PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Etmanskie*, 2018 NSPC 77

Date: 2018-29-10
Docket: 8198958-8195963
Registry: Dartmouth, Nova Scotia

Between:

Her Majesty the Queen

v.

Cody Chase Etmanskie, Morgan Wade Reddick and Sabrina Marie Penney

Decision	
Judge:	The Honourable Judge Jean M. Whalen
Heard:	September 4, 2018, in Dartmouth, Nova Scotia
Decision:	October 29, 2018
Charges	Section**s** 5(2) and 7(1) CDSA
Counsel:	Michael Taylor, for the Crown Peter Kidston, for Etmanskie Brian Smith, Reddick Bernie Thibault, for Penney

By the Court:

I Introduction

[1] Constable Joseph testified that his unit had received third party source information regarding drug trafficking at 92 Pinecrest Drive, Apt. 10, in Dartmouth. Cody Etmanskie was the target. They were briefed and on February 14, 2018, at 8:20 p.m. they executed a search warrant on the residence.

[2] Three people were found inside: Mr. Etmanskie, Mr. Reddick and Ms. Penney.

[3] All three were subsequently charged, pursuant to section 5(2) and 7(1) of the *Controlled Drugs and Substances Act.* The Crown called seven witnesses and Mr. Reddick took the stand and testified.

[4] During closing submissions, Crown counsel, Mr. Taylor, acknowledged the Crown had not proven its case against Ms. Penney and urged the Court to enter an acquittal. I agreed with his comments and found Ms. Penney not guilty of both charges on the Information.

[5] I am now left to decide whether or not the Crown has proven the guilt of Mr. Etmanskie and Mr. Reddick beyond a reasonable doubt on one or both charges.

II Issues

[6] Is Mr. Etmanskie guilty pursuant to section 5(2) of the *CDSA* or simple possession? Is Mr. Etmanskie guilty of production pursuant to section 7(1) *CDSA*?

[7] Is Mr. Reddick guilty pursuant to section 5(2) *CDSA* or simple possession? Is Mr. Reddick guilty of production pursuant to section 7(1) *CDSA*?

III Review of the Evidence

[8] Constable N. Joseph testified that he received third party source information regarding Mr. Etmanskie and drug trafficking. A search warrant was prepared and executed at 92 Pinecrest, Apt. 10 – Mr. Etmanskie's home. He was the target.

[9] When the door to the apartment was breached, he saw Mr. Etmanskie and a second black male start running down the hallway. That male was later identified as Mr. Reddick, he stopped in the livingroom and sat down. Mr. Etmanskie continued and was arrested in the area of a "child's bedroom".

[10] The police officer also saw a female in the livingroom , who was later identified as Ms. Penney, she ran from the livingroom to the bathroom.

[11] Cst. Joseph handcuffed and searched Mr. Etmanskie and found a cell phone in his pants pocket; a dime bag of cocaine (later confirmed by LAB) in his sock. He also observed items in the kitchen: water on the stove, baking soda, Pyrex dish, scale and bowl of ice water in the freezer.

[12] On cross-examination, he confirmed that Mr. Reddick was not the target. He thought the scale was on the floor. When asked if he saw/found any cash, he replied "he did see things that could be used for packaging," and saw a few "pro-line" tickets on the table. He does not recall seeing any baggies or score sheets. He did not analyze Mr. Etmanskie's cell phone.

[13] Constable P. Apa testified that he assisted in the execution of a search warrant at 92 Pinecrest, Apt. 10. He was assigned as exhibit officer and also assisted in breaching the door. He collected and processed all exhibits seized that day.

[14] Mr. Reddick was located at a coffee table in the livingroom. See [Ex. #1 – page 15] Page 16 of the same exhibit is a picture of the baggie of cocaine seized from Mr. Reddick. [Ex. #2 – 1.8 grams.] The officer also found black "nitro gloves" in his rear pocket.

[15] He then proceeded to outline all exhibits seized that day, including all of the Certificates of Analysis [Ex. #3] that confirm the stated substances.

Ex. #4 – 1.2 grams cocaine (Mr. Etmanskie's sock)

Ex. #5 – Cell phone left pants pocket of Mr. Etmanskie

Ex. #6 – Found on kitchen table – sandwich bag – 7.9 grams cocaine

Ex. #8 – 1 gram cocaine (wallet of Mr. Etmanskie)

Ex. #9 – NS ID (wallet of Mr. Etmanskie)

Ex. #10 – Scale – positive for cocaine – found on the floor between kitchen and livingroom

Ex. #11 – 86.6 grams – of Arm and Hammer baking soda – kitchen table

Ex. #12 - .5 grams cocaine – kitchen table

Ex. #13 - .3 grams cocaine – in "flat" package on kitchen table

Ex. #14 – Spoon with residue (cocaine) on kitchen table

Ex. #15 – white G.N.C. bottle containing 152 grams of unknown powder (could be used for cut) on kitchen table

Ex. #17 - .4 grams cocaine in plastic wrap on kitchen table

Ex. #18 – Tied off sandwich bag – 25.4 grams – phenagatin which could be used for "cut"

Ex. #20 – Mail in cupboard addressed to Mr. Reddick, Apt. 10, 92 Pinecrest Drive, although in Ex. #2, page 28 – mail addressed to Mr. Reddick says Apt. 1, 92 Pinecrest (found on top of fridge)

Ex. #21 – Cell phone on kitchen table

Ex. #22 – Nova Scotia power bill with Mr. Etmanskie's name – Apt. 10, 92 Pinecrest, in cupboard above fridge

[16] On cross-examination, he admitted he could have said to Mr. Reddick that he was in "wrong place at wrong time." He agreed baking soda is a common household item but it is also used to change "cocaine" to become smokable.

[17] He agreed the 1.8 grams found on Mr. Reddick could be personal – a heavy user could purchase [that amount].

[18] He also agreed the one gram found on Mr. Etmanskie is consistent with personal possession and you could buy that amount in a "flat" package. He also agreed the unknown powder in the GNC bottle could have been a health supplement.

[19] (iii) Detective Constable R. Baird testified he assisted in the execution of the search warrant and breached one of the two doors to Mr. Etmanskie's apartment. He seized (Ex. #4) the cocaine found in Mr. Etmanskie's sock and the cell phone in his pants pocket, plus a number of other items, including mail (Ex. #20) which had a different address than what he reported as 1 – 92 Pinecrest Drive.

