

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Snowden*, 2017 NSSC 84

Date: 20170323

Docket: Amh. No. 437262

Registry: Amherst

Between:

Her Majesty The Queen

v.

Michael John Snowden

Defendant

DECISION

Judge: The Honourable Justice Jeffrey R. Hunt

Heard: October 27 & November 28, 2016 & March 9, 2017, in
Amherst, Nova Scotia

Oral Decision: March 23, 2017

Written Release: March 23, 2017

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

By the Court:

[1] Michael John Snowdon is charged with trafficking in hydromorphone. The

Indictment alleges as follows:

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*;

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 substance included in Schedule 1 to wit: hydromorphone, contrary to Section 5(1) of the *Controlled Drugs and Substances Act*.

[2] There is also a separate Indictment dealing with matters being prosecuted by the Provincial Crown. We will return to that Indictment at the conclusion of these reasons.

[3] By way of overview, the circumstances of the CDSA matter are as follows:

- The police had source information and other intelligence which drew their attention to Michael Snowdon of 58 Hickman Street, Amherst, an individual who had a legal prescription for hydromorphone. It was alleged that he was selling his prescription.

- The background of the confidential source information and the steps leading to Snowden's arrest and the issuance of search warrants was more fully explored in a Charter *voir dire* ruling delivered previously (*Michael John Snowden v. Her Majesty The Queen*, 2016 NSSC 278).
- On the morning of February 15, 2013 the accused filled his prescription for 60 - 24 milligram hydromorph contin capsules and 60 – 30 milligram hydromorph contin capsules.
- A surveillance operation subsequently followed him to the residence of Kevin Dwyer at 245 Station Street, Macan, Nova Scotia, where he spent approximately 16 -17 minutes.
- Mr. Snowden was stopped and arrested a few minutes after leaving the Dwyer residence. Later that day, a search of his home at Hickman Street could locate only 19 – 24 milligram hydromorph contin capsules and 59 – 30 milligram hydromorph contin capsules. In addition, however, the police also seized a quantity of loose hydromorphone powder which at some point had been extracted from hydromorphone capsules.
- Later that same day, 25 – 24 milligram hydromorph contin capsules were located in a search of 245 Station Street.

- The Crown asserts that the totality of the evidence is such that the only reasonable conclusion is that Michael Snowden trafficked the unaccounted for balance of his prescription.

[4] It is my intention to turn shortly to a review of the evidence presented at trial. Before doing so, I want to review the legal presumptions, including the presumption of innocence, that will underpin the rest of my analysis.

[5] I intend to do so at this point in the decision as I want to keep the applicable presumptions and burden of proof in mind as I move through the rest of these reasons.

Legal Principles

[6] The fundamental principle in every criminal trial is the presumption of innocence. This is the primary and irreducible foundation of our criminal justice system. It has to be appreciated that this presumption is not an incantation to be cited and then forgotten. It must remain central to the entire analysis to be conducted.

[7] To be presumed innocent until proven guilty by the evidence presented in Court is the fundamental right of every person accused of a criminal offence.

[8] Running together with the presumption of innocence is the standard of proof against which the Crown's case must be measured.

[9] To secure a conviction in a criminal case the Crown must establish each essential element of the charge to the point of "proof beyond a reasonable doubt". This standard has rightly been called an exacting one.

[10] It is a standard far beyond the civil threshold of proof on a balance of probabilities.

[11] The law recognizes a range of degrees of proof.

- A Peace Officer may lay a charge based upon the Officer having reasonable grounds to believe an offence has been committed.
- A Crown may proceed with a prosecution where there is a reasonable prospect of conviction.
- A litigant in a civil proceeding need only establish their case on a balance of probabilities.
- Only when we come to the point of a conviction in a criminal case do we reach that point of requiring proof beyond a reasonable doubt.
- This is not a standard of absolute or scientific certainty but it is a standard which is closer to absolute certainty than it is to a balance of probabilities.

