

Court of Queen's Bench of Alberta

Citation: R v Small, 2021 ABQB 840

Date: 20211026
Docket: 180911760Q1
Registry: Red Deer

Between:

Her Majesty the Queen

Crown

- and -

Rico Small

Accused

**Reasons for Decision on Entrapment Application
of the
Honourable Mr. Justice D.A. Labrenz**

Introduction

[1] Mr. Small was convicted by a jury of six criminal offences consisting of the following: three counts of trafficking in methamphetamine, contrary to s.5(1) of the *Controlled Drugs and Substances Act* ["CDSA"]; one count of possessing methamphetamine and one count of possessing cocaine for the purpose of trafficking methamphetamine, contrary to s.5(2) of the *CDSA*; and, one count of possession of Canadian currency, knowing that it was obtained by the commission in Canada of an offence punishable by indictment, contrary to s.355(b) of the *Criminal Code of Canada*. Mr. Small committed all of these offences in June and July of 2018 at Red Deer, Alberta.

[2] Mr. Small argues that the police entrapped him by offering him an opportunity by telephone to traffic in methamphetamine on June 28, 2018 and seeks a stay of proceedings based upon the alleged abuse of the court's process. Mr. Small argues that the police did not have the prerequisite reasonable suspicion to believe that he was engaged in drug trafficking, or the related reasonable suspicion to investigate the telephone number that Mr. Small answered as part of a bona fide investigative inquiry. Although not expressly argued, I understand Mr. Small's implicit position to be that all of his present convictions were tainted by the same entrapment and should therefore be collectively stayed because of the alleged abuse of process.

[3] The application before me proceeded on the basis of a consideration of the evidence given at trial and based upon the evidence given by three police witnesses during a post-conviction *voir dire*. Mr. Small did not testify, either at the trial, or during the *voir dire*. I find that all of the police witnesses who testified at the trial and *voir dire* gave credible and reliable evidence. Notably, it does not seem that the evidence given by each police witness was challenged by Mr. Small.

[4] I conclude that the police had the necessary and pre-existing reasonable suspicion to provide Mr. Small with an opportunity to traffic in methamphetamine because the police were engaged in a bona fide inquiry into that telephone as a place where drugs were being trafficked. Accordingly, Mr. Small was not entrapped and there is no corresponding abuse of process.

Background and Findings of Fact

[5] HQ 1300 ["U/C 1"], an undercover police officer with the Royal Canadian Mounted Police ["RCMP"], was instructed in June of 2018 to buy methamphetamine from a known drug trafficker in Calgary, Alberta. These instructions were given by Corporal Len Larson who acted as U/C 1's trained cover person. I will refer to the known Calgary drug trafficker by her initials as "BR". At the time of receiving his instructions, U/C 1 was aware that an undercover operator from the Calgary Police Service ["CPS"] had previously purchased cocaine from BR.

[6] U/C 1 is an experienced police officer of over twenty years and an experienced undercover operator. Over the years, U/C 1 acquired extensive experience relating specifically to drug investigations as an investigator, supervisor, provincial undercover coordinator, and also as a trained cover person. Since 2007, U/C 1 has been involved in one capacity or another investigating controlled drugs and substances, and frequently as an undercover operator. As an undercover operator, U/C 1 has made "buys" of controlled drugs and substances on approximately 100 occasions. Similarly, as a cover person/supervisor since 2009, U/C 1 had some involvement in 200 additional "buys". U/C 1's experience also involves more peripheral involvement such as by way of surveillance or as a secondary witness to hundreds of other purchases of controlled drugs or substances.

[7] After the two successful purchases of methamphetamine from BR, Corporal Larson instructed U/C 1 to contact BR again in an attempt to seek BR's cooperation. Specifically, U/C 1 was to ask BR to refer him to an active drug trafficker for the purpose of purchasing methamphetamine in Red Deer, Alberta. In response to Corporal Larson's instructions, U/C 1 sought to have BR "vouch" for him in furtherance of his established goal of successfully purchasing methamphetamine in Red Deer.

[8] To provide context, it would not be controversial to suggest that the obtaining of a "vouch" from an active drug trafficker, serves as an important first step in contacting and

successfully purchasing drugs from dial-a-dope drug traffickers. This is because, as would seem obvious, drug traffickers are understandably wary of selling to strangers because of the ongoing need to avoid detection by law enforcement. The “vouch” provided by one drug trafficker to another serves to confirm the legitimacy of a prospective buyer. A “vouch” can therefore be viewed as a type of pre-screening or authentication process.

