SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Dennis*, 2023 NSSC 338

Date: 20231019
Docket: CRK 508588
Registry: Kentville

Between:

His Majesty the King

Applicant

v.

Devyn Adam Dennis

Respondent

D E C I S I O N

Judge:	The Honourable Justice James L. Chipman
Heard:	October 19, 2023, in Kentville, Nova Scotia
Written Decision:	October 23, 2023
Counsel:	Peter Craig, K.C. and Robert Kennedy, for the Applicant
	Zebedee Brown, for the Respondent

By the Court (orally):

INTRODUCTION

[1] This is my decision with respect to the Crown's application to have Mr. Brown removed as counsel for Mr. Dennis. In advance of providing my decision I have the benefit of counsels' oral submissions together with the file materials. With respect to the file contents, I place particular emphasis on the following:

1. pre-trial conference records dated May 16 and 17, 2023;
2. Crown's brief of law and book of authorities filed September 1, 2023;
3. transcripts of pre-trial conferences dated June 19 and July 23, 2024, filed September 7, 2023;
4. the prior appearance before me (inclusive of the transcript) held September 7, 2023;
5. Defence's brief of law and book of authorities filed September 28, 2023;
6. Crown's rebuttal brief and book of authorities filed October 4, 2023;
7. Emails to the Court from Defence counsel and from Crown counsel to Defence counsel (copied to the Court) dated October 12 and 13, 2023.

BACKGROUND

[2] Mr. Dennis is charged with offences contrary to the *Criminal Code*, R.S.C., 1985, c. C-46 (as amended), ss. 348(1)(a), 182(b), 434 and 139 x 2. The Crown has provided a brief summary of the allegations as follows:

> On May 24, 2020 Darroll Atwell and Devyn Dennis, together with the deceased Robert Campbell, travelled together in Robert Campbell's van to the residence of Rebecca Moir (and guest Brandon Doucette) at 1997 Ridge Road. At approximately 5 a.m., the three forced entry into the Ridge Road location with a plan to steal from Rebecca Moir. Shortly after their entry into the house Robert Campbell was shot in the chest. It is believed he died very quickly.
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> Darroll Atwell and Devyn Dennis fled the residence with the firearm used to shoot Robert Campbell. They dragged Robert Campbell to his vehicle and placed him in the backseat. Devyn Dennis and Darroll Atwell drove to retrieve Darroll Atwell's vehicle from his residence. The two subsequently drove in tandem (stopping for

> gas) to an area in Ste. Croix, Hants County ("Rocks Road"). Using camping fuel/kerosene they lit Campbell's van on fire with his body still in the backseat.
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> After leaving the scene of the fire, the pair drove to a secondary location (Forsythe Road, Wolfville) and hid the firearm that they had removed from the scene at 1997 Ridge Road in a wooded area.
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> A number of witnesses were interviewed during the course of the investigation. Among these was Anthony Kelly. On June 19, 2020 RCMP Cst. Stephen Currie spoke with Mr. Kelly who did not wish to give a recorded statement; however, he told the officer he was fine with notes being taken. These notes were provided as an attachment to the Crown's rebuttal brief. From the notes Mr. Kelly alleged that Mr. Dennis had recounted the nature of his involvement in the offences to him.
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> On June 22, 2020, Mr. Kelly provided an audio statement to the police. The transcript of this statement is provided as an attachment to the Crown's rebuttal brief. In his recorded statement, Mr. Kelly says what Mr. Dennis had told him about his involvement in the offences. What Mr. Dennis allegedly told Mr. Kelly is inculpatory.

[3] On July 15, 2022, the Crown forwarded to Defence counsel a list of 125 witnesses and their contact details as part of "the resolution reached with counsel with respect to redactions within the disclosure materials concerning witness addresses and contact particulars." This lengthy witness list included Mr. Kelly. Unbeknownst at the time to the Crown, Mr. Kelly died of terminal cancer on August 23, 2021.

[4] On May 4, 2023, the Crown provided a witness list to the Court and Defence counsel with the list of witnesses the Crown intended to call at the trial, beginning May 23, 2023. The list of witnesses included Mr. Kelly as the Crown did not become aware of his death until later in May, subsequent to filing their witness list.

