NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Brown*, 2017 NSCA 44

Date: 20170526
Docket: CAC 443021
Registry: Halifax

Between:

Bernard John Brown

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Hamilton
Appeal Heard:	January 17, 2017, in Halifax, Nova Scotia
Subject:	Section 185(1)(e) of the *Criminal Code*; Whether the appellant was properly named as a "known" person in a wiretap warrant.
Summary:	The appellant's telephone and pager communications were intercepted pursuant to a wiretap warrant in which he was named as an "Other Known Person". He challenged the admissibility of the intercepts at his trial on the basis his s. 8 *Charter* rights had been infringed because his identity was known to the police at the time the authorization was sought, but the affidavit supporting the application for the warrant did not provide reasonable grounds to believe the interception of his communications might assist the investigation of the offence. The reviewing judge upheld the warrant and convicted the appellant.

Issues:

1. Did the reviewing judge err in law in finding that the appellant was properly named in the wiretap warrant as a "known person" within the meaning of s. 185(1)(e)?

2. If so, should the appellant's intercepted communications be admitted under s. 24(2) of the *Charter*?

3. Were the judge's verdicts on the cocaine offences unreasonable or unsupported by the evidence?

Result:

Appeal dismissed. Given the information set out in the supporting affidavit, the low threshold for naming a person as a known person in a wiretap warrant and the deference owed to the issuing judge by the reviewing judge, the reviewing judge did not err. Reconsidering and reweighing the evidence as this Court is to do, the appellant's convictions are supported by the evidence and are reasonable within s. 686(1)(a) of the *Code*.

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Judges:	Beveridge, Hamilton, Farrar JJ.A.
Appeal Heard:	January 17, 2017, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Hamilton, J.A.; Beveridge and Farrar, JJ.A. concurring
Counsel:	Luke Craggs, for the appellant David W. Schermbrucker, for the respondent

Reasons for judgment:

[1] The appellant, Bernard John Brown, appeals his convictions for trafficking and possession for the purpose of trafficking in cocaine and for trafficking and possession for the purpose of trafficking in marijuana on the basis Associate Chief Judge Alan T. Tufts of the Nova Scotia Provincial Court, the "reviewing judge", erred by finding his s. 8 *Charter* rights were not infringed when his private communications were intercepted as a result of wiretap warrants. The appellant also says the reviewing judge erred by making unreasonable decisions or ones that cannot be supported by the evidence on the cocaine offences.

[2] The appellant says that considering the wording of s. 185(1)(e) of the *Criminal Code* and the relevant case law, he was improperly named as an "Other Known Person" in the wiretap warrant targeted at other persons that was issued on July 9, 2012 by Chief Justice J. P. Kennedy of the Supreme Court of Nova Scotia, the "issuing judge".

[3] Section 185(1)(e) requires the affiant to provide, among other things, the names, "if known, of all persons, the interception of whose private communications there are reasonable grounds to believe may assist the investigation of the offence". The appellant says the affidavit of Constable Craig Foley, filed in support of the application for the Kennedy warrant, did not indicate reasonable grounds to believe the interception of his private communications may assist the investigation of the offence.

[4] A second wiretap warrant was granted by Justice Arthur W. D. Pickup on September 5, 2012 in which the appellant was now a targeted subject and as such was named as a "Principal Known Person" along with Messrs. Laviolette, Phillips, Phillips and Durling. The parties agree, as do I, that the validity of the Pickup warrant is dependant on the validity of the Kennedy warrant, as it rested on information obtained pursuant to the Kennedy warrant.

[5] If we find the warrants are valid, the appellant challenges only his cocaine convictions on the basis they are unreasonable or not supported by the evidence. He argues the reviewing judge failed to properly consider that the coded word "white" used in the intercepts may have been referring to cigarettes, not cocaine, and that the relatively small amount of cocaine found may have been for personal use.

[6] For the reasons that follow, I would dismiss the appeal.