[20] On cross-examination, he confirmed no "crack" was found in the apartment. He thought Ex. #10, scale, was on the table when he seized it.

[21] (iv) Constable S. Sampson testified that he assisted with the execution of the search warrant at Apt. 10 – 92 Pinecrest. Mr. Etmanskie was the target. A female was located seated on the toilet in bathroom and arrested and searched. Nothing was found on her person or in her purse after a search. He had no contact or conversation with Mr. Reddick.

[22] (v) Constable J. Joncas testified that he assisted with the execution of the search warrant at 92 Pinecrest, Apt. 10. The resident was believed to be Mr, Etmanskie. He was the last in the door to the kitchen. He saw a table with drugs, cut and paraphernalia, and a pot of water boiling on the stove (which he turned off). He did not seize the pot or its contents. He stayed in the kitchen to maintain continuity while the three occupants were taken into custody.

[23] He seized and turned exhibits 11, 13, 14, 15, 17 and 18 over to Constable Apa. He had no dealings with any of the three individuals.

[24] Constable D. Hull testified he assisted other units to execute the search warrant at 92 Pinecrest Drive, Apt. 10. Once through the door to the hallway, he stopped to assist police officers who had Mr. Reddick in handcuffs. Then he

stopped at the bathroom to assist Constable Sampson with Ms. Penney, who he handcuffed and took out to another police officer. He located nothing in the bathroom or on Ms. Penney. He did not seize anything from the back bedroom after searching it.

[25] Constable Peter Hurley testified he was a member of the RCMP for the past 14 years. He was qualified as a "Drug Expert" (with defence consent) able to give opinion evidence regarding the possession and possession for the purpose of trafficking in cocaine and crack cocaine, the production of crack cocaine, the methods used to avoid police detection, trafficking methods, drug trafficking trends, drug distribution chains, drug hierarchy, drug pricing and drug packaging methods. (His report – Ex. #23).

[26] He outlined:

USERS: - Typically buy ½ gram to 1 gram powder cocaine or .20 stone of crack. A high-end weekend binge, they would buy .8 ball

- Dime bag of cocaine are 1 inch x 1 inch or Flaps which is 1 inch paper pouch
- Crack is usually in tinfoil or corner bag (sandwich bag)

CRACK: The police officer explained a .20 stone looks like a rock/yellow in colour but cocaine is a different colour. The police officer then went on to explain how to

"make" crack from cocaine powder. You add baking soda, cover with water, boil water. You then put it in ice water to cool and you get a "rock of crack."

[27] He stated you need good "cut agents"; otherwise it will melt away. The 25.4 grams of phenatin (Ex. #18) found in the defendant's apartment was a "good cut" agent because it adheres to the cocaine.

[28] Cutting agents are a market themselves. Benzocaine is another "cut agent" [Ex. #6 – the 7.9 grams of cocaine also contained lidocaine and benzocaine].

[29] When asked what volume of crack would you get if you "cooked" 10 grams of cocaine, he stated 9 grams (equivalent of 60-70 .10/.15 rocks x $20.00 = $1,200). the powder cocaine (total seized 13.1 grams) had a street value of $1,000 to $1,300.

[30] He also stated the contents of Ex. #15 (GNC bottle) could be used for "cut". Considering the items found and seized: spoon with residue, scale, cut agents, cocaine, pot of boiling water and pot of ice water in freezer, it was his opinion it was consistent with crack and cocaine for resale.

[31] Considering the following items: 86.8 grams baking soda, spoons (can be used to mix), scale (tool of traffickers), boiling water/ice water, pro-line tickets

(which can be used to make Flaps to put drugs in), it was his opinion it was consistent with making crack.

[32] He offered the opinion that 7.9 grams of cocaine is high for personal use. If people are snorting cocaine, you will usually find a razor blade or bank card to make a "line" but none of that was present in the apartment. Items to smoke crack, such as pipes, burnt tinfoil or lighter were not present either. (page 8 and 11 = playing card, credit card and lighter)

[33] Ex. #13 – Lotto paper is folded to put drugs in and the .3 grams can be sold on the street as ½ gram for $40.00/$50.00).

[34] Ex. #4 – 1.2 grams of cocaine found in Mr. Etmanskie's sock is consistent with personal use and the one gram (Ex. #15) found in Mr. Etmanskie's wallet is consistent with personal use.

[35] All items found on the kitchen table are consistent with packaging for the purpose of trafficking and production of crack. (No extra sandwich bags or tinfoil.)

<u>On Cross-Examination</u>:

[36] When directed to page 3 of his report (Ex. #23) by Mr. Smith (counsel for Mr. Reddick) and questioned regarding his conclusion "consistent with personal use" versus his testimony "consistent with trafficking," he stated it was a typed error and that his testimony is what he believed.

[37] On cross-examination by Mr. Kidston when questioned regarding the "amount," he testified that different amounts were seized from the apartment. He agreed there was no analysis of Mr. Etmanskie's phone, and no cash, score sheets or safe was found. When asked the question, given three people in the apartment with 9 grams, could it be a binge? he testified, "not typical because of other items found."

Defence Evidence

[38] Mr. Morgan Reddick was the only defendant to take the stand and testify.

[39] He testified he lives alone at 92 Pinecrest, Apt. 1, as he is separated from his wife and children. Mr. Etmanskie is his half-brother. At the time of this alleged offence, he was on administrative leave from his job as a bus driver.

[40] He described himself during that time as being in "a dark place." He got into an argument with his wife that morning. He bought some cocaine and went to a bar and began drinking.

[41] He went to his brother's (Mr. Etmanskie) later in the day. He was there for a couple of hours before the police arrived. He stated all three were "just getting' high." They were "doin' lines … got their income tax done." (Ex. #1 - T4 28)

[42] Mr. Reddick denies any discussion amongst the three about producing crack, stating, "I'm not a crack head."

[43] He refused to tell the police officer who sold him the cocaine, when asked, stating, "I'm not an informant, it would jeopardize my family."

On Cross-Examination:

[44] He reiterated that he does not do crack, but readily admitted he snorts cocaine. He denied using the spoon to snort; usually $1, 2, 5 (US) or $100 when paid but $20 bill is his preference.