[5] On May 16, 2023, the parties participated in a pre-trial conference. By this time, the Crown had just learned of Mr. Kelly's death. In her pre-trial conference record Justice Gatchalian notes as follows at p. 2 under the heading "Deceased Witness / *Bradshaw* Application":

> 7. Anthony Kelly, who appears on the Crown witness list, is deceased. The Crown only recently learned about Mr. Kelly's passing. The Crown may make an application to rely on Mr. Kelly's recorded statement for the truth of its contents.
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> 8. If the Crown decides to make such an application, Mr. Brown might give evidence on the application with respect to threshold reliability, as he spoke to Mr. Kelly before his death. Mr. Brown's evidence might also be relevant to the substantive reliability of the statement. This raises the issue of whether Mr. Brown

> may have another lawyer take carriage of the case during his evidence, while Mr. Brown remains counsel of record for the rest of the trial, or whether Mr. Brown will have to withdraw as counsel of record. The Crown also raised the possibility that Mr. Brown may be a compellable witness for the Crown.
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> 9. The Crown will notify the Court and Defence counsel on May 17, 2023, whether it intends to make the application. Mr. Brown will reply shortly thereafter to notify the Crown and the Court whether he intends to testify on the *voir dire.* The Court will then attempt to convene a telephone conference to determine the impact, if any, of the parties' decisions on the trial.

[6] The next day there was a follow-up pre-trial conference and in her pre-trial conference record, Justice Gatchalian noted:

> 1. Mr. Craig informed the Court that the Crown intends to bring an application to introduce into evidence the statement of Anthony Kelly (deceased) for the truth of its contents.
> 2. Mr. Brown informed the Court that Mr. Dennis will call evidence regarding a conversation Mr. Brown had with Mr. Kelly, and as a result Mr. Brown is in a conflict and cannot continue as Mr. Dennis' trial counsel.
> 3. The previously set May, June and July trial dates are therefore adjourned without day.
> 4. Mr. Brown will continue to assist Mr. Dennis to find new counsel and Mr. Brown will continue to attend appearances. Mr. Dennis is to make best efforts to secure counsel before the next Pre-Trial Conference.
> 5. Mr. Brown is to notify the Crown and the Court if Mr. Dennis retains new counsel prior to the next Pre-Trial Conference.
> 6. The Pre-Trial Conference scheduled for May 18, 2023 is vacated.
> 7. A Pre-Trial Conference will take place on June 19, 2023 at 9:30 a.m. to be held by Teams.
> 8. Mr. Dennis' release conditions continue, and he is required to attend the next Pre-Trial Conference.

[7] Given that the Defence put on the record that they intended to call evidence about Mr. Brown's conversation with Mr. Kelly, Justice Gatchalian stated during the May 17, 2023 pre-trial conference:

> THE COURT: Okay. Okay, well, in light of the fact that Mr. Dennis intends to call evidence about Mr. Brown's conversation with Mr. Kelly, before Mr. Kelly's death, and that places Mr. Brown in a conflict for the trial, meaning that he can no longer represent Mr. Dennis in the trial of this matter. Mr. Dennis will have to seek new counsel and we will have to adjourn the trial dates.

[8] The approximately 20 day trial, which had been scheduled to begin on May 23, 2023 was then adjourned. It was subsequently re-scheduled to begin November 14, 2023 for a similar length of time.

[9] A further pre-trial hearing was held on June 19, 2023, and Mr. Brown indicated that there was some progress in Mr. Dennis obtaining new counsel; similar submissions were made at subsequent pre-trial conference on July 13, 2023.

