

Case Name:

R. v. [REDACTED]

**Between
Her Majesty the Queen, and**

[REDACTED]

[2018] O.J. No. 351

Information No. 4811-998-16-15005731-00

Ontario Court of Justice
Toronto, Ontario

K.J. Caldwell J.

Heard: January 9, 2018.
Oral judgment: January 9, 2018.

(10 paras.)

Counsel:

A. Jamieson, Counsel for the Federal Crown.

A. Stastny, Counsel for [REDACTED]

REASONS FOR JUDGMENT

1 K.J. CALDWELL J. (orally):-- Mr. [REDACTED] is charged with trafficking in cocaine and possession of proceeds, namely the police buy money that was used in the sale of the drugs. This was a very brief day-long trial. It was brief as counsel significantly narrowed the issues, and I would like to thank them in advance for doing that, as it certainly allowed me to focus on what was truly important in this case.

2 Before getting into my reasons, I will outline the result, just so Mr. [REDACTED] is aware, and I do find you not guilty, sir. All right? But I am going to go through my reasons for that.

3 The only issue in this case is one of identification. I was provided with two decisions, one from the Ontario Superior Court of Justice, *Regina v. Carter*, 2015 ONSC 5273 and *Regina v. Gaskin*, 2017 ONCJ 414, a decision of Justice Mara Greene of this court. The *Carter* decision related largely to broader principles, especially a review of the recommendations in the Sophonow report, regarding the dangers of identification evidence and, in particular, problematic photo line-up evidence. The *Gaskin* decision had numerous factual analogies, and though I will not reference those in any particular detail, it was very helpful to review that decision and review how my sister judge applied the law with respect to identification evidence.

4 The facts, in brief, are that an undercover buy was set up by an undercover officer. The buy was done the same day. The officer then left the scene and had no further physical contact with the accused again, though there were numerous calls and text message exchanges in the months that followed in an attempt to set up further buys that never occurred. Ultimately, the accused was arrested pursuant to a warrant in the first instance. This case rests entirely on the identification evidence of the undercover officer and there is no confirmatory evidence in this case.

5 At the outset, I want to emphasize that it is not the police investigative techniques that are on trial. There were a number of submissions made about the fact that the undercover officer was shown a photo of the intended target prior to the buy, and that the subsequent photo line-up that the officer did was not videotaped. There were many reasons put forth by the Crown as to why these procedures were done or, in terms of the lack of videotaping, not done. For example, concerns were raised with respect to videotapes finding their way onto social media. Frankly, all of the concerns that were raised by the Crown make total sense to me. The issue for the police, however, is though it is understandable that certain procedures are done or not done, at the end of the day the undertaking of certain procedures or omission of certain procedures cannot affect the standard the court applies with respect to the sufficiency of evidence, regardless of how understandable the various police decisions are. Showing a photo to the undercover officer in advance, in the briefing prior to the buy, the so-called briefing photo, and not videotaping the line-up, certainly can present problems in terms of proof. I appreciate, however, that the police have concerns that go beyond proof issues, and I certainly accept that the safety of their undercover officers is paramount. The decision to take or not to take certain steps is one that they have to weigh, balancing all of the considerations, particular officer safety. At the end of the day, at times, there may be still sufficient evidence to lead to proof beyond a reasonable doubt, and at other times not, but I do not find it is necessary or appropriate for me to comment on the overall wisdom of their decisions.

6 I am simply tasked with determining if the evidence in this case amounts to proof beyond a reasonable doubt that Mr. [REDACTED] was the person that sold the officer drugs back in May of 2016. I find in this case that the evidence falls short given, first, the lack of any evidence of what the briefing photo looked like, secondly, the gap in time of two months before a photo line-up was shown to the officer, and thirdly, the total lack of any confirmatory evidence. The case rests on whether I'm satisfied beyond a reasonable doubt on the basis of the officer's identification alone, and I am not. I find that the officer was credible but it is her reliability which causes me concerns,

given the factors I have already outlined. There were, essentially, three identifications done by the officer. The first was what I might term an in-dock identification of pointing Mr. ██████████ out in the courtroom. Certainly it is well established that, for identification purposes, that type of identification is essentially useless, though I do understand why the Crown would still ask the officer if the officer recognizes the accused before the Court.

7 Turning to the photo line-up, as I've already indicated, my main concern is the passage of time. If the photo line-up had been done immediately after the undercover purchase, I might not have had the same concerns in this case, but in this instance it was done two months later. I do have to factor in that she saw the so-called briefing photo prior to the drug purchase. I certainly accept that she genuinely believes that she was totally uninfluenced by that photo when she reviewed the photo line-up, but my concern is that we know well that identification evidence is a particularly fragile and unique type of evidence, and that fact has been made very clear in the case law in recent decades. Very well-meaning witnesses get it wrong simply because of the fragile nature of human memory. Bluntly, it would be impossible for her to know how much that photo influenced her, and it is therefore impossible for me to know. As I say, if the line-up had been done immediately after the deal I might not have these concerns, but given the gap in time that had also taken place, I am left with concerns about what exactly she was remembering when she picked Mr. ██████████ out of that line-up. I would not go so far as to say that the line-up had no value but I find that its usefulness is somewhat limited in this case.

8 Finally, and perhaps most persuasively, there is the evidence put forth by the officer that she immediately recognized Mr. ██████████, on the day in question, as being the individual that was in the briefing photo. The problem that I have is that I don't have the briefing photo, so I am essentially assessing her evidence in a vacuum. It may have been the same photo that was in the photo line-up, and certainly the photo in the photo line-up looks very much like Mr. ██████████, but it may not have been. The photo may have looked very similar to the gentleman before me in court today, or it may not have, but without seeing it I cannot make that assessment.

9 I also do not find, for the reasons that I have already put forth in terms of the problems with the identification evidence, that the fact that she has identified him on both the date in question, as being the person in the briefing photo, and two months later in the photo line-up, does not add together to satisfy me that there is proof here beyond a reasonable doubt, given the frailties with both pieces of identification evidence. These problems, again, might not be fatal if there was other confirmatory evidence, for example, if he had been found with the cell phone that had allegedly been used to set up the undercover buys, but there is no such evidence before me.

10 Further, it also might not have been fatal, the problems with respect to the identification in this case, if Mr. ██████████ had a particularly distinguishing feature. Mr. ██████████, I know a lot of emphasis has been placed on your size, and I am sorry about that, but the nature of the case and given that it comes to identification we have to emphasize that. So the only real distinguishing feature that has been put forth to me is Mr. ██████████ size. He certainly is quite a large man with

large features. To some extent that is distinguishing, but I do think I can take judicial notice of the fact that there are very many large white men in Toronto. His size is not distinctive in the way that, for example, a specific unusual tattoo would be in a particular location. And so, when I weigh all of the evidence at the end of the day, I am left with reasonable doubt, given the very high standard to which the Crown is put, as to whether Mr. [REDACTED] was the person who was engaged in the transaction on the day in question, and I, therefore, find him not guilty. All right. So you are free to go, sir.