[45] He can't recall how much he snorted that day, just "a lot." He couldn't recall how much money he spent but refused to say who he bought it from. He snorted it at his apartment, a washroom at the pub and at Mr. Etmanskie's apartment.

[46] Mr. Reddick denies running down the hallway; says he sat down on the couch in the livingroom. He can't recall what anyone else did when police entered.

[47] Mr. Reddick denies knowing anything about a pot boiling; doesn't recall any baking soda or anyone baking or cocaine on the table. He does not recall seeing Ex. #15 (GNC) or scales in the apartment. He doesn't recall anyone in the kitchen; "I was there getting high."

[48] When asked why "nitrol" gloves were found in his pocket upon arrest, he said he was cleaning the sink, doing dishes and cleaning chicken before he went to his brother's apartment. He denied cooking crack, stating, "I don't know how to cook crack. As far as I know, no one was cooking."

[49] Mr. Reddick testified he brought his own cocaine. He did not know where everyone else got theirs. He testified he shared his. He said he had enough to last until the next day.

[50] When asked by Ms. Penney's lawyer (Mr. Thibeault) about the consumption of alcohol, he said he started drinking when the bar opened at "11a.m. or so but can't remember." He couldn't recall how many drinks, but left the pub at 4:00 or 5:00 p.m. He agreed he was intoxicated.

[51] He testified he went home, did some more drugs, then went to his brother's apartment. He took 8 mg. of Dilaudid and mixed with cocaine.

IV Credibility of Witness

[52] In *R v. Jaura* 2006 CarswellOnt 6296, 2006 ONCJ 385, at para. 12 and 13:

> 12 The assessment of credibility is not a science (*R. c. Gagnon*, [2006] 1 S.C.R. 621 (S.C.C.)) nor can it be reduced to legal rules or formulae: *R. v. White* (1947), 89 C.C.C. 148 (S.C.C.). However, proper credibility assessment is closely related to burden of proof. For this reason, an accused is to be given the benefit of reasonable doubt in credibility assessment: *R. v. W.(D)*,[1991] 1 S.C.R. 742 (S.C.C.)(1991), 63 C.C.C. (3d) 394 (S.C.C.). Credibility must not be assessed in a way that has the effect of ignoring, diluting, or worse, reversing the burden of proof. What must be avoided is an "either/or" approach where the trier of fact chooses between competing versions – particularly on the basis of mere preference of one over the other. …
>
> …
>
> 13 In assessing the credibility of any witness, including the accused, the existence of evidence that contradicts the witness is obviously highly relevant. For my part I regard it as the single most important factor in most cases, though the relative weight given to this versus other factors – such as demeanour, contradictions within the witness's evidence itself, potential bias, criminal record or other factors- varies from case to case. No witness is entitled to an assessment of his credibility in isolation from the rest of the evidence. Rather, his evidence must be considered in the context of the evidence as a whole. In a "she said/he said" case, that necessarily means that the defendant's evidence must be assessed in the context of and be weighed against the evidence of the complainant (and vice versa): *R. v. Hull* [2006 CarswellOnt 4786 (Ont. C.A.) (Aug 4 2006 at Para 5):
>
> > W.(D.) and other authorities prohibit triers of fact from treating the standard of proof as a credibility contest. Put another way, they prohibit a trier of fact from concluding that the standard of proof has been met simply because the trier of fact prefers the evidence of Crown witnesses to that of defence witnesses. <u>However, such authorities do not prohibit a trier of fact from assessing an accused's testimony in light of the whole evidence, …, comparing the evidence of the witnesses. On the contrary, triers of fact have a positive duty to carry out such an assessment</u>

> recognizing that one possible outcome of the assessment is that the trier of fact may be left with a reasonable doubt concerning the guilt of the accused (underlining added)

[53] The *W(D)* procedure is outlined in *R. v. Arop,* 2015 ABQB 695, at beginning at para 15 the court stated:

> 15 W.(D.) at p 758 directs the finder of fact, in this case me as trial judge, to follow a three-step procedure to ensure that I do not convict the Accused because I rejected his evidence in favour of another witness.
>
> > First, if you believe the evidence of the Accused, obviously you must acquit.
> >
> > Second, if you do not believe the testimony of the Accused but you are left in reasonable doubt by it, you must acquit.
> >
> > Third, even if you are not left in doubt by the evidence of the Accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the Accused.
>
> 16 Further, if after a careful consideration of all of the evidence, I am unable to decide whom to believe, I must acquit the Accused.
>
> 17 I may only convict he Accused if I am satisfied that the Crown has proved each of the elements of the offence charged beyond a reasonable doubt. If after considering all the evidence I am not sure of the Accused's guilt and have a reasonable doubt of such guilt, I must find him not guilty.
>
> 18 The analysis as directed by the Supreme Curt in *W.(D.*) is essential in order to ensure that the burden to prove an accused's guilt beyond a reasonable doubt remains with the Crown, and is not inappropriately shifted to the accused. Binnie J explained his requirement in *R. v. S. (J.H.)*¸2008 SCC 30 (S.C.C.) at para 13, *R v. S. (J.H.),* [2008] 2 S.C.R. 152 (S.C.C.):
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> > W.(D.)'s message that it must be made crystal clear to the jury that the burden never shifts from the Crown to prove every element of the offence beyond a reasonable doubt is a fundamental importance but its application should not result in a triumph of form over substance.

[54] The court goes on to say at para 20 and 21:

> 20 A W(D) analysis requires that a judge evaluate the credibility and reliability of the accused. In *R. v. Norman* (1993), 87 C.C.C. (3d) 153 (Ont. C.A.), at 173, (1993), 16 O.R. (3d) 295 (Ont.C.A.), Finlayson JA for the court stressed that:
>
> > I do not think that an assessment of credibility based on demeanour alone is good enough in a case where there are so many significant inconsistencies. The issue is not merely whether the complainant sincerely believes her evidence to be true: it is also whether this evidence is reliable. Accordingly, her demeanour and credibility are not the only issues. The reliability of the evidence is that is paramount. …
>
> 21 Similarly, in *R. v. Morrissey* (1995), 80 O.A.C. 161 (Ont C.A.) at para 33, (1995), 22 O.R. (3d) 514 (Ont. C.A.), Doherty JA wrote:
>
> > … When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is honest witness, may, however, still be unreliable. …

[55] Mr. Reddick was the only defendant to testify. Mr. Reddick's evidence falls into two categories. One, denial – it is difficult to elaborate on a denial. There is nothing inherently untruthful or contradictory in his denial. His evidence on its own suggests nothing inherently believable or unbelievable. The defendant's evidence must be contrasted with the evidence of the police officers to be given context. It is impossible to give full consideration to the denial without considering it and testing it in light of the details of the allegation.