[10] On July 24, 2023, the scheduling of trial dates was turned over to Associate Chief Justice Duncan who presided over the pre-trial conference. Mr. Brown indicated at that time that there was a change in circumstances:

> BROWN: …So I've gone over this with Mr. Dennis and, and I've suggested to him that he needed to – or he should perhaps think about trade-offs that are involved here. If he were to continue on this path he could be looking at, you know, another year before his trial, if not longer, having new counsel come onboard. And, and against that his option is to not call me as a witness so that I would not play that sort of a role in the trial And that's what he's decided. He's decided that he's, he's going to be content to go forward on this *Bradshaw* application without the advantage, whatever it may be, of what I would have to say about my contact with this witness.
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> [underlining added]

[11] In the Defence brief the rationale for Mr. Dennis' change of mind is described as follows:

> With respect to Mr. Dennis's decision to change course in July 2023, Defence counsel told the Court that Mr. Dennis had decided to forego reliance on Defence counsel's evidence because it appeared likely to delay the trial for a year or more, and because he had considered other sources of evidence that he could bring forward on the *Bradshaw* application, including a new witness statement obtained from Mr. Kelly's son, Devan Townsend, on May 15, 2023, which directly related to the content of Mr. Kelly's statement to police.

[12] With respect to the *Bradshaw* hearing, the Crown has indicated that it is the sole anticipated *voir dire* and that to provide context and for efficiency, that it ought to occur within the trial. Given my review of the file, I agree that it makes sense to proceed with the *Bradshaw voir dire* mid-trial.

ISSUE

[13] Having regard to the above, the issue comes down to whether Mr. Brown should have been permitted to continue as solicitor of record.

POSITION OF THE PARTIES

Crown

[14] The Crown emphasizes that despite the Defence's change of course there is no suggestion that the evidence of Mr. Brown is irrelevant or immaterial. To the contrary, the Crown submits that by declaring a conflict which resulted in the adjournment of the lengthy trial in May, Mr. Brown went on record as having evidence relevant to the reliability of the statement of a deceased witness. As the statement of the deceased witness concerns a confession, the Crown submits that it is of great import to the Crown's case.

[15] The Crown points out that there has been no wavier by Mr. Dennis of his right to have access to the evidence, nor has independent legal advice been obtained. The Crown asserts that in the event that the statement is admitted at the threshold stage and ultimately relied upon, without the benefit of hearing and testing the evidence of Mr. Brown, confidence in the result would be undermined by the looming question of "what if Mr. Brown's evidence would have made a difference to the Court's assessment?"

Defence

[16] The Defence points out that the bare fact that a lawyer interviewed a witness does not result in a disqualifying conflict. The Defence goes on to argue that the Crown has not shown that there is any realistic risk of a conflict developing during the *voir dire*.

[17] The Defence submits that the Crown application is based on "speculation, vague what-ifs, and pre-trial conference transcript excerpts taken out of context." The Defence states that by attempting to remove Defence counsel rather than working with the Defence to overcome the problems caused by the late *Bradshaw* notice, the Crown is trying to "pass responsibility for its negligence onto the shoulders of Mr. Dennis." They add that granting the application would have significant financial consequences and would cause Mr. Dennis to endure additional delay, another year of highly restrictive release conditions, and to have to start again at square one.

[18] The Defence suggests that the conflict is cured by virtue of the fact that after weighing their options, and in order to procure a speedier trial date, they will forego calling Mr. Brown as a witness.

GUIDING LAW

[19] Courts possess the inherent jurisdiction to remove or disqualify counsel for a conflict of interest. Albeit in a civil context, the Supreme Court of Canada provided this direction almost 35 years ago: “Their jurisdiction stems from the fact that lawyers are officers of the court and their conduct in legal proceedings which may affect the administration of justice is subject to this supervisory jurisdiction” (*MacDonald Estate v. Martin*, [1990] 3 SCR 1235, para. 18).

[20] In a criminal prosecution the right to counsel of choice is a *Charter*-protected right of the accused. This was recognized in the earliest *Charter* cases and repeatedly re-affirmed, including in the recent decision in *R. v. Yates*, 2023 SKCA 47:

> [55] Case law also supports the view that the right to retain counsel of choice is inferentially entrenched in ss. 7, 10(b) and 11(d) of the *Charter*: see *R v Robillard* (1986), 28 CCC (3d) 22 (Ont CA); *R v McCallen* (1999), 116 OAC 308 (CA); and *R v Willett*, 2018 ONSC 5031. As the Ontario Court of Appeal discussed in *McCallen*, "The solicitor-client relationship is anchored on the premise that clients should be able to have complete trust and confidence in the counsel who represent their interests" (at para 34). Thus, "[i]t therefore follows that the accused's right to control the conduct of the defence free from unjustified state interference is a significant principle underlying the constitutional protection of the right to choice of counsel" (David Layton, "The Pre-Trial Removal of Counsel for Conflict of Interest: Appealability and Remedies on Appeal" (1999) 4 Can Crim L Rev 25 (WL) at 18).

