

Action No.: 170318752P1  
E-File Name: CCP19 [REDACTED]  
Appeal No.: \_\_\_\_\_

IN THE PROVINCIAL COURT OF ALBERTA  
JUDICIAL CENTRE OF CALGARY

HER MAJESTY THE QUEEN

v.

[REDACTED]

Accused

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TRIAL  
(Excerpt)

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Calgary, Alberta  
June 28, 2019

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1 Proceedings taken in the Provincial Court of Alberta, Calgary Courts Centre, Calgary, Alberta  
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3 June 28, 2019 Morning Session  
4

5 The Honourable Provincial Court of  
6 Judge Tyndale Alberta  
7

8 R.A. Sigurdson For the Crown  
9 P.C. Fagan, QC For the Accused  
10 J. Bohler Court Clerk  
11

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12

13 **Discussion**

14

15 MR. SIGURDSON: Good morning, Your Honour.  
16

17 THE COURT CLERK: Calling [REDACTED] It's here for decision.  
18

19 MR. FAGAN: For the record, the accused is present, Sir.  
20

21 THE COURT: Thank you, Mr. Fagan.  
22

23 Good morning, Mr. Fagan, Mr. Sigurdson.  
24

25 MR. FAGAN: Good morning, Sir.  
26

27 **Reasons for Judgment**

28

29 THE COURT: As a preface, in the interests of timely justice, I  
30 have not ordered a transcript but rely only on my notes. I apologize in advance for any  
31 misquotation or for any unpolished portions of this judgment.  
32

33 Introduction  
34

35 On December 14th, 2016, and again on January 6, 2017, Constable Mitch Young, acting  
36 in an undercover capacity, purchased cocaine from an individual he knew as Sammy.  
37

38 The trial was held before me on June 24, 25, and 26 of 2019. The only issue to be decided  
39 is whether the Crown has proved beyond a reasonable doubt that the accused, [REDACTED]  
40 [REDACTED] is the individual Constable Young knew as Sammy.  
41

1 Background

2  
3 As a result of a noticeable increase in drug activity in the Gleichen area in the summer of  
4 2016, RCMP Corporal Mercer, who worked in Gleichen, requested the assistance of the  
5 ALERT unit, a combined RCMP and Medicine Hat Police Service team. Corporal Mercer  
6 obtained a buy phone number from a confidential informant, and a plan was put in place to  
7 attempt to purchase methamphetamine. The anticipated target was Samantha Redgun  
8 (phonetic).  
9

10 Buy Number One

11  
12 On December 14th, 2016, Constable Young called the phone number to set up a drug  
13 purchase. A male answered who identified himself as Sammy. It became clear that Sammy  
14 was not associated to Ms. Redgun at all. He did not sell methamphetamine. He did not  
15 know where Gleichen was, and he needed directions to get to Strathmore. Ultimately,  
16 Constable Young and Sammy agreed to meet at Strathmore for the sale and purchase of  
17 2.5 grams of crack cocaine for \$200.  
18

19 Constable Young described that at 5:19 that afternoon, a grey SUV pulled behind his  
20 undercover vehicle, where it was parked in the Husky parking lot facing Highway 1, and  
21 he received a telephone call instructing him to come back and get into the SUV. When  
22 Constable Young approached the SUV, he saw a male driving the vehicle and a female in  
23 the front passenger seat. He opened the rear passenger door but was reluctant to get in. The  
24 driver assured him it was safe and that they were not going far. Constable Young got in the  
25 rear passenger side of the SUV, and it drove to the east side of the gas station parking lot  
26 and tucked in by some trucks.  
27

28 Constable Young told the driver that he had \$200. Constable Young then heard noises from  
29 the front seat, including plastic crackling and a cracking or snapping sounds. The driver  
30 turned and handed three pieces of crack cocaine to Constable Young; two the size of nickels  
31 and one dime-sized. The driver asked, Is that good? And Constable Young agreed it was.  
32 The driver then drove the SUV back to the undercover vehicle, talking to Constable Young  
33 as they went. The driver told Constable Young that he should order more if they had to  
34 travel so far, and the driver told Constable Young to call him Sammy.  
35

36 Constable Young immediately exited the vehicle and drove his undercover vehicle to the  
37 safe house, where he began making notes.  
38

39 Constable Young described this interaction with Sammy as lasting roughly 2 minutes in  
40 total. That December was cold and already dark by the time of the meeting. The parking  
41 lot was well lit. One of the occupants of the SUV turned on the dome light. Constable