[56] And the second category is evidence intended to undermine the credibility of the allegations: (a) he does not do crack; (b) he does not know how to cook crack.

[57] All of the police officers involved in executing the search warrant and seizing exhibits gave a straightforward narrative. Any inconsistencies between the testimony of each other was minor; for example, where a digital scale was seized (at the table); the photo of the scale (floor of kitchen).

[58] Constable Hurley, the expert, was questioned about the opinion in his report, stating it was a typo, but stood by his own opinion at trial. I will say more about that later.

V The Law

(A)Possession

[59] The law is outlined in the paper by Thomas P. Laughlin, *Possession and Trafficking Offences* (Charlottetown, PEI: National Criminal Law Program, July 2016) beginning on page 1:

> **Possession**
>
> Section 4 of the *CDSA* prohibits possession of a controlled substance and reads in part as follows:

> 4(1) Except as authorized under the regulations, no person shall possess a substance included in Schedule I, II, or III.

In order to establish the offence, the Crown must establish three elements: (1) that an individual was in possession of a substance, (2) that the substance was a controlled substance, and (3) that the individual knew (or reckless or wilfully blind) that the substance was a controlled substance.

Types of Possession

There are three types of possession: (1) personal, (2) constructive, and (3) joint. Possession is a question of fact. However, a trier of fact can draw inferences from the circumstantial evidence to establish the offence.

Personal Possession

To prove personal possession, the Crown must establish three elements: that there was manual handling of the substance, knowledge and control of the substance in question. Generally, personal possession will involve situations where drugs have been found on an individual's person whether they are holding them, housing them in their pockets, or carrying them in a bag or purse.

The manual handling need not be lengthy and need not demonstrate ownership of the drug or substance in question. Although contact may be fleeting, there must be some evidence to show the accused took custody of the substance willingly and intended to deal with it.

As noted by the British Columbia Court of Appeal, personal possession requires proof of knowledge of the substance.

> To constitute [personal] "possession" within the meaning of the criminal law… where, as here, there is a manual handling of a thing, it must be co-existent with some act of control (outside public duty).

To establish the knowledge component of possession, the Crown must prove that the person was aware (or reckless or wilfully blind) of the presence of the substance and of its character. For example, in

Beaver, the accused was acquitted of possession of heroin because he believed that he possessed milk sugar:

> …Has X possession of heroin when he has in his hand or in his pocket or in his cupboard a package which in fact contains heroin but which he honestly believes contains only baking-soda? In my opinion that question must be answered in the negative. The essence of the crime is the possession of the forbidden substance and in a criminal case there is in law no possession without knowledge of the character of the forbidden substance.

As discussed, there remains some question as to the exact nature of the knowledge requirement, and whether knowledge of possession of a controlled substance (if not knowledge of the substance alleged) will suffice.

Finally, the Crown must establish that the person had a measure of control over the drugs or substances in their possession. …

Constructive Possession

Constructive possession is established pursuant to subparagraphs 4(3)(a)(i) and (ii) of the *Criminal Code.* Constructive possession involves situations where the substance, while not in personal possession, is found in a location over which the person has some element of control. In *Morelli*, the Supreme Court of Canada set out the elements of constructive possession as follows:

> Constructive possession is established where the accused did not have physical custody of the object in question, but did have it "in the actual possession or custody of another person" (*Criminal Code*, s. 4(3)(a)). Constructive possession is thus complete where the accused: (1) has knowledge of the character of the object, (2) knowingly puts or keeps the object in a particular place, whether or not that place belongs to him, and (3) intends to have the object in the particular place for his "use or benefit" or that of another person.

The Crown may prove the knowledge component of constructive possession either through direct evidence or by inference.

In order to establish control, the Crown must show that the drugs were stored in a place over which the accused had control.

Joint Possession

A person may be in possession of a drugs substance if he or she knows and consents to drugs being in the possession of another person, and exercises a measure of control over the drugs. A common example of joint possession involves several individuals found in a room where one individual is in personal possession of a controlled substance. If the Crown is able to establish that the other individuals in the room knew of the presence of the controlled substance, consented to the possession of it by the one individual and exercised a measure of control over the controlled substance in the possession of the one individual, all of the persons in the room may be found to be in joint possession, despite only one person having personal possession.

…

Once again, proof of knowledge requires that the Crown established the individual knew (or was reckless or wilfully blind) that another had the substance in his or her possession and also knew of the nature or composition of the substance. Control may be established if there is the right to grant or withhold consent. A person must demonstrate some form of active concurrence, as opposed to mere passive acquiescence.

…

Knowledge, Reckless, or Wilful Blindness

For all three forms of possession, in order to establish guilt the Crown must prove that the accused had knowledge of the presence of the controlled substance. In *Aiello,* the Supreme Court of Canada concluded that recklessness and wilful blindness were also included in the *mens rea* of the offence.

The question of whether or not the requisite *mens rea* is established if a person knows that he or she had a *controlled substance* in his or her possession, but not necessarily *the specific controlled substance* remains open, depending on the nature of the offence a substance. …

Possession For The Purposes of Trafficking

In cases where there is no evidence that an individual is trafficking, yet it is apparent that the individual intended to traffic a controlled substance, he or she may be charged pursuant to section 5(2) of the *CDSA*, which reads:

> No person shall, for the purpose of trafficking, possess a substance included in Schedule I, II, III, or IV.

The *actus reus* of a charge of possession for the purpose of trafficking requires the Crown to establish that the accused was in possession of the controlled drug or substance. As noted above, this may be personal possession, constructive possession or joint possession. The *mens rea* of the offence requires the Crown to establish two components: knowledge and intent. The knowledge has been discussed above in relation to possession.

Intent

The Crown does not need to prove that a transfer of drugs took place. It is enough that the evidence establishes an intention to traffic. Intention to traffic, however, must be proven beyond a reasonable doubt. It is insufficient for the Crown to show that the accused was considering trafficking, or even that it was very likely that the accused intended to traffic.

