

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Snowden*, 2016 NSSC 321

Date: 20161122

Docket: CRAM 437260

Registry: Amherst

Between:

Her Majesty The Queen

Applicant

v.

Michael John Snowden

Respondent

Decision
Voir Dire
Qualification of Constable Nicholas Baker as Expert

Judge: The Honourable Justice Jeffrey R. Hunt

Heard: October 27, 2016 in Amherst, Nova Scotia

Written Decision: November 22, 2016

Counsel: Catherine Hirbour, for the Federal Crown
Stephanie Hillson, for the Defendant

Indictment # 1 – March 23, 2015

Charges:

THAT HE on or about the 15th day of February, 2013, at or near Amherst, in the County of Cumberland, Province of Nova Scotia:

Count #1 Did possess a firearm, to wit: A Cooley model 840 shotgun, knowing that he was not the holder of a license under which he may possess it, contrary to Section 92(3)(a) of the ***Criminal Code***;

AND FURTHERMORE at the same time and place aforesaid,

Count #2 Did possess a firearm to wit: A Winchester 308 model 100 rifle, knowing that he was not the holder of a license under which he may possess it, contrary to Section 92(3)(a) of the ***Criminal Code***;

AND FURTHERMORE at the same time and place aforesaid,

Count #3 Did possess a firearm, to wit: A Remington model 788 rifle, knowing that he was not the holder of a license under which he may possess it, contrary to Section 92(3)(a) of the ***Criminal Code***;

AND FURTHERMORE at the same time and place aforesaid,

Count #4 Did possess a firearm, to wit: A Weatherby Vanguard 30-06 rifle, knowing that he was not the holder of a license under which he may possess it, contrary to Section 92(3)(a) of the ***Criminal Code***;

AND FURTHERMORE at the same time and place aforesaid,

Count #5 Did possess a firearm, to wit: A CIL model 171 .22 calibre rifle, knowing that he was not the holder of a license under which he may possess it, contrary to Section 92(3)(a) of the ***Criminal Code***;

AND FURTHERMORE at the same time and place aforesaid,

Count #6 Did possess a firearm to wit: A Cooley model 840 shotgun, without being the holder of a license under which he may possess it, contrary to Section 91(3) of the *Criminal Code*;

AND FURTHERMORE at the same time and place aforesaid,

Count #7 Did possess a firearm, to wit: Winchester 308 model 100 rifle, without being the holder of a license under which he may possess it, contrary to Section 91(3) of the *Criminal Code*;

AND FURTHERMORE at the same time and place aforesaid,

Count #8 Did possess a firearm, to wit: A Remington model 788 rifle, without being the holder of a licence under which he may possess it, contrary to Section 91(3) of the *Criminal Code*;

AND FURTHERMORE at the same time and place aforesaid,

Count #9 Did possess a firearm, to wit: A Weatherby Vanguard 30 06 Rifle, without being the holder of a license under which he may possess it, contrary to Section 91(3) of the *Criminal Code*;

AND FURTHERMORE at the same time and place aforesaid,

Count #10 Did possess a firearm to wit: a CIL model 171 .22 calibre rifle, without being the holder of a license under which he may possess it, contrary to Section 91(3) of the *Criminal Code*;

AND FURTHERMORE at the same time and place aforesaid,

Count # 11 Did unsafely store a CIL model 171 .22 calibre rifle, thereby contravening Regulation 5(1)(a) of the *Storage, Display, Transportation and Handling of Firearms by Individuals Regulations*, contrary to Section 86(2) of the *Criminal Code*;

AND FURTHERMORE at the same time and place aforesaid,

Count #12 Did unsafely store a Cooley model 840 shotgun, thereby contravening Regulation 5(1)(a) of the *Storage, Display, Transportation and Handling of Firearms by Individuals Regulations*, contrary to Section 86(2) of the *Criminal Code*.

Indictment #2 – May 1, 2015

Charges:

Count #1 **THAT** on or about the 15th day of February, 2013 at or near Amherst, Nova Scotia, did possess a substance included in Schedule 1 to wit: hydromorphone for the purpose of trafficking contrary to Section 5(2) of the *Controlled Drugs and Substances Act*.