[12] The Supreme Court of Canada has provided clear direction on the question of what we mean when we say “proof beyond a reasonable doubt”.

[13] They have instructed as follows:

- A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.
- Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.
- On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.
- In short, if based upon the evidence before the Court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.

[14] Case law further directs that a Court must remember that even where the Defendant does not testify or the Defence calls no evidence, the accused person bears no evidentiary burden of proof whatsoever. The burden remains on the Crown throughout, regardless of whether the Defence calls evidence or not.

[15] I must also instruct myself in relation to the concept of reasonable doubt as it is laid out in *R. v. Lifcus* from the Supreme Court of Canada. I have considered that case and the instruction it contains in relation to my decision in this matter.

Applicability of R. v. W.D. principles where Defendant does not testify

[16] The principles set out in *R. v. W. (D.)*, [1991] 1 S.C.R. 742, are applicable where the accused testifies. As for situations where the accused does not testify but does lead evidence, Saunders J.A. for the Nova Scotia Court of Appeal in *R. v. J.M.M.*, 2012 NSCA 70, [2012] N.S.J. No. 364 said as follows:

74 The question arises whether the approach urged in *W. (D.)* applies to cases where the accused does not take the stand in his own defence. In the present case the appellant did not testify. However, he did call evidence which was in direct opposition to the complainant's account. The Ontario Court of Appeal recently dealt with this issue directly., In *R. v. B.D.*, 2011 ONCA 51, Blair, J.A., writing for the Court, observed:

[114] What I take from a review of all these authorities is that the principles underlying *W.(D)* are not confined merely to cases where an accused testifies and his or her evidence conflicts with that of Crown witnesses. They have a broader sweep. Where, on a vital issue, there are credibility findings to be made between conflicting evidence called by the defence or arising out of evidence favourable to the defence in the Crown's case, the trial judge must relate the concept of reasonable doubt to those credibility findings. The trial judge must do so in a way that makes it clear to the jurors that it is not necessary for them to believe the defence evidence on that vital issue; rather, it is sufficient if – viewed in the context of all of the evidence – the conflicting evidence leaves them in a state of reasonable doubt as to the accused's guilt: *Chalice*. In that event, they must acquit.

75 I would, respectfully, adopt Justice Blair's analysis as a proper statement of the law on this point.

[17] The balance of my analysis will proceed with these principles in mind.

Evidence

[18] I intend to turn at this point to a review of the evidence presented by both parties.

[19] It is not my intention to repeat or offer a summary of every single point of testimony presented at the trial. However, in reaching my conclusions, I have weighed and considered all of the evidence and submissions.

[20] Called for the Crown were Constable Stephen Maddison who was the Exhibit Officer; Constable Paul Vincent who was a lead investigator and Constable Jason Galloway who played a central role in the surveillance and search.

[21] The evidence of Corporal Christal Ellis was the subject of an Agreed Statement of Facts.

[22] The final Crown witness was Corporal Nicholas Baker who presented an Expert Report and was qualified to offer opinion evidence on behalf of the Crown.

[23] The Defence did elect to call evidence and Sandra Logan was called for the Defence. Her evidence was largely limited to offering an explanation for the amount of cash which was found in the possession of the accused upon arrest.

Constable Stephen Maddison

[24] Constable Stephen Maddison was the first witness called by the Crown in the trial proper. Earlier in the proceeding he had also testified on the Charter *voir dire*.

[25] Constable Maddison is an RCMP Officer with 23 years' experience. In this operation he acted as the Exhibit Officer. As such he was responsible for collecting evidence at the two search sites (Hickman and Station Streets), documenting exhibits and maintaining scene continuity.

[26] He logged the exhibits and ensured the documented transition of the evidence to the Exhibit Custodian Officer. He was also responsible for sending to Health Canada the samples of suspected controlled substances.

[27] At one point in the proceeding it appeared that continuity and documentation might be in issue. In the final analysis this was not the case and the central points in dispute are found elsewhere.