[9] In June of 2018, U/C 1 made two purchases of what he believed to be methamphetamine from BR in Calgary. On both of those occasions he was in the company of an undercover officer who worked for the CPS. The CPS undercover officer purchased what U/C 1 believed to be cocaine. U/C 1 described BR as an active user of drugs and as being erratic.

[10] U/C 1 said that what he purchased from BR was packaged in the same manner as he would expect methamphetamine to be packaged at the street-level. Based upon U/C 1’s extensive experience and the street jargon that BR used, U/C 1 was confident that he had purchased methamphetamine.

[11] After the two successful purchases of methamphetamine in June of 2018, Corporal Larson instructed U/C 1 to telephone BR. Corporal Larson instructed U/C 1 to seek a referral from BR to a drug trafficker who was actively selling methamphetamine in Red Deer. In particular, U/C 1 was tasked by Corporal Larson to obtain a telephone number for a Red Deer methamphetamine trafficker that was associated to BR, or simply to obtain a phone number for an active methamphetamine trafficker without any association to BR.

[12] U/C 1 succeeded in obtaining a Red Deer phone number from BR on June 26, 2018. U/C 1 telephoned BR, and was satisfied that he was speaking to BR because he recognized her voice and because BR recognized him. In response to U/C 1’s referral request, BR “blurted” out a phone number without any hesitation. BR did not inform U/C 1 who he might expect to answer the telephone number she provided; however, BR did tell U/C 1 that he should use her name as a “vouch”. BR also said that U/C 1 should ask for “Tek”. U/C 1 explained that “Tek” is one of many different street names for methamphetamine.

[13] U/C 1 had no information from BR as to her knowledge of or her relationship to the telephone number she provided. U/C 1 confirmed that he did not know if the person answering the phone had ever worked with BR or had ever sold controlled drugs and substances in tandem with BR.

[14] On June 26, 2018, Corporal Larson provided Constable Christopher Augstman, the primary investigator, with the telephone number that U/C 1 obtained from BR. Constable Augstman searched various police databases in an attempt to associate a particular person with the telephone number. Constable Augstman confirmed, however, that he considered the telephone number to be the target of this investigation and not whomever might answer the phone.

[15] Constable Augstman conducted a search of the referral phone number on a transmission data recorder that was operative on several telephone lines related to the current drug investigation. Constable Augstman located the phone number BR provided to U/C 1 because it had been recorded by the data recorder. The Telus subscription information associated with the telephone number revealed that the registered owner of the telephone number was an individual who I will refer to as “DB”. The address provided by Telus for DB was an address located in Deschner Close or Deschner Avenue in Red Deer.

[16] Mr. Small was associated to the Deschner address in another police database (at an unknown time). Constable Augstman was not certain of the exact nature of the association. As a consequence, Constable Augstman created a “target sheet” in relation to Mr. Small by utilizing a photograph of Mr. Small that he found on Facebook. That target sheet was provided to U/C 1.

[17] The next day, June 27, U/C 1 called the telephone number that he had received from BR. U/C 1 said that the ensuing conversation was somewhat convoluted because neither U/C 1 nor Mr. Small knew each other. U/C 1 employed his “vouch” and told Mr. Small that BR sent him, before asking for “Tek”. It was apparent to U/C 1 that Mr. Small did not understand the phrase “Tek” and U/C 1 then asked for “Side”. U/C 1 explained that he asked for “Side” because it is a more common street name for methamphetamine. U/C 1 explained that he was not surprised that Mr. Small did not know “Tek” as street jargon for methamphetamine because the phrase was relatively new (Spring of 2018). Mr. Small, in response, quickly started discussing price and amounts. They reached an agreement.

[18] U/C 1 and Mr. Small agreed upon a place and time to meet. Mr. Small was speaking in street jargon during the telephone call in a manner that could be described as typical. Mr. Small self-identified as “Roe” to U/C 1.

[19] A drug deal was completed that same day between U/C 1 and Mr. Small at a parking lot in north Red Deer. Mr. Small sold U/C 1 an “eight ball” of methamphetamine measuring approximately one eighth of an ounce and weighing 3.5 grams for \$100. U/C 1 said that he would have paid more while explaining that the price was quite cheap; however, U/C 1 acknowledged that prices had been falling quite quickly in the spring of 2018.

[20] The initial buy from Mr. Small was followed by two further buys of methamphetamine. On the two subsequent occasions, Mr. Small sold U/C 1 methamphetamine weighing at 3.7 and 3.2 grams respectively. U/C 1 described that Mr. Small was understandably nervous during the first buy, however, Mr. Small became increasingly more comfortable with each transaction.

