly the accused knew of the drugs. He intended to purchase them. Did he have control? In my view he did. Even if he did not actually touch or have them in his hands he had paid for them, which, when they were being passed to him and when they fell or were dropped to the ground by Mr. Johnson, if that actually happened. The accused had constructive control over them, in my opinion. He was entitled to them, that is the drugs, and had the ability to exercise control over them, notwithstanding that the police were on their way. I am satisfied beyond a reasonable doubt that the drugs in question were in his possession.

[16] The more complex issue is whether he possessed the drugs for the purposes of trafficking and whether the Crown has proven this beyond a reasonable doubt.

[17] Sergeant Vail relied on the text messages as a critical piece of evidence to form his opinion, indeed, this is the focus. However, it must be remembered that the Court must look at all of the evidence when examining the text messages. I need not repeat verbatim all of the messages—it is the fourth message from the

accused to Mr. Johnson which is critical. It says, “text me back man, I need to make some money, I’m broke”. Let me place this in some context.

[18] The messages begin at approximately 1:40 p.m. and end at 6:28 p.m. all but four messages are from the accused to Mr. Johnson. These are all the messages between these two gentlemen in the period it appears. It is not clear if other messages to other people were made, but that, it appears, would not affect this analysis in any event. Clearly, while the messages used street lingo the accused is asking to buy crack cocaine. He repeatedly sends messages from 1:40 to 4:21 to Mr. Johnson, with no reply. Mr. Johnson replies at 4:21. The accused wants to buy drugs around five or shortly after. Apparently Mr. Johnson’s phone was not working. It appears Mr. Johnson needed to get the drugs from another source. Thereafter the messages centre around the arrangements to meet.

[19] The accused testified. He explained that he works with his brother buying, restoring and selling cars. He was scheduled to work at five o’clock and the message directed to Mr. Johnson to get back to him because, “I need to make money, I’m broke”, was his indication to Mr. Johnson, who he said would understand this, was that he needed to get to work, i.e. to make money.

[20] The accused also testified he used crack cocaine and that he purchased a similar amount every two weeks and that that amount would last three to five days. He said he would not sell or traffic crack cocaine.

[21] I cannot accept or believe the accused’s account. It simply, in my opinion, does not make sense. It does not accord with the import of the text messages. In my opinion it is clear from the messages he wanted the drugs at five or after, not before, which would have been the case if he needed to get to work by that time. In fact he continued in his efforts to get drugs until 6:30, not consistent with his assertion that he had to get to work. There is an urgency in the messages, in my opinion, “I need five today”, clearly he wanted drugs but not until five, yet he sent the messages at 1:40 p.m. Interestingly, he was never cross-examined on this aspect of the messages. In any event his testimony does not make any sense and I do not believe or accept it. However, rejected testimony is not proof of the contrary assertion contained in it. It simply has little or no probative value. The real issue is whether the Crown has met its burden with the evidence I do accept and whether

the accused's testimony, notwithstanding its non-acceptance, or more particularly from examining all the evidence, is there a reasonable doubt about the accused's intention that he possess the drugs for the purposes of trafficking?

[22] The Crown argues that the first four messages ending with the words, "text me back man I need to make some money I'm broke" is conclusive evidence that the accused needed the drugs for resale and that this is the only reasonable inference one could draw from that. I agree that one could draw such an inference, but is it, along with all the other evidence, the only reasonable inference? This is the standard. It is not whether it can be an inference; it is whether it is the only reasonable inference.

[23] But before addressing that it must be remembered that one must look at all of the evidence, as I indicated, or lack of evidence, when determining proof beyond a reasonable doubt. That is the standard and I am referring of course to *Lifchus* and *Star*, which stand for that proposition. What indicia of trafficking exists? The amount of drugs, the denominations of the bills found in the three hundred and fifty dollars used by the accused to buy the drugs and the text messages. Sergeant Vail was quite clear that without the text messages the drugs would only be evidence of possession and nothing more. Then does the message, together with the other indicia only support an inference of possession for the purpose of trafficking? In my opinion it does not. The difficulty is that the text message in question are equivocal and open to other interpretations, or more particularly, I cannot say with any confidence that they only lead to the conclusion that the accused was to resell the drugs. Had there been other indicia of trafficking, that is, evidence of score sheets, scales, cutting tools or other indicia of drug activity, whether found at the car or elsewhere, then the messages could very well have led me to conclude that he was going to sell or transfer or distribute these drugs again.

[24] I recognize that there is a real possibility that he had someone else ready to purchase these drugs around five o'clock and that he needed the drugs from Mr. Johnson to complete the deal. However, there just is not enough evidence to substantiate that and convince me beyond a reasonable doubt that that was the case. In the end the drugs themselves are consistent with personal use. The cash denominations are of little or no assistance, and the text messages, while probative of an intention to traffic, do not, taking all of the indicia together--satisfy the

criminal burden of proof. I have a reasonable doubt that the accused possessed the drugs for the purpose of trafficking. He is found not guilty of the charge under s. 5(2) of the *CDSA*. He is found guilty of the included offence of possession of a controlled substance under s. 4(1) of the *CDSA*.

Tufts, J.P.C.