Facts

[7] In 2012, the RCMP conducted an investigation into suspected drug trafficking activities in the Annapolis Valley. As part of the investigation, Cst. Foley swore an affidavit in support of his application for the Kennedy wiretap warrant targeted at the "Principal Known Persons": Joseph Andre "Andy" Laviolette, Gerald "Gerry" Wayne Phillips, Gerald Stephen Phillips and Trevor Dwayne Durling. In paragraph 6 he swore:

> Through confidential source information, investigation and physical surveillance conducted by myself and other police officers, I do believe the following principal known persons are involved in the listed offences. Other known persons are associated to the principal known persons in some significant or criminal manner, as will be shown in the remainder of this affidavit. There are reasonable grounds to believe that the interception of the private communications of both principal known and other known persons may assist the investigation of the offences . . .

[8] Cst. Foley set out that on June 4, 2009 Source "C" told a police officer: Mr. Laviolette traveled to Ontario for cocaine and supplied kilogram amounts of it to Mr. Brown; the location where the transactions took place; Mr. Brown was a "major cocaine dealer and supplie[d] most of the Valley"; Mr. Brown used a pager to coordinate his drug deals; Mr. Laviolette used the pager to notify Mr. Brown when he had cocaine or ecstasy to deliver to him; Mr. Brown's pager number and Mr. Brown carried his cocaine and marijuana in a gym bag.

[9] Cst. Foley set out in his affidavit the results of a Canadian Police Information Centre query where he learned Mr. Brown had drug offences for possession and possession for the purpose of trafficking. Cst. Foley also described the police having seen Mr. Laviolette's car on May 12, 2012 in the vicinity of what the police determined was Mr. Brown's home address.

[10] His affidavit indicated in paragraph 118 that the pager number Source "C" provided for Mr. Brown in 2009 showed up on the list of calls from the residence where Mr. Laviolette lived on April 19, 2012.

[11] In addition, the affidavit indicates in paragraph 22 that on March 7, 2012 and June 20, 2012 Cst. Foley sought information regarding Source "C" from other police officers and was told that Source "C": associated freely with persons involved in criminal activity; had been acting as a confidential informant since

June 2009; had provided information on a total of 11 occasions dealing with illegal drug activity, firearms offences and illegal tobacco; was financially motivated to provide information to the police; had been paid for information provided; had not been used in obtaining search warrants to date, but had been confirmed by police surveillance and database queries; had a criminal record and that the information provided by Source "C" referred to in the affidavit was based on direct observations and conversations with the persons subject to the information, unless otherwise stated.

[12] Based on Cst. Foley's affidavit, the issuing judge granted the Kennedy warrant authorizing the interception of the communications of the "Principal Known Persons" (3a) and the interception of "any other person intercepted at any place in paragraph 4 or intercepted over any device in paragraph 5" (3c). The places where interception could occur were the residences and vehicles of the four "Principal Known Persons" (4a, b), together with other places there were reasonable grounds to believe were being resorted to or used by the four "Principal Known Persons" (4c). The "devices" – basically mobile phones – over which communications could be intercepted were those subscribed to or believed on reasonable grounds to be used by any of the "Principal Known Persons" (5).

[13] During the 60 day term of the Kennedy wiretap authorization, the appellant communicated with a number of the "Principal Known Persons", which communications were intercepted on phones or devices associated with the "Principal Known Persons". Six such communications were then relied on in the affidavit used to obtain the Pickup wiretap authorization. Additional communications involving the appellant were intercepted during the term of the Pickup authorization.

[14] Intercepted communications involving the appellant and Messrs. Laviolette, Phillips, Phillips and Durling; surveillance; the observation of what the police thought was a drug transaction between the appellant and another person on October 3, 2012; and other evidence led to the RCMP making arrests and searches and seizures involving the appellant and others on October 3, 2012.

[15] The appellant was interviewed by the police and his car and house were searched. The searches yielded many items of interest to the police, including 1,800 grams of marijuana, approximately 24 grams of cocaine together with plastic brick packaging, drug paraphernalia and significant amounts of cash.

[16] At trial, the appellant challenged the validity of the wiretap warrants on the same basis he raises on appeal – that he was improperly named as an "Other Known Person" and hence his intercepted communications could not be introduced into evidence.