[21] It is recognized that the right to counsel of choice is of fundamental importance to our system of justice; however, it is not an absolute right and is subject to limitations (*R. v. Downey*, 2013 ONSC 138, at para. 29).

[22] In considering the merits of a disqualification order, “the court must balance the individual’s right to select counsel of his own choice, public policy and the public interest in the administration of justice and basic principles of fundamental fairness” (*Regina and Speid*, [1983] 43 OR (2d) 596 (CA) at page 3).

[23] In *R. v. Widdifield et al*. (1995), 25 OR (3d) 161 (CA) at page 9, the Ontario Court of Appeal framed the issue in the following way (albeit in the context of co-accused):

> …Where the issue is raised at trial, the court must be concerned with actual conflicts of interests and potential conflicts that may develop as the trial unfolds. In deciding whether counsel should be permitted to act for co-accused, trial judges must, to some degree, speculate as to the issues which may arise and the course the trial will take. The trial judges' task is particularly difficult since they cannot be privy to the confidential discussions which may have passed between the clients and counsel and which may reveal the source of potential conflicts. Given those circumstances, trial judges must proceed with caution and when there is any realistic risk of a conflict of interests they must direct that counsel not act for one or perhaps either accused.

[24] The threshold for the removal of counsel has been articulated in many ways, including that there be a "compelling reason", or "good cause" (*R. v. Bogiatzis*, 2002 CanLII 49648 (ON SC).

[25] In *Bogiatzis*, counsel was not removed despite evidence that he unwittingly helped the co-accused further their conspiracy to traffic drugs. Justice Nordheimer wrote:

> [14] Mr. Justice Doherty in *R. v. W.(W.), supra*, said that what must be established in order to justify a disqualification order is the presence of an actual conflict of interest or a "realistic risk" of a conflict developing. In order to consider whether there is a realistic risk such as to justify a disqualification order, it seems to me that there is an obligation on the party seeking the disqualification, in this case the Crown, to provide a sufficient evidentiary, basis upon which the court could conclude that a realistic risk exists before counsel is called upon to refute that suggestion. This requirement is put as follows in Proulx and Layton, Ethics and Canadian Criminal Law (1st edition, 2001) at p. 295:
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> > The qualifying words "any realistic" would seem to mean that there must be some evidentiary foundation from which risk can reasonably be said to flow. Mere conjecture and bare possibility is simply not sufficient to require the removal of counsel.
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> [underlining added]

[26] A lawyer cannot act as counsel and a witness in the same proceeding. This is settled law as noted in *Bogiatzis* at paras. 21 – 23:

> [21] It is clear that a person cannot be both counsel and a witness in the same proceeding. This principle is established in cases such as *R. v. Baxter* (1975), 27 C.C.C. (2d) 96 (Ont. C.A.) at p. 117, where Martin J.A. quoted the principle from *Halsbury's Laws of England* as follows:
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> > The rule is stated in 3 Hals., 4th ed., p. 653, para. 1187, as follows:

> "A barrister should not act as counsel and witness in the same case; and he should not accept a retainer in a case in which he has reason to believe he will be a witness, and if, while engaged in a case, it becomes apparent that he is a witness on a material question of fact, he ought not to continue to appear as counsel if he can retire without jeopardizing his client's interests, but if he continues he is not debarred from going into the witness box and being cross-examined."

[22] The principle is also established by the Rules of Professional Conduct of the Law Society of Upper Canada. Rule 4.02(2) states:

> Subject to any contrary provisions of the law or the discretion of the tribunal before which a lawyer is appearing, a lawyer who appears as advocate shall not testify before the tribunal unless permitted to do so by the rules of court or the rules of procedure of the tribunal, or unless the matter is purely formal or uncontroverted.