[21] Corporal Larson justified the reasonableness of police suspicion in relation to the phone number that U/C 1 obtained from BR. Corporal Larson did not claim that he had a reasonable suspicion in relation to Mr. Small as an individual.

[22] Corporal Larson said that he acquired his suspicion in relation to the telephone number because it was provided to U/C 1 by a “drug dealer” that U/C 1 had an existing relationship with in good standing. Corporal Larson added that he was aware that Mr. Small has been previously associated with a drug investigation involving a large quantity of drugs. Corporal Larson explained that approximately one year earlier he had been involved in the execution of a search warrant for drugs in the Deer Park area of Red Deer. Drugs were located during the search and an unspecified number of individuals were later charged with drug-related offences. Corporal Larson said that Mr. Small was arrested during the execution of the search warrant and Mr. Small was subsequently transported to the police station. Subsequently Mr. Small was released without charges.

[23] Corporal Larson did not know of any relationship between BR and the phone number that she had provided. He also confirmed that he did not know how current BR’s information was in relation to the telephone number. Corporal Larson, who like U/C 1 is a very experienced drug investigator, did not feel that BR would provide the police with a telephone number that was not extant. Corporal Larson did acknowledge, however, that the phone numbers used by drug

traffickers to facilitate drug transactions do tend to change from time to time. Corporal Larson knew, however, that BR was from Red Deer and therefore had ties to Red Deer.

Principles Relating to Entrapment

The General Framework

[24] Entrapment was successfully raised in the Supreme Court of Canada in ***R v Mack***, [1988] 2 SCR 903. Three years later, now Chief Justice Lamer, revisited the entrapment framework established by ***Mack*** in ***R v Barnes*** [1991] 1 SCR 449. In ***Barnes***, Chief Justice Lamer elaborated upon the statements that he made in ***Mack*** to the effect that entrapment does not occur in those circumstances where the police, as part of a bona fide inquiry, offer an opportunity to an accused to commit crime while having a reasonable suspicion that the person is associated with a place where the particular criminal activity is likely occurring. More recently, in ***R v Ahmad***, 2020 SCC 11, a majority of the Supreme Court confirmed the continued authority of ***Mack*** and ***Barnes***. I will discuss aspects of ***R v Ahmad*** in greater detail below.

[25] In ***Mack***, Justice Lamer stated the conceptual framework of entrapment is not dependant upon the culpability of an accused and consequently the focus of the inquiry is not upon the affect of police conduct on the accused's state of mind. It is largely for this reason that entrapment does not operate as a substantive defence; entrapment is, instead, founded upon the residual power of a court to refuse to enter a conviction (following a finding of guilt) because the entrapment of an accused by the state constitutes an abuse of the court's process. As Justice Lamer explained, "it is the belief that the administration of justice must be kept free from disrepute that compels recognition of the doctrine of entrapment" (***Mack***, at p 940). The remedy for entrapment is therefore not an acquittal but a stay of proceedings. The stay, where directed by the court, is one that ultimately seeks to maintain confidence in the administration of justice. The majority in ***R v Ahmad***, at para 2, described the circumstances where the administration of justice would be undermined as follows:

For that reason, this Court in ***R. v. Mack***, [1988] 2 S.C.R. 903, sanctioned, but narrowly confined, the power of police to step beyond their normal investigative role and tempt people into committing criminal offences. Where they do so without reasonable suspicion, or where they go further and induce the commission of a criminal offence, they commit entrapment. Without a requirement of reasonable suspicion, the police could target individuals at random, thereby invading people's privacy, exposing them to temptation and generating crimes that would not otherwise have occurred. Such conduct threatens the rule of law, undermines society's sense of decency, justice and fair play, and amounts to an abuse of the legal process of such significance that, where it is shown to have occurred, a stay of proceedings is required.

[26] The onus to prove entrapment is on the accused on a balance of probabilities. A court may only enter a stay for abuse of process in the clearest of cases (***Mack***, at p 975).

[27] Justice Lamer stated that there are two primary concerns that a court must consider when determining whether police conduct amounts to entrapment. The first concern arises from the need to regulate the state's power to "randomly test the virtues of individuals" and the second concern arises from the need to restrict state conduct that improperly induces criminal conduct (***Mack***, at p 941). Justice Lamer cautioned, however, that an appropriate balance must be struck.

In particular, Justice Lamar was of the view that some considerable latitude must be given to the police in the investigation of crime, especially as crimes and those who commit crime become more sophisticated. (*Mack*, at pp 916-917).