Count #2 **AND FURTHERMORE** on or about the 15th day of February, 2013 at or near Maccan, in the Province of Nova Scotia, did traffic in a substances included in Schedule 1 to wit: hydromorphone, contrary to Section 5(1) of the *Controlled Drugs and Substances Act*

By the Court:

[1] The Crown seeks to have Constable Nicholas Baker qualified as an expert in this matter. The proposed statement of qualifications is as follows:

Constable BAKER is seeking to be qualified by the Court to provide expert evidence in relation to Hydromorphone, and more specifically the use, quantities, jargon, distribution, purchasing, availability, sale, and value.

[2] The Defence opposes this motion. They question:

1. The degree of expertise;
2. The issue of bias/impartiality as Constable Baker is a member of the RCMP.

I propose to deal with each of these issues in turn.

Background

[3] The Constable was examined and cross-examined on his education, training and experience.

[4] Constable Baker has been with the RCMP for 12 years. Since December, 2014 he has been posted with the South West Nova Major Crime Unit, currently out of New Minas, Nova Scotia.

[5] Prior to his posting to Major Crimes he spent approximately three years with the South Shore Integrated Street Crime Unit operating out of Bridgewater. His original posting had been as a General Duty Investigator.

[6] In evidence the Constable detailed his past experience dealing with drug investigations in general. He also gave evidence as it related to his involvement in hydromorphone investigations.

[7] The Officer's CV was put in evidence. It appears to reference approximately nine investigations which pertained to alleged hydromorphone possession or trafficking. He has been involved in numerous *CDSA* based files and investigations.

[8] One of the significant investigations was Operation Hamlin, an operation which targeted cocaine and hydromorphone trafficking in and around Lunenburg County. It resulted in multiple individuals being charged including four individuals charged with hydromorphone trafficking.

[9] Operation Hamlin involved the management of intelligence from 12 different confidential sources. The Officer provided testimony with respect to the various aspects of this operation.

[10] The CV also discloses multiple other cases which involved allegations of hydromorphone possession or trafficking. In testimony the Officer detailed the extent to which the duties of an Integrated Street Crime Unit member touched upon

the illegal narcotic trade. Most matters had at least some involvement or aspect of the drug trade.

[11] The Defence raises a concern that Constable Baker, despite having authored three expert reports in CDSA matters, has never been previously qualified in Court.

[12] Constable Baker testified that in two of these matters the accuseds changed their pleas to guilty on various charges and the trials did not proceed. He believes he would have been called to give evidence if the matters had proceeded.

[13] Constable Baker noted that in one of these cases he gave an opinion that could not rule out a personal use defence in the case of a hydromorphone trafficking charge. Accordingly, the Crown allowed this charge to be dispensed with.

[14] In the case of the third expert report authored by the Constable he testified that the charges were not proceeded with due to an issue with the Certificates of Analysis.

[15] Other aspects of the CV confirm the Constables attendance at various courses respecting the obligations of an expert witness.

[16] I have closely reviewed the contents of the CV and his testimony in Court. I recognize that the Constable has not been previously qualified. However, his exposure to numerous hydromorphone investigations is clear. These range from smaller investigations to more substantial efforts against suspected traffickers. The management of confidential sources and the interpretation of any related communications has been a feature of their investigations.

Law

[17] The party seeking to advance expert evidence has the burden of establishing its admissibility on a balance of probabilities. In *R. v. Mohan* [1997] 2 S.C.R. 9, the Court established the threshold requirements to be satisfied.

1. Relevance;
2. Necessity in assisting the trier of fact;
3. The absence of an exclusionary rule which would otherwise render the evidence inadmissible;
4. A properly qualified expert.

In this case the central point in dispute is that of whether the proposed expert can be properly qualified.

[18] *White Burgess v. Abbott*, 2015 SCC 23, gives guidance on the question of qualifications. The Court directs that the expert must be shown to have acquired special or peculiar knowledge through study or experience. Additionally, the

proposed expert must be able and willing to fulfill a duty to the Court to provide fair, objective and non-partisan assistance.