[28] Constable Maddison was questioned in some detail as to the various exhibits relevant to this matter. The more critical of these will be referred to later in these reasons.

Constable Paul Vincent

[29] Constable Paul Vincent gave evidence on behalf of the Crown. He is an RCMP Officer currently stationed in Springhill, Nova Scotia.

[30] At the time of this arrest he was posted with the Cumberland Integrated Street Crime Unit and had been with them since 2009. This unit was focused on a number of matters including street level CDSA enforcement.

[31] Constable Vincent testified as to the source information, and others matters more fully explored in the Charter *voir dire* ruling, which culminated in the surveillance operation directed against Michael Snowdon on February 15, 2013.

[32] Information obtained by Constable Vincent suggested that Mr. Snowdon would be picking up his hydromorphone prescription that day and would soon thereafter sell it to Kevin Dwyer, who lived at 245 Station Street, Maccan.

[33] Mr. Snowdon had in fact filled his prescription the morning of February 15, 2013 at some point before surveillance commenced. He had picked up 60 – 24

milligram hydromorph contin capsules and 60 – 30 milligram hydromorph contin capsules.

[34] At approximately 10:30 a.m. Constable Vincent and Constable Jason Galloway were engaged in surveillance of the Defendant's home. They observed the Snowdon vehicle leave 58 Hickman Street. Mrs. Snowdon was driving. Mr. Snowdon was a passenger. Constable Vincent and Constable Galloway followed the vehicle as it began to make its way towards Maccan. They proceeded to Dwyer's home. Source information had suggested that this was the location Mr. Snowdon would proceed to for the purpose of selling his prescription to Kevin Dwyer.

[35] On arrival at 245 Station Street Mr. and Mrs. Snowdon entered the home. A minute later a third party came out of the Dwyer residence, entered a vehicle and drove away.

[36] After spending a further 15 minutes in the home, the Snowdons exited, entered their vehicle and began driving back towards Amherst. A few minutes later they were stopped near Amherst Point, Cumberland County. The stop was made by Constable Vincent. He subsequently arrested Mr. Snowdon for trafficking in hydromorphone and took him to the detachment.

[37] In Mr. Snowdon's jacket pocket was a pharmacy receipt for the hydromorphone prescription picked up by him earlier that day. Upon his arrest, Mr. Snowdon also had \$810.00 cash in his wallet which was described as being folded and segregated in a fashion which drew the attention of the Officers.

[38] Constable Vincent detailed in his evidence the arrest process and the steps taken to secure CDSA search warrants for 58 Hickman Street (Snowdon residence) and 245 Station Street (Dwyer residence). He also canvassed details of the search at each location. In the search of the Snowdon residence the police located 92 hydromorphone capsules of different strengths, together with four to five grams of hydromorphone powder, some empty hydromorphone caplets and various items of drug paraphernalia. The significance of this loose hydromorphone powder will be explored further shortly.

[39] The search at the Dwyer residence resulted in the seizure of 25 – 24 milligram hydromorphone capsules.

[40] Before moving on to examine the other evidence presented, I want to note my impression that Constable Vincent presented his evidence in a very fair and straight forward manner. He did not resist reasonable suggestions from the

Defence. I am satisfied he gave a full and complete account of his involvement in this matter.

Constable Jason Galloway

[41] Constable Jason Galloway was called by the Crown. Constable Galloway is a ten year Officer with the Town of Amherst Police Department. At the relevant time he was also assigned to the Cumberland Integrated Street Crime Unit.

[42] On February 15, 2013 he was participating in the surveillance of Mr. Snowdon and 58 Hickman Street. He was initially at the Hickman Street address and then later began surveillance at the Station Street location after the Snowdons drove to Maccan.

[43] Constable Galloway offered testimony with respect to the surveillance and his involvement in the subsequent arrest of Snowdon and the searches of the two residences.

[44] There was extensive questioning with respect to the exhibits seized at each address. These included hydromorphone of various strengths and other items of drug paraphernalia from Hickman Street.