There are generally three types of evidence that may establish an intention to traffic: direct evidence of an intention to traffic, such as admissions or intercepted communications, facts proven at trial from which an inference may be drawn or expert evidence to explain the significance of the circumstantial evidence.

Circumstantial evidence of an intention to traffic may include:

- a large quantity of drugs, more than is reasonable for personal use;
- unexplained wealth;
- text messages or other communications setting up a sale or transaction of drugs;
- weigh scales, ziplock baggies, or other packaging or drug paraphernalia;
- association with known drug traffickers;
- statements from the accused or other indicating an intention to traffic drugs;
  and
- the manner of storage of drugs.

(B) Production

[60] As stated by the Hon. Judge Frank Hoskins in a paper entitled Cultivation and Production Offences Charlottetown, PEI: National Criminal Law Program, July 2016) beginning on page 1:

> **Introduction**
>
> Section 7 (1) of the *Controlled Drugs and Substances Act* (CDSA) creates the offence of production of controlled substances without authorization. The offence prohibits a person from obtaining a controlled substance by any method or process, including the manufacturing or cultivating of it without legal authorization. It is also an offence under s. 7(1) to offer to produce a substance.
>
> Section 7 (1) provides:
>
> Except as authorized under the regulations, no person shall produce a substance included in Schedule I, II, III or IV.
>
> … The essence of the offence of production is to obtain a controlled substance by any method or process, including: (a) manufacturing, synthesizing or using any means of altering the chemical or physical properties of the substance, or (b) cultivating, propagating or harvesting the substance or any living thing from which the substance may be extracted or otherwise obtained, and includes the offer to produce. These two broad categories describe the actus reus of the

offence of production, which includes the cultivation or manufacture of a substance. They do not exclude other means or processes by which a person may obtain a controlled substance, such as altering the chemical or physical properties of a controlled substance.

The CDSA, however, empowers the government to create exemptions by regulation for medical, scientific or industrial purposes. Indeed, the Narcotic Control Regulations permit the distribution of controlled drugs and substances by pharmacists, medical practitioners and hospitals. Section 56 of the CDSA gives the Minister of Health the discretion to exempt any person or controlled substance from the application of the CDSA if the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest. Under the Narcotic Control Regulations the Minister has the discretion to issue a license to cultivate, gather or produce opium or marihuana for scientific purposes. Also, the Marihuana Medical Access Regulations (MMARs) created an exemption for people who could demonstrate a medical need for cannabis. A holder of a personal use production license was also authorized to produce and keep marihuana for the medical purpose of the holder. The MMARs were replaced in 2013 with the Marihuana for Medical Purposes Regulations (MMPRs). The new regime replaces the marihuana production scheme in the MMARs with a system of government-licensed producers.

The regulations are Parliament's response to a number of court decisions which held that a blanket criminal prohibition on the possession and cultivation of marihuana was unconstitutional because it did not provide an exemption for people who used marihuana for valid medical purposes. Most recently, the Federal Court declared the MMPRs constitutionally invalid and imposed a six-month suspension of the declaration to permit governmental response. The constitutionality of the regulations will not be addressed herein, as such would exceed the purpose and scope of the paper.

This paper will, however, briefly address the essential elements of the offence of production, and will touch upon the various means of committing the offence. This will include a discussion of the possession, sale or importation of certain precursors, in situations where the person knows that they will be used in the manufacture of methamphetamine and ecstasy. The paper will also examine critical terms and definitions as they relate to the prosecution of production offences.

The Essential Elements of the Offence

The Crown must prove each of the essential elements beyond a reasonable doubt; namely:

i. the accused produced a substance;

ii. the specific substance was a controlled substance;

iii. the accused knew what the specified substance was; and

iv. the accused intended to produce the specified substance.

The actus reus of the offence is established when it is shown that the accused obtained a substance by any method or process, including the manufacture or cultivation thereof. The mens rea requires that the accused know what the substance is, and have the intent to produce it. Therefore, the mens rea requirement consists of two separate and distinct mental states: knowledge and intent. The Crown must first prove the accused had knowledge of the nature of the substance produced, and second, prove the intent to produce the specified substance.

i The Accused Produced a Substance

The Crown must prove that the accused produced a substance. Section 2 of CDSA defines produce:

means, in respect of a substance included in any of Schedules I to IV, to obtain the substance by any method or process including

(a) manufacturing, synthesizing or using any means of altering the chemical or physical properties of the substance, or

(b) cultivating, propagating or harvesting the substance or any living thing from which the substance may be extracted or otherwise obtained,

and includes the offer to produce.

What is contained in this definition is non-exhaustive. While manufacturing and cultivating are included in the definition, they alone do not define its extent. Rather, to produce is to obtain by any method or process, a substance. Manufacture and cultivation are mere examples of two methods or processes. The definition also includes synthesizing, or using any means of altering the chemical or physical properties of controlled substances and/or altering a licit substance into an illicit one (ie. a controlled substance), as well as altering two illicit substances.

If through a synthesizing process one substance has been altered and turned into a controlled substance, then a production has taken place. As stated, in the text, Drugs Offences in Canada:

A synthesis can therefore involve, for instance, the union of a precursor (which is contained in Schedule VI to the Act and is chemically simpler than a

controlled substance) with any other substance, including a controlled substance or another precursor, leading to the creation of a controlled substance.

In essence, to produce a substance means to make the substance, or mix it with some other substance. A substance means any material thing, in any form: solid, liquid, gas or powder; it may be pure or mixed with other things.

…

Any Method or Process

According to s. 2 of the CDSA, the method or process used to produce a controlled substance may, but need not be, by manufacture, synthesis, or the use of any means to alter its chemical or physical properties….

The terms manufacturing and cultivating are not defined in the CDSA, but both have been judicially considered in numerous cases in the context of the predecessor legislation, the *Narcotic Control Act* (NCA). In these cases the courts have referenced the ordinary dictionary definition of these words.

For example, in *Daniel*, the Ontario Court of Appeal endorsed the following definition of "manufacture":

[T]o manufacture is to fabricate; it is the act or process of making articles for use; it is the operation of making goods or wares of any kind; it is the production of articles for use from raw or prepared material by giving to these materials new forms, qualities and properties or combinations whether by hand or by machinery.