[17] In his unreported March 12, 2014 decision, the reviewing judge upheld the validity of the warrants. He reasoned:

> Basically, section 185 and 186 of the Criminal Code and the applicable jurisprudence requires that the Applicant for such an authorization establish, number one, that a specified crime has been or is being committed and, two, that the interception will afford evidence of a crime. Section 185 requires the supporting affidavit to include the particulars of known persons.
>
> The threshold for describing a person as known is modest. It is only necessary that there be reasonable and probable grounds to believe that the intercept of that person may – again under "may" – assist in the investigation. The investigative necessity requirement relates to the affidavit as a whole, that is to the investigation as a whole, not to each person's known involvement.
>
> I agree, again, with the Crown's submission that a "last resort" test is not necessary to meet this requirement. Clearly both ITOs establish that a crime has been or is being committed, that is trafficking in a controlled substance. It is clear as well that the interception will afford – or the proposed interception will afford evidence of this crime.
>
> The dispute appears to be -- to centre around the inclusion of the Accused, Brown, as a named person pursuant to Section 185(1)(E) of the Criminal Code. As an aside, I agree with the Crown that there is no distinction between principal known or other known, it is a Crown construct, as the Crown attorney describes it. The focus here appears to be on whether the accused, Mr. Brown, should be included as a known person.
>
> The Accused argues that the information from Source "C" in the ITOs is too limited, it is dated and that the source was not reliable. The Accused appears to argue that there must be reasonable and probable grounds to connect the Accused, Brown, to the investigation. On this latter point I agree with the Crown, there is nothing in the statutory provisions on the jurisprudence that requires probable cause, or investigative necessity for that matter, as a condition precedent to each known person.
>
> Those requirements apply to the investigation as a whole and not each known person. It is enough if the Crown can establish that the intercept or that the Accused, Brown's, private communication may – underline "may" – assist in their investigation.
>
> . . .

> **I agree that the Source "C" information is dated and limited, but it is sufficient, in my opinion, to allow the issuing judge to conclude it is sufficiently reliable to be used by him to draw the required conclusion. At paragraph 118, Source "C" connects the Accused, Brown, to the subject of the investigation.** This is something the issuing judge was entitled to do, and it's not for me as a reviewing judge to overrule this conclusion unless . . . no . . . basis existed. I have concluded that such is not the case.
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> . . .
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> . . . the two wiretap authorizations are valid, there was no Section 8 violation . . .
>
> [Emphasis added]

[18] During his trial, opinion evidence was offered by Corporal Charla Keddy on the meaning of the coded words used in the intercepts, including the meaning of the word "white". Her evidence that the word "white" referred to cocaine, not cigarettes, was accepted by the reviewing judge.

Issues

[19] The issues to be resolved in this appeal are:

1. Did the reviewing judge err in law in finding that the appellant was properly named in the Kennedy authorization as a "known person" within the meaning of s. 185(1)(e)?

2. If so, should the appellant's intercepted communications be excluded under s. 24(2) of the *Charter*?

3. Were the judge's verdicts on the cocaine offences unreasonable or unsupported by the evidence?

Standard of Review

[20] In reviewing the decision of the reviewing judge, we must remember his role in reviewing the issuing judge's decision and this Court's role on appeal from the decision of the reviewing judge.

[21] Charron J.A., as she then was, set out the role of a reviewing judge and subsequently of a court of appeal, in *R. v. Grant* (1999), 132 C.C.C. (3d) 531 (Ont. C.A.), leave to appeal to the Supreme Court of Canada ref'd, [1999] S.C.C.A. No. 168:

> [17] The role of Corbett J. as the reviewing justice is also well established. Sopinka J., in writing for the majority in *R. v. Garofoli*, *supra* at 188 set out the test in these often-quoted words:
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> > The reviewing judge does not substitute his or her view for that of the authorizing judge. If, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere. In this process, the existence of fraud, non-disclosure, misleading evidence and new evidence are all relevant, but, rather than being a prerequisite to review, their sole impact is to determine whether there continues to be any basis for the decision of the authorizing judge.
>
> [18] This court is also a reviewing court and the test in *Garofoli* is applicable on this appeal. In addition, the usual deference is owed to the findings of the trial judge in her assessment of the record "as amplified on the review" and her disposition of the s. 8 application. In the absence of an error of law, a misapprehension of the evidence or a failure to consider relevant evidence, this court should not interfere with the trial judge's conclusion.