[28] Justice Lamar summarized those instances where a court might find an abuse of its process by reason of entrapment as follows (*Mack*, at pp 959, 962, 964-65):

- 1) The police must not offer opportunities to commit crime unless they have a reasonable suspicion that the targeted individual is already engaged in criminal activity; or
- 2) The police make such an offer while in the course of a bona fide inquiry;
- 3) Assuming that the police have acted with the necessary reasonable suspicion in relation to the individual or as part of a bona fide inquiry, an accused may still argue that entrapment occurred because the police have induced him to commit the offence through deceit, fraud, trickery, reward or other conduct.

[29] In *Barnes*, Chief Justice Lamar described a bona fide inquiry at p. 463 as follows:

The basic rule articulated in *Mack* is that the police may only present the opportunity to commit a particular crime to an individual who arouses suspicion that he or she is already engaged in the particular criminal activity. An exception to this rule arises when the police undertake a bona fide investigation directed at an area where it is reasonably suspected that criminal activity is occurring. When such a location is defined with sufficient precision, the police may present any person associated with the area with the opportunity to commit the particular offence. Such randomness is permissible within the scope of a bona fide inquiry.

Random virtue testing, conversely, only arises when a police officer presents a person with the opportunity to commit an offence without a reasonable suspicion that:

- (a) the person is already engaged in the particular criminal activity,
or
- (b) the physical location with which the person is associated is a place where the particular criminal activity is likely occurring.

[30] The Supreme Court in *R v Ahmad* addressed the entrapment framework in the modern context of investigating suspected dial-a-dope operations. The five-member majority affirmed the law relating to the treatment of entrapment and found no reason to recalibrate the balance struck by the Court's earlier decisions in *Mack* and *Barnes*. The majority did, however, issue important guidance as to how the law of entrapment should be applied to those police investigations into virtual spaces. In particular, the majority clarified when and how the reasonable suspicion standard could be established in those circumstances where the police receive a tip or information that a phone number may be used for drug dealing (*Ahmad*, at para 3).

[31] Specific to the investigation of virtual spaces, the majority recognized the significant privacy rights that individuals have in their telephones, while at the same time acknowledging the difficulties involved in detecting dial-a-dope drug traffickers who work in both digital and physical places (*Ahmad*, at para 41). The majority also stressed that while bona fide inquiries

may be into virtual spaces, including telephone numbers, the virtual space must be “sufficiently particularized” to support reasonable suspicion (*Ahmad*, at para 43).

Reasonable Suspicion

[32] The *Ahmad* majority reiterated the need for objectively based reasonable suspicion before the police decide to offer an accused the opportunity to commit crime, or before the police undertake the investigation of a particular location as part of a bona fide inquiry. The majority explained that the minimum standard of reasonable suspicion was necessary as a means to avoid discriminatory police conduct; particularly, as a means to avoid racial profiling, and the corresponding disproportionate impact on the poor or otherwise marginalized individuals. The reasonable suspicion standard is a means by which the courts attempt to identify and preclude discrimination by reminding judges of the need for “exacting curial scrutiny of police conduct” and by requiring that the reasonable suspicion standard be supported by “objectively discernible facts” (*Ahmad*, at paras 25 -28).

[33] Drawing primarily upon the Supreme Court’s prior decisions, (for example, *R v Chehil*, 2013 SCC 49; *R v MacKenzie*, 2013 SCC 50; and *R v Kang-Brown*, 2008 SCC 18) the majority explained what is required before a court concludes that the reasonable suspicion standard has been met (*Ahmad*, at paras 44 -57):

- (a) reasonable suspicion is an objective standard subject to rigorous, independent and exacting judicial scrutiny;
- (b) reasonable suspicion must be focused, precise, reasonable, and based in objective facts;
- (c) reasonable suspicion can be described as requiring a constellation of objectively discernible facts that provide the police with reasonable cause to suspect that a certain type of crime was being committed by a particular person or in a particular place;
- (d) the requirement for reasonable suspicion is not an unduly onerous standard and is a lower standard than reasonable grounds;
- (e) reasonable suspicion requires only the possibility, rather than the probability of criminal activity;
- (f) although innocent explanations and exculpatory information remain relevant to assessing reasonable suspicion, the police need not undertake further investigation to rule out those explanations, however, mere hunches and intuition will not suffice;
- (g) a police officer’s training or experience can make otherwise equivocal information probative of the presence of criminal activity;
- (h) reasonable suspicion is not a generalized suspicion and must identify a specific person or phone number;
- (i) the police may investigate tips of unknown reliability in an attempt to establish reasonable suspicion because reasonable suspicion cannot be supported by a bald tip alone;
- (j) when the police use a tip from a confidential or anonymous source, courts must scrutinize the tip to determine if the detail is compelling, the informant credible, and its information is corroborated;

- (k) the police may form reasonable suspicion in the course of a communication with the complainant before presenting the opportunity to commit a crime; and,
- (l) close scrutiny of the language used by the police is required to determine whether the police offered the accused an opportunity to commit the crime.