[23] If there is even the prospect of Mr. Orr being a witness, is that sufficient to invoke the application of this principle? I believe that it is. In my view, it falls by analogy within the statement of Mr. Justice Doherty, to which I referred above from *R. v. W. (W.), supra*, which requires me to consider not only known situations but potential situations. Therefore, if there is a realistic risk that Mr. Orr may be a witness then the court must consider an order disqualifying Mr. Orr from acting.

ANALYSIS AND DISPOSITION

[27] Justice Gatchalian extensively pre-trialed this matter in the lead up to the (three times) previously scheduled trial. Within a week of the scheduled start of the trial last spring, there were two significant pre-trial conferences. Justice Gatchalian provided timely pre-trial conference records to counsel noting at the end of the memoranda (which were sent to counsel and Mr. Dennis); "If there are any errors or omissions in this memorandum, counsel are asked to notify the Court immediately." I previously quoted the relevant parts of these records. Neither counsel took issue with Justice Gatchalian's summaries of what transpired as there is no record of counsel (or Mr. Dennis) notifying the Court.

[28] Having regard to the transcript from May 17, 2023 it is clear that the trial scheduled to start on May 23 was then adjourned without day on account of Mr. Dennis's wish to call Mr. Brown "regarding a conversation Mr. Brown had with Mr. Kelly, and as a result, Mr. Brown is in a conflict and cannot continue as Mr. Dennis' trial counsel." The within quote, taken from Justice Gatchalian's second enumerated point in her May 17, 2023 memorandum is crystal clear. It is obvious from reading the transcript that her note arose from what Mr. Brown placed on the record during the pre-trial conference.

[29] Mr. Kelly died about 14 months after providing his recorded statement to the police on June 22, 2020. Mr. Brown met with Mr. Kelly following his police statement. On May 17, 2023 Mr. Brown advised the Court that his conversation with Mr. Kelly was relevant to the threshold reliability of the statement. Mr. Brown declared a conflict and this resulted in the adjournment of the spring trial.

[30] Just over two months later Mr. Brown advised Associate Chief Justice Duncan on July 24, 2023 that Mr. Dennis had decided to go ahead without calling Mr. Brown as a witness. This change of mind was made, the Court was told, due to Mr. Dennis' concerns that the trial would be further delayed "for another year" and that Mr. Dennis was "content" to go forward without "the advantage" of calling Mr. Brown. There was mention of another witness and in the Defence brief this person is revealed to be Mr. Kelly's son, Devan Townsend, whom police obtained a statement from on May 15, 2023.

[31] The Defence argues that the within application lacks an evidentiary foundation and is based on speculation. Given the totality of the record, I specifically reject this notion. Indeed, I am of the view that the application is founded on specifics and the record provides ample evidence of this. For example, we have the previously documented pre-trial conferences of May 16 and 17, 2023. Mr. Brown declared the conflict and his declaration must have been an important consideration because it resulted in the adjournment of the imminent, lengthy trial. The transcript reveals that Mr. Brown's evidence would go to the threshold reliability of a deceased witness who had given a critical statement inculpatory *vis-a-vis* Mr. Dennis. Mr. Brown declared this conflict notwithstanding that:

1. his client knew that the trial would be adjourned; and
2. he had the statement of Devan Townsend (taken on May 15, 2023).

[32] Two months later Mr. Brown went on record to state that his client had a change of heart; however, there is nothing new offered as a substantive rationale for this about-face. For example, nothing has been proffered to suggest that Mr. Brown's evidence had been overstated or irrelevant. To the contrary, it has emerged that Mr. Brown was in the process of arranging for someone to take another statement from Mr. Kelly prior to Mr. Kelly's death. This fact provides support to the Crown's submission that the Defence must have determined that the late Mr. Kelly's police statement needed to be re-visited. A fair reading of the statement confirms what the Court was told by all counsel; it is inculpatory *vis-à-vis* the accused.

[33] I have been provided with a number of authorities which have been highlighted by counsel. When I consider the guiding cases, I am mindful of the Court's overarching role to balance the individual's right to select counsel of his own choice, public policy, and the public interest in the administration of justice along with the basic principles of fundamental fairness.