The observations of the authors of Drug Offences in Canada, are apposite:

Parliament has drawn a marked distinction between manufacturing, synthesizing and altering the properties of a substance. Each act is separately culpable. It is equally culpable to do any of these things 'by any method or processes. There is also a distinction drawn between altering the chemical and the physical properties of a substance. The use of 'any means' to alter these properties may be unlawful. This legislative regime makes it very clear that the culpability net has deliberately been cast widely by Parliament.

…

Another means by which a person can commit the offence of production is by synthesizing or using any means of altering the chemical or physical properties of the substance. In other words, if through a synthesizing process one substance has been altered and turned into a controlled substance, then a production has occurred. The altering of a substance includes not only the conversion of a licit substance into an illicit substance, but also the conversion of one illicit

substance into another illicit substance, such as converting powder cocaine to crack cocaine.

ii The Specific Substance was a Controlled Substance

In addition to proving that the accused produced a substance, the Crown must establish beyond a reasonable doubt that the specific substance was a controlled substance listed in Schedules I to IV of the CDSA.

Section 2 of the CDSA further provides:

(2) For the purposes of this Act,

(a) a reference to a controlled substance includes a reference to any substance that contains a controlled substance; and

(b) a reference to a controlled substance includes a reference to

(i) all synthetic and natural forms of the substance, and

(ii) any thing that contains or has on it a controlled substance and that is used or intended or designed for use

(A) in producing the substance, or

(B) in introducing the substance into a human body.

…

iii. The Accused Knew what the Specified Substance was

The Crown must prove beyond a reasonable doubt that the accused knew what the specified substance was that he or she produced. This means that the accused knew the nature of the substance produced, but not necessarily that it was a specific substance listed in Schedules I to IV.

The Crown may establish the accused's knowledge of the nature of the substance either by proving that he accused actually knew that the substance produced was an illicit substance, or by proving that the accused willfully blinded himself or herself about the nature of the substance. Of course, it does not matter whether the accused knew the technical term or chemical name for the illicit substance; as long as he or she knew that it was an illicit substance.

iv. The Accused Intended to Produce the Specified Substance

In addition to proving that the accused knew what the specified substance was that he or she produced, the Crown must also establish beyond a reasonable doubt that he or she intended to produce the specified substance. For example,

> in *Rochon*, the accused's son used her property to operate a large-scale marijuana production. The accused appealed her conviction of producing cannabis for the purposes of trafficking in marijuana. In convicting the accused, the trial judge found on the evidence that the accused had knowledge of the situation and therefore should have called the authorities to report her son's activities. In over-turning the conviction, the majority held that the Crown had to prove, beyond a reasonable doubt, the appellant's specific intent to aid or abet the main perpetrator of the crime, her son. It had to be shown that the appellant had the specific intent to help her son commit the offence, which was not established. The fact that the appellant did not report her son to the authorities did not constitute the actus reus of participating in the production and possession of marijuana.
>
> …
>
> Included Offences
>
> It should be noted that other than the offence of attempt, there does not seem to be any other offences included in the offence of production. The British Columbia Court of Appeal in *Powell* held that possession is not an included offence in production, but involvement in production generally also results in possession. …
>
> **Offence of Attempt**
>
> As previously mentioned, the offence of attempt is an included offence to the offence of production. For example, in *Burdan*, the accused, who set up manufacturing apparatus, obtained chemicals to manufacture MDMA and had commenced the process, was convicted of attempting to produce.

VI Position of the Parties

[61] Mr. Smith argues Mr. Reddick should be found not guilty of counts 1, 2 and guilty of simple possession. Citing: (1) Mr. Reddick was not the target of the raid; (2) Mr. Reddick does not live in that apartment; (3) Mr. Reddick was getting together with his brother, Mr. Etmanskie, to "use" as he had been using/drinking all day; (4) Mr. Reddick had his own cocaine which was seized

by the police when he was searched incident to arrest; (5) the expert report contradicts his testimony at trial and is unreliable.

[62] Mr. Kidston argues that Mr. Etmanskie should be found guilty of simple possession citing: The 9.1 grams is not accounted for – don't know who owned it; (2) no test for residue on the "pots"; (3) No one was cooking anything when the police arrived; (4) expert's report is contradictory and unreliable; (5) there are no score sheets, no bulk amount of drugs, no cell phone analysis, no cash, no weapons, which is typical of "trafficking". Mr. Etmanskie is guilty of simple possession – that is the cocaine in the sock and wallet. Mr. Taylor argues both individuals are guilty beyond a reasonable doubt.

Mr. Reddick is, at the very least, guilty of possession; (2) pot of water on stove, pot of water in freezer, baking soda, scales, 'cut', cocaine, all use in trafficking = "low level street dealing operation"; (3) Mr. Reddick's explanation is inconsistent; i.e., there for two hours and didn't see anyone go into the kitchen; (4) although there is a mistake in the report, the court should accept Constable Hurley's testimony which is consistent with trafficking – it shows police did not collude between; i.e., ITO versus report.

[63] As stated in Final Instructions to a Jury, Joint Principles, section 101 A beginning at page 450:

> [1] The case for the Crown is that the accused [Reddick] committed (these) offence(s) together with [Etmanskie]. Under our law a person may commit an offence alone or together with others., whether the other person(s) is (are) charged and on trial.
>
> …
>
> [4] … Each is entitled to have his/her case decided on the basis of his/her own conduct and state of mind and from the evidence that may apply to him/her.
>
> …
>
> **Case Law**
>
> ***Joint Principals***
>
> *R. v. Pickton,* [2010] 2 S.C.R. 198, 77 C.R. (6th) 12, 257 C.C.C. (3d) 296—
>
> Co-principal liability is established where two or more people "actually" commit an offence and also where two or more persons together form an intention to commit an offence, are present at its commission, and contribute to it, although they do not personally commit all its essential elements. (Binnie, LeBel and Fish JJ.)
>
> *R. v. Jackson,* [2007] 3 S.C.R. 514, 52 C.R. (6th) 1, 226 C.C.C. (3d) 97—
>
> Mere presence at the scene of a crime does *not* prove culpable participation in the crime. But presence, together with the cumulative effect of other factors, such as
>
> i. apprehension at the scene;
>
> ii. the particular nature of the offence;
>
> iii. rejection of D's explanation for presence;
>
> iv. the context in which the offence was committed; and
>
> v. other circumstantial evidence of guilt.
>
> may establish D's participation.