Providing an Opportunity to Traffic in Drugs

[34] The majority in *Ahmad*, at paras 63-69 took care to delineate between the exploratory requests made by police to an accused from those circumstances in which it could be said that the police offered the opportunity to commit a crime. These principles may be summarized as follows:

- (a) the determination of whether police offer and opportunity to commit an offence is informed by both the offence and context;
- (b) in a conversation, an opportunity will be established when an affirmative response to the question posed by police would constitute the material elements of the offence;
- (c) to constitute an opportunity to commit an offence, the conduct must be sufficiently proximate to conduct that would satisfy the material elements of the offence;
- (d) an opportunity to commit an offence is offered when the police ask the accused a question to which the accused can commit an offence by simply answering “yes”;
- (e) in appreciation of the definition of trafficking in the *CDSA*, the police can make exploratory requests of the target, including whether they generically sell drugs without offering an opportunity to traffic in illegal drugs; and,
- (f) an opportunity is provided when the police request a specific type of controlled drug or substance or in some cases a particular quantity when the police are working from a tip that the accused deals in a particular drug.

Analysis

Issues that are not in dispute

[35] Consistent with the entrapment framework, it is evident that the administration of justice must take care to avoid inadvertently condoning abusive police conduct. While it might be tempting to justify abusive conduct that does not meet the high standards of “decency, justice and fair play” based upon the difficulties involved in detecting the virtual trafficking of controlled drug and substances, it should not be forgotten that the entrapment of an accused by the state abuses the court’s process: *R v Bank*, 2021 ABCA 223 at paras 44-50. As the majority cautioned in *Bank* at para 50, the challenging part is to properly identify the conduct of police that can be properly categorized as abusive.

[36] I start by acknowledging that there are a number of issues before me that are not in dispute.

[37] First, it is clear that the police did not have a reasonably individualized suspicion to believe that Mr. Small was trafficking in methamphetamine before U/C 1 offered him the opportunity to do so on June 27, 2018. Although U/C 1 had been provided a target sheet with Mr. Small’s Facebook photograph, Mr. Small’s association to the phone number that U/C 1

obtained from BR bordered on tenuous and approached non-existent. It is clear that the police did not reasonably suspect that Mr. Small would answer the telephone, and it is equally clear that the police did not have a reasonable suspicion that Mr. Small was trafficking in methamphetamine.

[38] I say this because, at best, the police information association of Mr. Small to the Deschner municipal was tenuous. It would to my mind constitute an unwarranted leap in logic to conclude that such a tenuous connection was to the Deschner address was in some manner capable of linking Mr. Small to either the registered owner of the telephone or the telephone number itself.

[39] The information associating Mr. Small with the Deschner address was also potentially stale dated information. In my view, it is not objectively reasonable to conclude that Mr. Small's unspecified association with the Deschner address is capable of supporting either a reasonable suspicion that Mr. Small was actively trafficking in drugs, or the reasonable suspicion that Mr. Small was using the telephone number that BR provided to U/C 1 for the purpose of selling drugs.

[40] In reaching this conclusion, I recognize that the evidence relied upon in support of the reasonable suspicion standard must not to be considered on some piecemealed basis, but instead on the full constellation of objective factors known to the police.

[41] I have also considered Corporal Larson's suggestion that he acquired a reasonable suspicion in relation to the phone number, in part, because of Mr. Small's presence at the execution of a search warrant one year earlier where drugs were found.

[42] In my view this additional piece of information does not assist in establishing either a reasonable suspicion that Mr. Small was actively trafficking in controlled drug and substances, or a reasonable suspicion that the phone number provided by BR was a location where drugs were being trafficked.

[43] I say this because the police were unaware of any association between Mr. Small and the telephone number obtained by U/C 1 beyond speculation. Corporal Larson's reliance upon Mr. Small's presence at the time of the executed drug search warrant remains completely untethered to the telephone number that U/C 1 received from BR.

[44] It is my view, therefore, that any suspicion that the police may be said to have reasonably relied upon depends upon the reliability of BR's information and, to a lesser extent, the capture of that telephone number on the transmission data recorder as part of the larger drug investigation.