[45] Constable Galloway agreed there was a period of hours after Snowden's departure from Station Road where that address was not under surveillance. This was the period when the search warrant was being sought.

[46] As well, the Constable's knowledge of Mr. Snowden's past medical condition was explored. He acknowledged that Mr. Snowden had a history of past medical problems and required pain medication.

[47] Like Constable Vincent, Constable Galloway was in my view giving a full and fair account of his involvement in this matter. This case does not turn on the credibility of the investigators. The issue is what reasonable inferences are possible from the proven evidence.

Corporal Cristal Ellis

[48] The evidence of Corporal Ellis took the form of an Agreed Statement of Facts.

[49] That Statement was entered as an exhibit. Her efforts were largely directed towards the search at the Dwyer residence located at 245 Station Street, Maccan.

Corporal Nicholas Baker

[50] Corporal Nicholas Baker testified in the trial proper after having been qualified as an expert following a contested *voir dire*. (*Her Majesty The Queen v. Michael John Snowden*, 2016 NSSC 321.) His statement of qualification was 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.”

[51] Corporal Baker’s report is in evidence. I do not intend to repeat it here. I will touch on some of the most relevant issues.

[52] In summary he canvassed the following points:

- He commented on different types of hydromorphone traffickers including the trafficker who holds a legal prescription but sells all or part of that prescription into the illicit market.
- He testified as to the jargon used in the illegal hydromorphone trade.
- He testified as to pricing and values of hydromorphone in the illegal market.

- He gave evidence with respect to the practices and habits of a trafficker who is addicted to hydromorphone but also sells into the illicit market.

[53] With respect to the specific facts and circumstances of this case, Constable Baker agreed that as an expert he had been given a set of assumptions on which his opinion was based. He said that these included:

- The apparently unaccounted for prescription medications not found at Hickman Street.
- The drugs found at Station Street.
- The short duration visit made by Michael Snowdon to Station Street.
- The cash found on Snowdon and the manner in which this cash was segregated and folded.
- The irregular state in which the seized hydromorphone at Hickman Street was stored.

[54] Corporal Baker was a forthright and fair expert witness. There is obviously an obligation on any witness to be accurate and fair but this applies with even greater force to an expert. I will return shortly to an analysis of the underlying

factual assumptions in the Report and to a consideration of the issues raised by the Defence. First, however, I will briefly summarize the evidence of the final witness.

Sandra Logan

[55] Sandra Logan was the sole witness called by the Defence. Ms. Logan is the 75 year old mother-in-law of the accused. Given her relationship with the accused I have weighed her evidence with care.

[56] She testified that Michael Snowden is married to her daughter Elizabeth. They have lived with her at 58 Hickman Street for approximately 10 to 15 years. She owns the home. Her granddaughter Savannah also lives in the home. She testified that more than five years ago Mr. Snowden broke his neck. She says he has trouble with mobility and it is her belief that he suffers debilitating pain. She said that to her knowledge Mr. Snowden takes prescription medication for pain. She was not aware of what those medications were in particular.

[57] Ms. Logan was asked if she had any knowledge of the cash in Mr. Snowden's possession at the point of his arrest. She said that three to four days before the events in question she loaned Mr. Snowden money to purchase car

tires. She testified that the amount was "...\$600.00 maybe a little bit more... maybe I lent him also the money for the tax". She indicated that Mr. Snowdon was driving on bald tires. Her granddaughter was occasionally in the vehicle as well as her daughter and Mr. Snowdon. She said she did not want an accident.

[58] On cross-examination Crown counsel asked whether Mr. Snowdon was, to her knowledge, employed on February 15, 2013. She said that his source of income was disability.

[59] With respect to the loan of the money she was questioned as to which vehicle the tire loan was supposed to be for. She replied that it was for the vehicle shared by her daughter and Mr. Snowdon. She believes that the registered owner of that vehicle is her daughter, Elizabeth Snowdon.