[34] To my mind there is a compelling reason and good cause to remove Mr. Brown. The issue is squarely before the Court and not a potential conflict that might develop as the trial unfolds. Once the trial goes forward the described *Bradshaw* application will proceed. The evidence of the late Mr. Kelly is acknowledged to be critical. The transcript of the recorded statement confirms what all counsel placed on the record in prior appearances. If Mr, Kelly is to be believed, the accused confessed the crimes in question to Mr. Kelly.

[35] I cannot imagine that Mr. Brown ever could have thought that Mr. Kelly's evidence would not be critical. He obviously met with Mr. Kelly in the wake of his police statement. The Crown had Mr. Kelly's name on filed witness lists. Mr. Brown became aware of Mr. Kelly's death back in 2021. He chose not to inform the Crown. Since the Crown had no knowledge of the fact of Mr. Kelly's death until May, 2023, it obviously makes sense that they would not have given notice of a *Bradshaw voir dire*. As soon as the Crown learned of Mr. Kelly's death they confirmed to the Court during the May17, 2023 pre-trial conference that the *voir dire* was necessary. Mr. Brown then advised of his client's then position.

[36] We are now on the eve of Mr. Dennis' re-scheduled trial as it is set to commence in just under one month. The rationale for removing Mr. Brown has been clearly articulated by the Crown since Ms. MacDonald sketched the Crown's position out during our last appearance on September 7, 2023. Based on my review, the Defence filings have included nothing to ease the Court's concerns with regard to the conflict issue that was first recognized by Mr. Brown himself back in mid-May. The suggestion by Associate Chief Justice Duncan for Mr. Dennis to obtain independent legal advice has not been followed. This means that Mr. Dennis' decision to proceed is based on Mr. Brown's advice, alone. This is fraught with difficulty. As Associate Chief Justice Duncan said during the July 24, 2023 pre-trial conference:

> THE COURT: He, he should have it, I think, in order to ensure that at the end of the day if this is how it does proceed that there could be no suggestion on his part that there was an issue with his representation by you in the trial. Without that ILA, I think you leave yourself exposed and the trial exposed to allegations

> later that a decision was made for the wrong reasons to get the trial done as opposed to doing what should have been done, if you can gather my meaning.

[37] At this time, Mr. Brown agreed with the "excellent suggestion"; unfortunately to this day it has not been followed through with.

[38] The Court has not been provided with an affidavit (or anything) attesting to new information coming to the Defence's attention in the roughly ten weeks between when Mr. Brown declared a conflict and when he said that he had instructions to carry on as counsel. While the Defence brief discloses that the late Mr. Kelly's son gave a statement (presumably about the reliability of his father's evidence), the date of the statement pre-dates the appearances before Justice Gatchalian in mid-May.

[39] In all of the circumstances, I have grave concerns such that if I were to deny the Crown's application, the matter would then proceed and Mr. Dennis' defence could be significantly compromised. While Mr. Dennis has recently changed his mind and said that he is content without calling Mr. Brown, the Court is left to wonder about (the perhaps very real likelihood) that Mr. Dennis will re-visit this issue in the lead-up to the trial, during the trial or post verdict.

[40] The threat of a reconsideration of the import of Mr. Brown's evidence and the resulting havoc which would result is a very real possibility. It is in no way speculative and represents a real risk. In the result, I believe that the Court must intervene now and remove Mr. Brown as Mr. Dennis' counsel. While delay will no doubt immediately result, as noted by Justice Crerar in *R. v. Downey, 2020 BCSC 1794* (para. 72), "it is better to recognize the significant potential consequences of a conflict arising mid-trial, or being asserted on appeal after trial, and avoid it altogether." To this I would add that it is better now, approximately one month before the scheduled trial, to recognize the likely risk of forging ahead with Mr. Brown representing Mr. Dennis. While Mr. Dennis may think he is making the right decision with Mr. Brown as his counsel, he has not had independent legal advice in this critical area. Given this and in all of the circumstances I must allow the Crown's application and forthwith remove Zeb Brown as counsel to Devyn Dennis in this matter.

Chipman, J.