[45] The second issue that is not in dispute is that U/C 1 provided Mr. Small with the opportunity to traffic in methamphetamine on June 28th. The trafficking offence itself was made out when Mr. Small essentially said "yes" in response to U/C 1's request to purchase "Side" (methamphetamine).

[46] Third, the telephone number provided to U/C 1 by BR, as a single phone number, was sufficiently particularized so as to support the reasonable suspicion standard.

[47] Fourth, assuming that the police were acting in the course of a bona fide inquiry with the necessary reasonable suspicion that the phone number was a location where drugs were trafficked, U/C 1 did not induce Mr. Small to traffic in methamphetamine. In particular, there is

no suggestion that Mr. Small was induced to traffic because of deceit, fraud, trickery, reward or other similar conduct.

The question to be answered

[48] Mr. Small and the Crown focussed their arguments on one operative issue: Were the police entitled, without more, to rely upon the referral telephone provided by BR (a known drug trafficker) to support the reasonable suspicion that the phone number was a location where drugs were being sold. In other words, were the police entitled to investigate the telephone number as part of a bona fide inquiry?

[49] The answer, on these facts, is yes.

Mr. Small's argument

[50] Mr. Small's argument focusses on what was suggested to be the lack of any meaningful police investigation into the veracity of the BR's "tip" in the form of the telephone number she provided. Mr. Small argues that the police were obligated to investigate the "tip" to determine if it was compelling, credible and corroborated: *R v Debot*, [1989] 2 SCR at p 1168. In *Ahmad* at para 51, the majority explained the need for police to investigate a bare tip as follows:

Police practice itself shows that, whether the police are investigating an individual or a phone number, various steps can be taken upon receiving a tip associating a phone number with dial-a-dope activity before acting on it by calling the number. Police may wait to see if more tips are received about the same person or phone number. Police may cross-reference the person's name or phone number to find other connections between it and criminal activity. Police may also consider any details contained in the tip or, if known, the reliability of the informant. For example, does the source have a criminal record? How long have the police used the source? Has the source provided credible tips in the past? Is there a possible motivation for giving a false tip (as in *R v Olazo*, 2012 BCCA 59, 287 C.C.C. (3d) 379, at para 7, where the informant gave the tip to avoid a traffic ticket)? Is the source's information first-hand? (See *R v Lal* (1998), 130 C.C.C. (3d) 413 (BCCA), at paras 11 and 27; *R v Townsend*, [1997] O.J. No. 6516 (QL) (CJ (Gen Div)), at para 5; *R v Williams*, 2010 ONSC 1698 (*Williams* (2010)), at para 12 (CanLII); *R v Sawh*, 2016 ONSC 2776, at para 8 (CanLII).) As in *Mack*, whether a tip can generate reasonable suspicion will also be connected to the currency of the information (p. 958).

[51] Mr. Small emphasizes that the police did nothing to investigate the bare "tip". Instead, Mr. Small identifies concerns with the information that the police had concerning BR; in particular, Mr. Small argues that the police knew BR to be an unsavoury and untrustworthy individual as an active drug trafficker. Mr. Small reminds the Court that BR was a person actively involved in selling drugs, a self-confessed drug addict, and somebody that U/C 1 described as "erratic".

[52] Mr. Small argues that BR's "tip" amounts to nothing more than a telephone number and must therefore be corroborated by further police investigation before the tip could be relied upon to raise a reasonable suspicion. Mr. Small urged the Court to conclude that BR's status as an active drug trafficker was incapable *per se* of supporting any reasonable suspicion that the telephone number that she provided was a location where drugs were being actively trafficked.

[53] Mr. Small suggests that the unreliability of BR's tip can be demonstrated by U/C 1's evidence that Mr. Small was unfamiliar with "Tek" as a phrase that BR specifically suggested U/C 1 should use when requesting methamphetamine.

[54] In response to the Crown's argument, relying upon the experience of the police investigators, Mr. Small states that it is the obligation of the Court to fairly demarcate the boundary between mere suspicion and reasonable suspicion. Mr. Small argues, once again, that the police did little to investigate the telephone number BR provided. In particular, Mr. Small suggests that the police could have placed him under surveillance along with the registered owner of the telephone. Similarly, the police could have surveilled the Deschner Close address.

The Crown's Argument

[55] The Crown responds by suggesting that Mr. Small's argument effectively seeks to reverse the onus upon Mr. Small to establish entrapment on a balance of probabilities. The Crown urges the Court to consider that the police are not required to demonstrate BR's lack of motive and are not required to negate speculative possibilities.