[19] As to the question of expertise, I am satisfied that the Constable does have specialized experience gained from a reasonable number of hydromorphone investigations. These areas of expertise are relevant to the issues to be decided in the hearing.

[20] Case law is clear that the manner in which expertise is gained can be flexible. Some experts will gain their knowledge from pure academic training. Others will derive expertise from practical knowledge or experience.

[21] On the issue of impartiality, Justice Cromwell in *White Burgess* had the following to say (para. 47):

While I would not go so far as to hold that the expert's independence and impartiality should be presumed absent challenge, my view is that absent such challenge, the expert's attestation or testimony recognizing and accepting the duty will generally be sufficient to establish that this threshold is met.

[22] The case law makes clear that after threshold admissibility is made out there remains a balancing exercise to be engaged in by the Court as part of its gate keeper function. This is referred to in *White Burgess* as the 'cost-benefit' stage (para. 2):

Expert witnesses have a special duty to the Court to provide fair, objective and non-partisan assistance. A proposed expert witness who is unable or unwilling to comply with this duty is not qualified to give expert evidence and should not be permitted to do so. Less fundamental concerns about an expert's independence and impartiality should be taken into account in the broader, overall weighing of the costs and benefits of receiving the evidence.

[23] Specific concerns have been raised by the Defence with respect to whether Constable Baker, as an RCMP Officer can be seen as impartial and unbiased.

[24] I have reviewed a series of cases where police associated witnesses were proposed as experts. It can readily be observed that Courts have a concern with proposed experts who were involved in the investigation, for instance, in the seeking of search warrants or in the laying of charges.

[25] This was not the situation in the present case. Constable Baker was not involved in the investigation stage. He did not act in the obtaining of search warrants or the laying of charges.

[26] In the case of *R. v. Edison*, 2015 NBQB 74, the trial judge in a jury matter considered whether a long time RCMP officer could give expert evidence before the jury in a *CDSA* trial (para 49):

...the proposed testimony of Staff Sergeant Tomeo and his background as a career RCMP drug enforcement officer do not come together to warrant exclusion of his testimony on the basis of inherent intolerable bias. There are measures that must be taken in any jury trial to remind the jury that the findings of fact and the verdict are their decisions and not that of the expert or experts. That will be done in this instance.

[27] In the present case the proposed expert was not a member of the enforcement unit or detachment which conducted this investigation.

[28] I have reviewed a number of cases dealing with this issue including:

R. v. Edison, 2015 NBQB 74;

R. v. He, 2010 BCPC 457;

R. v. Jacobs, 2014 ABCA 172;

R. v. Tremblett, 2012 NSPC 121;

R. v. Klassen, 2003 MBQB 253;

Sturgeon v. R., 2006 NBCA 66;

R. v. L.K., [2011] O.J. No. 2553 (S.C.).

The case law makes clear that an RCMP officer can be qualified to give expert evidence in a case which had been investigated by the RCMP. However, if the Officer was involved in the investigation or from the unit or detachment which was responsible for the investigation, this can raise real concern for a reviewing Court. Each situation must be evaluated on its own facts.

[29] It is not disqualifying that Constable Baker has never been previously qualified. I do accept that where a witness is being qualified for the first time it is natural for the Defence to apply a more rigorous review and higher degree of scrutiny. This would be reasonable.

[30] After weighing all the evidence and submissions I have concluded that Constable Baker does meet the test for qualification on both the expertise and lack of bias elements. I do, however, want to consider the statement of qualifications.

[31] Courts have repeatedly emphasised the importance of tailoring the qualification statement to the particulars of the expert and the case.

[32] This issue was discussed in oral submissions. I have concluded the proposed qualification statement will be altered as follows:

An expert qualified to give opinion evidence with respect to the illicit trade in hydromorphone including common jargon, valuation, methods of acquisition and distribution.

[33] The motion to qualify in these terms is allowed. Any subsequent analysis will go to weight and applicability of the opinion.

Hunt, J.