[60] She was asked how, as a person on a fixed income, she could afford to make such a loan. She described her sources of income as being Canada Pension as well as some modest supplementary income from such sources as berry picking and recovering and selling recyclables. She said she was a saver, not a spender.

[61] Ms. Logan's material evidence was largely restricted to two points, these being the source of the cash held by Mr. Snowdon at the time of his arrest and her observations of his personal health challenges and circumstances.

[62] Ms. Logan's evidence was capable of belief. There was nothing inherently unbelievable about her evidence. However, in the big picture I do not find that the presence of the cash is highly determinative in any event. This case will turn on whether the Crown has carried its burden given the questions raised by the Defence with respect to certain assumptions underpinning the Crown's case.

Consideration of Expert's Report

[63] There are two central assumptions in the Expert's Report which the Defence says are unproven or unfounded and thus cannot be used to underpin those portions of the Report.

[64] An expert is, of course, permitted to set out a series of presumed facts or assumptions on which their opinion is founded. These underlying facts must be proven in order to ground any portion of the opinion dependant upon those assumptions.

[65] The two central issues in dispute are:

1. Has the Crown proven there was missing hydromorphone that cannot be accounted for at Hickman Street; and
2. Has the Crown proven that the resident at Station Street had no prescription for hydromorphone.

[66] These factors are cited by Corporal Baker in the conclusion section of his Report:

“...Based upon the observations made during surveillance, the quantity of cash located, the quantity of 24 milligram hydromorphone missing from the recent prescription, as well as the quantity of 24 milligram hydromorphone located at 245 Station Road, I believe this individual to have recently trafficked in 24 milligram hydromorphone.”

These assumptions require further consideration.

MISSING HYDROMORPHONE

[67] There were certainly unaccounted for hydromorphone caplets. The complication is that at Hickman Street there was also seized a quantity of loose hydromorphone powder. This was powder which was not ruled out as having come from the hydromorphone caplets when emptied. This suggestion was put directly to Corporal Baker in cross-examination. He accepted it could not be ruled out. The 4 milligrams of loose powder in Exhibit 9 was tested to be hydromorphone powder (see Certificate- Exhibit 17). This alone could account for the contents of the missing caplets, if they were opened and emptied.

[68] The Expert's Report notes at page 3 that abusers often extract and crush the microbeads within the hydromorphone capsules and either snort the product or

dilute the powder for intravenous injection. This practice was also referred to in oral evidence by Corporal Baker.

[69] Paraphernalia seized at the Snowdon residence would certainly be consistent with this activity and some degree of intravenous use. Used syringes and spoons with hydromorphone residue were seized from the Defendant's bedroom.

[70] Of course, the quantity of powdered hydromorphone itself is the most compelling indication of extraction for use.

[71] The Crown does point to the fact that only a relatively small number of empty caplets were recovered at 58 Hickman Street. This is true and would mean that a number of empty caplets would have been flushed or disposed of in some fashion. This must be weighed together with all the indicators positive and negative which point to the possibility of the capsules having been broken down for their contents. The caplet shells, once emptied of their active ingredient, are of no further use to the addict.

[72] If the amount of the powdered contents noted by the Police is accurate, and there is no evidence to the contrary, then there is more than enough volume in the seized powdered hydromorphone to account for the missing pills.

DID RESIDENT OF 245 STATION STREET HAVE A PRESCRIPTION

[73] Corporal Baker states at page 4 of his Report that:

“The occupant of the residence at 245 Station Street, Maccan, where 25 capsules of 24 milligram hydromorphone were seized did not have a prescription.”

[74] The Defence argues that this assumption was not proven. There was evidence in the form of an old pill bottle that Kevin Dwyer had at some point in the past had a prescription for hydromorphone, albeit what appears to be hydromorphone of a different strength. However, there was no evidence as to Dwyer’s current prescription status.

[75] Thus to the extent this assumption played a role in Corporal Baker’s opinion it has not been proven.