[64] Can Mr. Reddick be found guilty of aiding and abetting Mr. Etmanskie or vice versa? As stated in Final Instructions, beginning at page 452;

> Aiding
>
> (*Code*, s. 21(1)(b))
>
> [1] A person may be found guilty of an offence because s/he *helped*, somebody else to commit it. We describe those who help other commit crimes in a way as *aides*. Aiding requires both conduct and a (particular) state of mind.
>
> [2] An *aider* may help another person commit an offence by doing something … It is *not e*nough that what the aider does … has the *effect* or resulted in helping the other person commit the offence. The aider must *intend* to help the other person commit the offence. Actual assistance is necessary. This is the conduct requirement.
>
> [3] It is *not* enough that a person was simply there when a crime was committed by someone else. In other words, just being there does *not* make a person guilty as an aider of any or every crime somebody else commits in the person's presence. Sometimes, people *are* in the wrong place at the wrong time.
>
> [4] On the other hand, if a person:
>
> - *Knows* that someone *intends* to commit an offence; and
> - Goes to or is present when the offence is committed to help the other person commit the offence,
>
> that person is an aider of the other's offence and equally guilty of it.

[65] It goes on to state on page 456;

> *Dunlop v. R.*, [1979] 2 S.C.R. 811 C.R. (3d) 349, 47 C.C.C. (2d) 93- Mere presence at the scene of a crime is not sufficient to ground culpability. Something more is needed; encouragement of the principal offender; an act that facilitates the commission of the offence, such as keeping watch or enticing V away; or an act which tends to present or hinder interference with accomplishment of the criminal act, such as preventing the intended victim from escaping or being ready to assist the prime culprit. A person is not guilty merely

> because s/he is present at the scene of a crime and does nothing to prevent it. If there is no evidence of encouragement by D, his/her presence at the scene will not suffice to render him/her liable as an aider or abettor. However, presence at the commission of an offence can be evidence of aiding or abetting if accompanied by other factors such as prior knowledge of the principal offender's intention to commit the offence, or attendance for the purpose of engagement.
>
> …
>
> *R v. Taylor*, 201 ONCA 656, 7 C.R. (7th) 361- The mens rea of aiding or abetting consists of an actual intent to assist or encourage the principal in committing the offence along with the actual knowledge or wilful blindness that the principal intends to commit the offence.

[66] It finally goes on to state at page 457, Final 101-C, Abetting (Code, s. 21(1)(c));

> [1] Persons who *encourage* others to commit an offence may also be found guilty of the offence they encourage. … Abetting requires (proof of) both conduct and a (particular, or specific) state of mind.
>
> [2] An abettor must provide actual encouragement by words, conduct, or by both words and conduct to (the) other person (or, *specify)* to commit the offence. It is not enough that what the abettor does or says has the effect of encouraging or results in encouraging the other person to commit the crime. Actual encouragement is necessary. …
>
> [3] It is *not* enough that a person was simply there when the crime was committed by somebody else. In other words, just being there does *not* make someone guilty as an abettor of *any* crime that other person commits. Sometimes, people just end up in the wrong place at the wrong time.
>
> [4] On the other hand, if a person
>
> - *knows* that someone *intends* to commit a crime; and
> - goes to or is present at a place to encourage that other person to commit the crime,
>
> that person who encourages is also guilty of the crime the other commits.

> … *R. Helsdon* (2007), 45 C.R. (6th) 34, 216 C.C.C. (3d) 1 (Ont. C.A.); leave to appeal refused [1978] 1 S.C. R., xi- Despite the absence of language like "for the purpose" in s. 21(1)(c), abetting requires proof that D intended that his or her acts or words encourage the principal. Knowledge of the circumstances that make up the offence is as essential to the liability of an abettor as it is to the liability of an aider.

VII **Analysis**

Part A: Mr. Reddick

[67] Mr. Reddick was charged on counts (1) and (2), section 5(2) and 7(1) of the **Controlled Drugs and Substances Act;**

1) Was Mr. Reddick in possession of 1.8 of cocaine plus the 9.1 grams in the kitchen?

2) Was substance controlled?

3) Was Mr. Reddick reckless? Mr. Reddick readily agrees he was in possession of the 1.8 grams found on him when arrested but denies possession/possession for the purpose of remaining drugs found in apartment (on kitchen table 9.1 grams).

[68] Was this for personal possession? There were no finger prints taken from the baggie and no direct evidence he brought the drugs to the apartment.

[69] On the issue of knowledge and control, Mr. Reddick said he didn't know anything about it. Mr. Reddick says he was in the livingroom all the time getting high with cocaine he brought. The 9.1 grams of cocaine was on the kitchen table.

[70] There was no evidence that Mr. Reddick took custody of the substance (on the table) at any time while in the apartment. The gloves in Mr. Reddick's possession were not tested by the lab.

Constructive Possession

[71] The apartment belonged to Mr. Etmanskie.

[72] Mr. Reddick said he lived downstairs in apartment 1.

[73] I do not think the one piece of mail is sufficient to prove Mr. Reddick lives there.

[74] There were no clothes or other belongings entered as evidence to show Mr. Reddick lives there.

[75] There is no indication that he had keys to the apartment or that he had control over the apartment.

Joint Possession

[76] Mr. Reddick was in Mr. Etmanskie's apartment for a couple of hours "getting high." He testified he didn't know what anyone else was doing or what was going on in the kitchen.

[77] There is no evidence that Ms. Penney knew about drugs and conveyed that to Mr. Reddick or that Mr. Etmanskie told Mr. Reddick there was cocaine in the kitchen, and even if Mr. Reddick knew there was 9.1 grams of cocaine in the kitchen, there is no evidence he consented to the possession of it by Mr. Etmanskie or Ms. Penney or exercised any measure of control over it.

[78] Mr. Reddick was apprehended at the scene (Mr. Etmanskie's apartment). While I find Mr. Reddick's explanation for being there somewhat suspect, it is plausible and has not been refuted by the Crown.

[79] Section (7)(1) **CDSA** – Mr. Reddick was found in the apartment. There is no evidence he was "producing." There is no finger-print analysis of any of the items on the table, the pot on the stove or the bowl in the fridge.

[80] There is no evidence Mr. Reddick did anything to aid/abet any of the other two people in the apartment.