[56] The Crown also relies upon the combined drug-related police experience. The Crown urges the Court to consider the experience of the investigators as a factor tending to support the objective reasonableness of police suspicion regarding the telephone number that BR provided. In context, the Crown argues that the police properly relied upon the significance of BR's statement to U/C 1 that she could use her name as a "vouch". U/C 1 in his testimony advised the Court of the importance of receiving such a "vouch". As would seem self evident, a prospective buyer of drugs has a better chance of purchasing drugs from a stranger if he/she comes armed with such a "vouch". This resort to a "vouch" is apparently a common practice in the context of drug trafficking; both, with respect to the reliability of the purchaser, and in the context of a desire to avoid detection by law enforcement.

[57] The Crown also suggests that the police knowledge of BR's past connection to Red Deer has some relevance in establishing the reasonableness of police suspicion.

[58] The Crown strenuously argues that the information received from BR should not be considered as a bare "tip". In doing so, the Crown distinguishes a "tip" received from an anonymous source, confidential informant, or a Crime Stoppers tipster, from the telephone number that BR provided. The Crown points out that the legal authorities referred to by the majority of the Supreme Court in *Ahmad* do not consider the situation of a referral or a "vouch" as provided by a known drug dealer. Instead, the cases considered by the majority in *Ahmad*, without exception, concern themselves with the obvious concerns arising from bare tips offered by anonymous or confidential tipsters.

[59] The Crown's also argues, from BR's perspective, that U/C 1 was simply another drug addict, who was stuck in Red Deer, and in need of another methamphetamine fix. In this overall context, the Crown suggests that BR had no plausible motivation to mislead her drug-using client at the time she provided U/C 1 with the telephone referral.

The Police had the necessary Reasonable Suspicion

[60] I find that the police had the necessary *ex-ante* reasonable suspicion to believe that drugs were being trafficked over the telephone number supplied by BR at the time U/C 1 called that number.

[61] In my view, the objective inquiry into the reasonableness of police suspicion cannot be governed by those considerations that attach to bare tips arising from confidential or anonymous sources. As the *Ahmad* majority stated at para 32, the low bar of mere suspicion founded on nothing more than a bare tip does not adequately protect individuals from what amounts to random virtue testing by the state. This is because the granting of permission to the police to act upon a bare tip would be to permit the police to provide the opportunity to an individual to commit a crime upon a mere hunch. As the majority states in the same paragraph, “a source’s hunch does not transform into something more once placed in the hands of the police”.

[62] The factual circumstances of *R v Swan*, 2009 BCCA 142 at paras 23-26 aptly illustrate. In *Swan*, the police were engaged in cold calling individuals based upon unsubstantiated anonymous tips. The trial judge found that the lead investigator emailed the entire police department requesting that he be provided with the telephone numbers of suspected dial-a-dope drug traffickers. The request was broadly stated and merely requested that the lead investigator be provided with information from informants, sources, arrested persons, or any other source. In response to his request, the lead investigator received 150-250 telephone numbers in the form of napkins, torn pieces of paper, emails, and Crime Stoppers tips. The trial judge concluded that the lead investigator had only the “barest of information from an anonymous source that drugs were being sold by whomever was using the cellular telephone”.

[63] The British Columbia Court of Appeal at paras 36-37 found it to be disturbing that the police had used this “information” to make hundreds of cold calls. The Court of Appeal expressed concern about the apparent disinterest that the police had in attempting to distinguish between anonymous tips written on matchboxes or napkins from those tips that may have contained reasonably particularized information. The Court of Appeal surmised at para 37, that further investigative effort might well have elevated what was mere suspicion to that of reasonable suspicion.

[64] The concerns identified by the British Columbia Court of Appeal were shared by the majority in *Ahmad*, with the majority cautioning that that a single bald tip of unknown reliability can never be said to raise mere suspicion into objectively verifiable reasonable suspicion. At para 50, the majority echoed this concern by clearly stating that a “sole tip of predictive information cannot meet the reasonable suspicion standard”, but reiterated that a bare tip could be sufficiently corroborated by further investigation. Significantly, a tip may be sufficiently corroborated both with respect to individuals and as to locations as part of a bona fide inquiry.

[65] The majority concerned themselves with those bare tips that arise from confidential or anonymous source(s), and not with tips provided by known sources of proven reliability. The majority reference to *R v Debot* were specific to the context of bare tips emanating from confidential or anonymous sources. It is those confidential or anonymous bare tips that require special scrutiny to determine if the tip detail is compelling, the informant credible, and the information credible.

[66] In the facts before me, the honestly held suspicion that the police held in relation to the telephone number provided by BR as a known place where drug trafficking was being conducted was based upon information provided by a known individual who had proven herself to be a reliable drug trafficker. The telephone number that U/C 1 obtained was not from an anonymous or confidential untested source; rather, the information was obtained directly from BR in the nature of a referral.