[22] The first issue, did the reviewing judge err in finding the appellant was properly named in the Kennedy authorization as a "known person" within the meaning of s. 185(1)(e), is a question of law (*R. v. Chesson*, [1988] 2 SCR 148, p. 165). As such, the standard of review is correctness. There is no standard of review on the second issue as the reviewing judge did not conduct a s. 24(2) analysis, so we consider it for the first time. The standard of review on the third issue is whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered (*R. v. Villaroman*, 2016 SCC 33, para 55).

Analysis

Did the judge err in law in finding that the appellant was properly named in the Kennedy authorization as a "known person" within the meaning of s. 185(1)(e)?

[23] The "naming" requirement for wiretap warrants comes from the language of ss. 185 and 186 of the *Criminal Code*. Section 185(1)(e) requires that the affidavit accompanying the application for an authorization to intercept private communications set out:

> (e) **the names**, addresses and occupations, **if known, of all persons, the interception of whose private communications there are reasonable grounds to believe may assist the investigation of the offence**, a general description of the nature and location of the place, if known, at which private communications are proposed to be intercepted and a general description of the manner of interception proposed to be used;
>
> [Emphasis added]

[24] Section 186(4)(c) provides that an authorization shall:

> (c) state the identity of the persons, if known, whose private communications are to be intercepted, generally describe the place at which private communications may be intercepted, if a general description of that place can be given, and generally describe the manner of interception that may be used;

[25] The seminal case on the standard for naming a "known" person is *R. v. Chesson*, [1988] 2 SCR 148, also frequently known as *Vanweenan* after the name of the co-accused who raised the naming issue. In that case, Ms. Vanweenan was not named in the authorization despite her identity being known to the police at the time the authorization was sought. The Court refused to allow her intercepted communications to be introduced because she was known to the police at the time of the application but was not named.

[26] Justice McIntyre, for the majority, considering a predecessor section to s. 185(1)(e), said:

> [20] How is it to be decided whether a particular person is known or unknown for the purposes of Part IV.1 of the *Code*? In my opinion, the answer to this question is to be found in Part IV.1 itself. The starting point is s. 178.12(1)(e) of the *Code*, which sets out the two pre-conditions to be met before a person may be lawfully identified and named in an authorization and thus be a known person. The first and most obvious condition is that the existence of that person must be known to the police. Second, and equally important, however, is the additional requirement that the person satisfy the standard of being one "the interception of whose private communications there are reasonable and probable grounds to believe may assist the investigation of the offence". If at the time the police apply for a judicial authorization a person meets both these criteria, he will be a known person and therefore, if the interceptions of his communications are to be admitted against him, he must be named in the authorization as a target for interception. If he is not named his interceptions are not receivable since there is no authority to make them. A "known" person, then, for the purposes of Part IV.1 of the *Code* is one who satisfies the two criteria in s. 178.12(1)(e).

> [21] An unknown person, therefore, is a person who does not meet these conditions at the time the police apply for an authorization. Accordingly, for the Crown to rely on a basket clause to introduce interceptions of private communications in evidence, they must be made by one whose existence was not known to the police at the time of the application for the authorization, or who was not at that time known to the police as one "the interception of whose private communications there are reasonable and probable grounds to believe may assist the investigation of the offence". It is common ground that in the present case the police knew of the existence of Vanweenan when they applied for the authorization. To decide, then, whether the Crown can tender her interceptions under the basket clause, it must be determined whether she was one "the interception of whose private communications there are reasonable and probable grounds to believe may assist the investigation of the offence". If she was, the Crown correctly concedes that it may not rely on the basket clause to tender her private communications for she does not qualify as an unknown person: see *R. v. Crease (No. 2)* (1980), 53 C.C.C. (2d) 378 (Ont. C.A.); *R. v. Blacquiere* (1980), 57 C.C.C. (2d) 330 (P.E.I.S.C.), and *R. v. Meidel* (1984), 11 C.C.C. (3d) 77 (B.C. Co. Ct.).
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> . . .
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> [25] In summary, then, Vanweenan is not a "known" person whose private communications could be intercepted under the authorization, because though she was a person whose identity was known to the police and was one "the interception of whose private communications there are reasonable and probable grounds to believe may assist the investigation of the offence", she was not named in the authorization. She is not an "unknown" person whose communications could be intercepted under the basket clause because her identity was known and, as has been noted, was one "the interception of whose private communications there are reasonable and probable grounds to believe may assist the investigation of the offence".