[76] The Defence asserts that it has raised substantial issues with respect to the permissible use of the Expert’s Report. There can be no mistaking the relevance of these points to an analysis which is based on the presumption of innocence and proof beyond a reasonable doubt.

Secondary Elements Relied Upon By Expert

Short Duration Visit

[77] This was relied upon by the Crown and by Corporal Baker as one of the totality of factors which made this situation appear to him to be a trafficking exercise.

[78] In cross-examination the Expert acknowledged that a visit of this length could also be consistent with legal activity. The Officer was clear in pointing out that this short duration visit was just one factor weighed by him. He emphasized that it was the totality of the circumstances that he weighed and relied upon.

Cash and the Manner of Carrying the Cash

[79] All Officers, including Corporal Baker, referred to the manner in which the \$810.00 was being carried by Mr. Snowdon. The evidence was that it was divided into three separately folded bundles of \$600/\$100/\$100 (mostly comprised of \$20 bills) plus a separate \$10 note. The Expert said that in his experience the manner in which the cash was segregated and folded was consistent with how a dealer might carry cash.

[80] He acknowledged, however, that no score sheets or records of that nature were located either on Mr. Snowdon or at the Snowdon residence.

[81] In cross-examination he further agreed it could not be ruled out that the presence of the cash was also consistent with a legal use or source.

[82] Again, the Officer made the point that this was another single factor or circumstance which he weighed in totality with all the others.

Irregular state of medications storage at Hickman Street

[83] The 92 hydromorphone pills located at Hickman Street were stored in a haphazard way. The 92 pills were comprised of the 59 – 30 milligram capsules and 19 – 24 milligram capsules believed to have been picked up that day. In addition, there were 13 – 6 milligram tablets and 1 – 18 milligram tablet believed to be from older prescriptions. Most were in old pill bottles with incorrect labels or otherwise kept in irregular fashion. The expert argued that the state of medication storage at Hickman Street suggested to him an individual who is not taking the medications in accordance with directions or who was otherwise misusing the medications.

[84] I have no difficulty in accepting this. Unfortunately, this leaves unanswered the more complex question of whether this misuse takes the form of trafficking or, alternatively, abusing the medication in a way that is not prescribed, such as intravenous use or other misuse.

Snowdon as a User of Hydromorphone

[85] There was no real contest in this case with respect to whether the Defendant is a user of hydromorphone. He is. The question is whether it has also been proven that he further trafficked a portion of the prescription.

[86] These activities are not mutually exclusive and this point was made by the expert.

CONCLUSION

[87] This case involves a trafficking allegation against an individual who holds a legal prescription.

[88] I appreciate that this factor makes any investigation and prosecution a difficult one. This is, for the obvious reason, that an individual with a legal prescription has many advantages over a person who may not legally possess the substance. The Court is not blind to the challenges faced by investigators.

[89] The fact that these are difficult cases to investigate and prosecute does not change the applicable presumptions or burdens. There is no sliding scale for the burden of proof. It remains fully on the Crown and does not weaken because the charge is serious, the offence hard to prove, or because the stakes of illegally trafficked hydromorphone are so terribly high.

[90] There is a reasonable interpretation on the evidence that Mr. Snowdon is trafficking at least a portion of his hydromorphone prescription. There is also a reasonable path in the evidence to conclude that he has been extracting the contents of the capsules and dangerously abusing the drug.

[91] This is not a case where the issues are to be determined on a balance of probabilities. That analysis could be substantially different in form and outcome.

[92] After having assessed all of the evidence and arguments, I am left with a reasonable doubt as to the offences charged. Accordingly, the Crown has not carried its burden of proof and the presumption has not been displaced.

[93] A finding of not guilty will be entered on the CDSA Indictment.

[94] Normally at this point I would indicate that Mr. Snowdon's conditions of release are discharged and he is free to go. However, as counsel are aware,

there are a number of unrelated counts being prosecuted by the Provincial Crown on which guilty pleas have been entered. We will now proceed to deal with those matters.

Hunt, J.