[81] While the "nitrol" gloves are suspicious, there is no evidence they were sent for any forensic analysis.

[82] It is not enough that Mr. Reddick was seen running down the hall to the living room where he was arrested.

[83] There is no evidence he knew or had prior knowledge that anyone intended to produce “crack cocaine.”

[84] Although Mr. Reddick’s presence in the apartment is suspicious, that is not the test.

[85] The test is proof beyond a reasonable doubt.

[86] That was not met, therefore, I find Mr. Reddick not guilty on count 1, section 5(2) but guilty to possession section 4(1) **CDSA,** 1.8 grams of cocaine. He is not guilty of the section 7(1).

Part B – Mr. Etmanskie

[87] I find on the evidence and by his own admission that the apartment belonged to Mr. Etmanskie. I also find that he was in possession of 1.2 grams of cocaine (sock) and 1 gram of cocaine (wallet).

What about the other 9.1 grams found on the kitchen table?

[88] The cocaine was found in the kitchen of Mr. Etmanskie’s apartment, a place that he has control over. Mr. Reddick said he was at his brother’s for a couple of hours. All three were “just getting’ high.” They were doing lines. Even though Mr. Reddick doesn’t recall anyone in the kitchen, I find it hard to believe Mr.

Etmanskie couldn't know what was on his kitchen table as seen in Ex. #1, photograph #8. Based on the evidence, I am satisfied Ms. Penney or Mr. Reddick did not bring it to the apartment.

[89] I think that, given all of the evidence, it is a reasonable inference to draw that Mr. Etmanskie knew of the drugs on his kitchen table and he knew what that substance was, and I find he was in "possession" of same.

Was it for the purpose of trafficking?

[90] Constable Hurley, at page 2 of his report (Ex. #23), listed the "notable" exhibits seized as a result of executing the search warrant. (Included all cocaine seized):

1.8 – Reddick – (in sandwich bag – pocket)

1.2 – Etmanskie – (dime bag – sock)

7.9 – ripped open sandwich bag – kitchen table

1.0 – Etmanskie – wallet

0.5 – on kitchen table

0.3 – the flap package – kitchen table

0.4 – in plastic wrap on kitchen table.

[91] At page 3 he stated:

It is my experience that a user of powder cocaine will normally purchase (1) to (2) grams of powder cocaine at one time and no more than 8 ball (3.5 grams) at one time for personal use.

The amount of cocaine that was seized in this case and the way it was packaged is consistent with what someone would have for personal use. However, this is also common packaging for a street level cocaine trafficker.

[92] At page 4:

Powder cocaine is typically packaged for street level trafficking using dime bags, paper decks and in some cases, as observed here, corner bags. Corner bags is a method of using the tied off corner of a standard sandwich bag to package street level. The presence of a spoon and cutting agents, such as the unknown white powder, are all tools known to be used by street level cocaine traffickers. These tools allow the trafficker to mix the cocaine with a cutting agent such as (benzocaine, lidocaine, novocaine or pig de-wormer etc.). In this an unknown white powder. The original cocaine is mixed with the cutting agent lowering the purity of the cocaine product while increasing its quantity, therefore maximizing the trafficker's profit. There us also the presence of baking soda and this is indicative of the conversion from cocaine to crack cocaine. This is a process where the PH level of the cocaine is altered by slowly cooking the cocaine with baking soda. The purpose of raising the PH level is to make the cocaine smoke-able for users. Crack cocaine is known to give users a quicker and more intense high than that of powder cocaine.

DIGITAL SCALES

Digital weighing scales are a common accessory used by drug traffickers. The scales are used to weigh their drugs from a bulk amount to accurate smaller amounts that are ready to sell. The set of scales seized is common with drug trafficking.

CELL PHONES

It is common for drug traffickers of any level to use a cell phone or multiple cell phones to arrange drug deals, communicate with potential buyers/suppliers, and take orders for drugs. Many drug traffickers will have text messages, debt sheets, photographs and other information stored on their phones to facilitate trafficking in their commodities.

[93] Later, his conclusion: "…it is my opinion that this file is consistent with persons who are in possession of cocaine for purpose of trafficking."

[94] During the trial, Constable Hurley testified that the 7.9 grams of cocaine seized was high for personal use – a weekend binge person would buy an 8-ball (3.5 grams).

[95] If snorting cocaine, you would find a razor blade or bank card to make a line and he testified none were present in the apartment.

[96] If smoking crack, you would find a pipe, burnt tinfoil and lighter.

[97] Upon examination of photograph 8, I find there appears to be some type of plastic card similar to a credit card and a black lighter with a hockey logo on the kitchen table.

[98] Lotto paper was found (Ex. #13) as "flat" package with .3 grams cocaine. But I do not know how much, if any, was found in the apartment, although I can see two in photograph of table. Mr. Etmanskie's cell phone was seized but it was not sent for analysis. There was no cash found in the apartment. There were no score sheets or safe found. No weapons.

[99] Mr. Kidston questioned Constable Hurley about his previous cases, saying much higher amounts were involved. Constable Hurley testified this is a "low level" of street level trafficking.

[100] I find that Mr. Etmanskie was in possession of 11.3 grams of cocaine (wallet, sock, kitchen table). I also find, based on the presence of the spoon, scale and the cutting agents, including 25.4 grams of phenatin, that the reasonable inference to be drawn is that he possessed the cocaine for the purpose of trafficking. Mr. Etmanskie, in Constable Hurley's words, is "the lowest level" of a street level trafficker.

Section 7(1) – Production

[101] Upon police entry into Mr. Etmanskie's apartment, they found spoon, scale, baking soda, GNC bottle and cut(s), phenatin (a good agent for making crack), cocaine (9.1 grams) on the table, Pyrex dishes on the table and counter, boiling pot of water on the stove, and pot of water in the freezer, all things needed to produce crack cocaine.

[102] The pots or contents were not tested for presence of any substance.

[103] Mr. Kidston says there was no production because no one was cooking anything.

[104] I find, based on the evidence, that Mr. Etmanskie went beyond mere preparation; he had the intent to produce but the final step was interrupted when the police entered the apartment, at which point Mr. Etmanskie ran down the hallway to a bedroom

[105] Therefore, I find him guilty of the offence of attempting to produce “crack cocaine.”

Jean M. Whalen , JPC.