[27] In its factum, the Crown describes the practical effect of the *Chesson* decision:

> [42] The practical effect of *Chesson* (or again *Vanweenan* as the case is sometimes called) is that a wiretap authorization must name as known persons all those persons who are known to the police at the time and the interception of whose communications there are reasonable grounds to believe may assist in the investigation, failing which wiretaps may not be used against that person at trial. In consequence, wiretap authorizations now commonly name every person who arguably falls into this category. In order to distinguish the "targets" of interception from those who are known but not targeted, the Crown developed – as demonstrated by the authorization in the case at bar – two categories of known persons: Principal Known Persons, or targets, identified in paragraph 3.a of the typical authorization; and Other Known Persons, not targets, identified in

> paragraph 3.b of the typical authorization. Only the “Principal Known Persons” are actually targeted for wiretapping, though if others communicate with them on the identified devices or at the identified locations, they too will be intercepted. Following this practice, in the case at bar the appellant Bernard John Brown was considered to be a known person but not a target of interception, and accordingly he was named in paragraph 3.b of the authorization. (emphasis in original)

[28] In *R. v. Mahal*, 2012 ONCA 673, Justice Watt summarized the law on who constitutes a “named person”:

> [70] Section 185(1)(e) requires the affidavit to include “the names, addresses and occupations, if known, of all persons, the interception of whose private communications there are reasonable grounds to believe may assist the investigation of the offence”. The test for naming involves two components. The first has to do with identity and the second with investigative assistance. The requirements are cumulative. If a person meets both of these criteria at the time the authorization is sought, he or she is a “known” person. If it is later proposed to adduce that person’s intercepted private communications as evidence, that person must be described as a "known" person in the authorization: *R v. Chesson*, 1988 CanLII 54 (SCC), [1988] 2 S.C.R. 148, [1988] S.C.J. No. 70, at p. 164 S.C.R.
>
> [71] The threshold for describing a person as a “known” in the supportive affidavit is a modest one. Investigators need not have reasonable and probable grounds to believe that the person was involved in the commission of an offence being investigated. Provided investigators know the identity of the person and have reasonable and probable grounds to believe that the interception of that person’s private communications may assist the investigation of an offence, that person is a "known" for the purposes of s. 185(1)(e): *Chesson*, at p. 164 S.C.R.; *Schreinert*, at para. 43; and *R. v. Nugent*, 2005 CanLII 790 (ON CA), [2005] O.J. No. 141, 193 C.C.C. (3d) 191 (C.A.), at paras. 8-9.
>
> [72] The investigative assistance component in s. 185(1)(e) does not require that investigators determine (in advance) precisely how the “known” persons’ communications may assist in the investigation. Investigative omniscience or clairvoyance is unnecessary. It is enough that investigators have identified the person, and from the available evidence, have reasonable and probable grounds to believe that interception of his or her private communications may assist in their investigation: *Schreinert*, at para. 45.
>
> [73] For the purposes of s. 185(1)(e), a person is “unknown” if she or he does not meet the identity and investigative assistance requirements of the paragraph: *Chesson*, at p. 164 S.C.R. Admission of intercepted private communications of an "unknown" will depend on the inclusion and terms of a basket clause: *Chesson*, at pp. 164-65 S.C.R.

[29] As indicated, the threshold for describing a person as “known” in the supporting affidavit is a modest one, involving two components. The first has to do with identification and the second with investigative assistance. If a person meets both of these criteria at the time the authorization is sought, he or she is a “known” person.

[30] There is no dispute the appellant was known to the RCMP at the time Cst. Foley sought the Kennedy warrant. The challenge is to whether there were reasonable grounds to believe the interception of his private communications may assist the investigation of the offence. The appellant argues that the information in Cst. Foley’s affidavit was too vague, too dated and too likely to be fabricated by an anonymous criminal motivated by money to meet the low threshold. These are basically the same arguments he made before the reviewing judge.