[67] In response to U/C 1's request for a referral, BR did not hesitate to respond, but "blurted" out the telephone number. The spontaneity of BR's response reduces the likelihood of concoction in a manner similar to, but not identical with, the circumstantial degree of trustworthiness afforded by a spontaneous utterance.

[68] Before U/C 1 obtained the telephone referral from BR, an important factor to be considered is the police familiarity with BR who had demonstrated that she was reliable drug supplier. In addition, BR was known to have an established connection with Red Deer. BR's reliability as a drug trafficker was established by her past trafficking patterns. She trafficked on more than one occasion by selling cocaine to the CPS undercover operator, and on two other occasions she sold methamphetamine to U/C 1. U/C 1, as BR's customer, enjoyed what could be described as an established business relationship with BR. This relationship fostered the trust that resulted in BR providing the phone number to U/C 1, and also the trust that led to BR suggesting that U/C 1 should use her street name as a "vouch". I accept that BR's offer to U/C 1 that he should use her name as a "vouch" is a significant factor tending to confirm the reasonableness of the suspicion that the police had that the telephone number they were provided was place where drug trafficking was occurring.

[69] I also accept the reasonableness of Corporal Larson's suggestion, based upon his extensive drug investigation experience, that the good-standing relationship U/C 1 had with BR as a "drug dealer" increased the likelihood that the telephone number BR provided was a valid number for the purchase of methamphetamine.

[70] This business relationship is important because there is an element of reciprocal trust. I say this fully recognizing BR's unsavoury character as someone active in drug trafficking and as an erratic drug addict. It is my view, however, that BR's occupation lends some credence to the reasonable suggestion that she would be armed with the knowledge of where to find and purchase drugs. In short, it was objectively reasonable for the police to suspect that BR would necessarily be connected to individuals and to locations involved in the trafficking of drugs.

[71] While Mr. Small argues that BR might have the inclination to lie, Mr. Small's suggestions in this regard are not only speculative, but they run afoul of the caution given by the *Ahmad* majority to the effect that the police are not generally required to undertake further investigations to rule out speculative possibilities or alternative explanations.

[72] I find that it is reasonable that a seller of a particular commodity, including drugs, would be familiar with the suppliers of that commodity and familiar with where that same commodity might be located. It follows that a seller willing to refer a buyer to a place where the commodity might be located and purchased is a factor that is capable of supporting the reasonable suspicion standard. To put this another way, it is reasonable to suspect that a referral from a seller to an alternative supplier of drugs will likely result in a buy.

[73] Viewed in this manner, it was reasonable for the police to suspect that the referral telephone number obtained from BR would lead to a place where drugs were being sold. Accordingly, I find that U/C 1 was not engaged in random virtue testing when he called the telephone BR provided to him and when he offered Mr. Small the opportunity to traffic in methamphetamine.

[74] Although, I find that the police had the necessary reasonable suspicion to make a bona fide inquiry based solely upon the referral given by BR – the fact that the telephone number

provided by BR was found on the data transmission recorder used by the police to capture telephone numbers relevant to this police drug investigation – lends further support for the reasonableness of police suspicion.

[75] As the police had the prerequisite *ex-ante* reasonable suspicion to believe that drug trafficking was occurring at the phone number provided by BR, I find that U/C 1 called that telephone number as part of a bona fide inquiry into drug trafficking. Mr. Small was not entrapped.

[76] In reaching this conclusion, I do not accept the arguments made by Mr. Small that would require the police in these factual circumstances to undertake further police investigation in an attempt to corroborate the telephone number that BR provided.

[77] I am also of the view that Mr. Small’s unfamiliarity with “Tek” as the street name for methamphetamine does not undermine the reasonable suspicion the police had over the phone number. U/C 1’s evidence made it clear that many street names are used to describe methamphetamine and that “Tek” was a particularly new name in 2018. Mr. Small’s unfamiliarity with the phrase “Tek” does not render the police suspicion unreasonable, given the multitude of street names, and given the potential that the phone number that BR provided was being used by a number of individuals for the purpose of drug trafficking.

[78] The application for a stay of the charges on the basis of entrapment is denied as Mr. Small was not entrapped. Convictions will be entered on all six counts.

Heard on the 11th – 15th days of January, and the 27th day of September, 2021.

Dated at the City of Red Deer, Alberta this 26th day of October, 2021.

D.A. Labrenz
J.C.Q.B.A.

Appearances:

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for the Crown

Andrew Phypers
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