[31] As can be seen from the portion of the reviewing judge’s decision set out in paragraph 17 above, the reviewing judge recognized that the Source “C” information was dated, but found it was sufficiently reliable to be used by the issuing judge to draw the required conclusion. The reviewing judge observed that the police had verified that the pager number provided by Source “C” was still registered to the appellant, and that that pager number had been recently called from one of the devices listed in paragraph 5 of the Kennedy warrant. The reviewing judge was also aware that Source “C” was financially motivated, as this was set out in paragraph 22 of Cst. Foley’s affidavit. He nonetheless concluded that there was a basis on which the issuing judge could have granted the authorization.

[32] Given the information set out in Cst. Foley’s affidavit, the low threshold for naming a person as a known person in a wiretap warrant and the deference owed to the issuing judge by the reviewing judge, I am satisfied the reviewing judge did not err.

[33] Accordingly, it is not necessary to consider the second issue, whether the evidence should be excluded, in any event, under s. 24(2) of the *Charter*.

Were the judge’s verdicts on the cocaine offences unreasonable or unsupported by the evidence?

[34] The test for determining whether a verdict is unreasonable or cannot be supported by the evidence is set out in *R. v. Murphy*, 2014 NSCA 91:

> [6] The test to be applied in assessing a complaint that a verdict is unreasonable or cannot be supported by the evidence is well known; it is not open to debate. It is not sufficient that an appellate court merely be satisfied that there was some evidence that could support a conviction. An appeal court must re-examine, and to some extent, re-weigh the evidence, and consider its effect.
>
> [7] The traditional expression of the test is clearly set out in *R. v. Yebes*, [1987] 2 S.C.R. 168. In *R. v. Biniaris*, 2000 SCC 15, the Supreme Court was asked to modify the test. The Court unanimously declined. Arbour J., for the court, described the test:
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> > [36] The test for an appellate court determining whether the verdict of a jury or the judgment of a trial judge is unreasonable or cannot be supported by the evidence has been unequivocally expressed in *Yebes* as follows:
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> > > [C]urial review is invited whenever a jury goes beyond a reasonable standard. ... [T]he test is 'whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered'.
> > >
> > > (*Yebes*, *supra*, at p. 185 (quoting *Corbett v. The Queen*, [1975] 2 S.C.R. 275, at p. 282, per Pigeon J.).)
> >
> > That formulation of the test imports both an objective assessment and, to some extent, a subjective one. It requires the appeal court to determine what verdict a reasonable jury, properly instructed, could judicially have arrived at, and, in doing so, to review, analyse and, within the limits of appellate disadvantage, weigh the evidence. **This latter process is usually understood as referring to a subjective exercise, requiring the appeal court to examine the weight of the evidence, rather than its bare sufficiency.** The test is therefore mixed, and it is more helpful to articulate what the application of that test entails, than to characterize it as either an objective or a subjective test. [Emphasis in original]

[35] As noted by the respondent in its factum, the verdict of trafficking in cocaine over the period from July 22, 2012 to October 3, 2012, and possession of cocaine for the purpose of trafficking on October 3, 2012, is supported by the following:

a. The extensive history of drug-related communications to which the appellant was party, in which guarded and coded language is used that, in the opinion of Cpl. Keddy, denoted cocaine trafficking;

b. The use of the term “white” in many of these conversations, which again Cpl. Keddy opined is a street term for cocaine;

c. The suspicious meetings among the appellant and others in the context of these apparent drug-related texts;

d. The cocaine and paraphernalia seized on October 3, 2012 from the appellant's residence and trailer; and

e. The appellant's mildly incriminating remarks during the course of the October 3, 2012, interview.

[36] I am not satisfied the reviewing judge failed to properly consider other possible meanings of the word "white" used in the intercepts or that the amount of cocaine found was relatively small. His unreported reasons for conviction indicate he considered both.

[37] Reconsidering and reweighing the evidence, as this Court is to do, satisfies me the appellant's convictions are supported by the evidence and are reasonable within s. 686(1)(a) of the *Code*.

[38] Accordingly, I would dismiss the appeal.

Hamilton, J.A.

Concurred in:

Beveridge, J.A.

Farrar, J.A.