1 Young was 2 to 2 and a half feet away from the driver.  
2

3 I heard evidence from Staff Sergeant Bannerholt; Corporal Heysa; Corporal, now Sergeant,  
4 Mercer; Constable McGuigan of the Medicine Hat Police Service; and Constable Evans,  
5 now of the Winnipeg Police Service.  
6

7 These officers made up the surveillance and cover team overseeing Constable Young's drug  
8 buys. Their primary concern was ensuring the safety of their undercover operative,  
9 Constable Young. Of secondary importance was identifying the driver, Sammy. To that  
10 end, it was arranged that a marked RCMP unit would effect a traffic stop after the drug buy  
11 to identify the driver.  
12

13 The consensus among the witnesses was that the SUV pulled behind the undercover vehicle  
14 at 5:19.  
15

16 Constable Young entered the SUV at 5:20. He estimated the total interaction to last roughly  
17 two minutes.  
18

19 Although it had to have been the intention of the cover team to continuously monitor the  
20 SUV from the drug buy to the traffic stop, there appears to have been a noticeable gap in  
21 continuity of the surveillance from when Constable Young exited the SUV until it was  
22 observed at 5:30 in the drive-through of an A & W Restaurant.  
23

24 Staff Sergeant Bannerholt testified he picked up surveillance of the SUV at 5:30 in the A  
25 & W drive-through and thereafter kept continuous observation of it until the traffic stop.  
26

27 Constable Heysa testified that the first time he personally observed the SUV was at 5:33 in  
28 the A & W drive-through.  
29

30 Sergeant Mercer was in the surveillance vehicle with Staff Sergeant Bannerholt, and his  
31 observations of the SUV begins again in the A & W drive-through. Sergeant Mercer was  
32 asked directly in cross-examination and conceded that he could not say for sure whether  
33 the team lost continuity of the SUV before the traffic stop.  
34

35 Constable McGuigan was not part of the team on December 14th, 2016.  
36

37 Constable Evans testified that he cannot say for certain that his eyes were continuously on  
38 the vehicle following the drug buy. He was clear that the vehicle at the drug buy had the  
39 same licence plate as the vehicle pulled over in the traffic stop.  
40

41 I find that there was a break in the continuity of the surveillance of the SUV between

1 roughly 5:22, when Constable Young exited the SUV, and 5:30, when surveillance of the  
2 SUV recommenced in the A & W drive-through.  
3

#### 4 Traffic Stop

5

6 Constable Macausland was the uniformed RCMP officer who conducted the traffic stop of  
7 the SUV. He knew the purpose of the traffic stop was to identify the driver of that vehicle.  
8 As the SUV had one headlight not working, that was the pretext for pulling it over. Indeed,  
9 Constable Macausland did issue a violation ticket to the driver for the burned-out headlight.  
10 He made notes on the back of the ticket. These are the only notes he made.  
11

12 The SUV was stopped at about 5:40 on westbound Highway 1, a few kilometres west of  
13 Strathmore. Constable Macausland approached the driver's window and advised the driver  
14 of the reason for being stopped. He requested driver's license, registration, and insurance.  
15 Although no driver's license was produced, the driver gave a name and date of birth.  
16 Constable Macausland confirmed on his computer that there was a valid Alberta driver's  
17 license associated to that name and date of birth and issued the violation ticket.  
18

19 Constable Macausland did not remember whether he asked for an address. He did not recall  
20 the name on the vehicle registration and made no note of it. He did not recall the name on  
21 the insurance slip and made no note of it. He did not make any notes with respect to the  
22 description of the driver of the vehicle and was not able to identify that person at trial. The  
23 name the driver gave to Constable Macausland was that of the accused, [REDACTED].  
24 Forgive me for mispronouncing it, sir. I did not hear any evidence whether the date of birth  
25 Constable Macausland received matched that of the accused.  
26

#### 27 The Facebook Search

28

29 Sometime after the traffic stop, it was communicated to the team and ultimately to  
30 Constable Young that the driver had been identified as [REDACTED]  
31

32 Constable Young, without seeking guidance from any of his staff sergeant or corporal  
33 supervisors, took it upon himself to enter the name [REDACTED] into a Facebook search  
34 engine. That engine turned up a Facebook page profile picture which Constable Young  
35 said he immediately recognized as Sammy. That picture has been included as page 4 of  
36 Exhibit 3. Constable Young identified the gentleman on the right side of the picture as  
37 being Sammy.  
38

#### 39 Buy Number Two

40

41 After a series of texts and phone calls between Constable Young and Sammy, a second

1 drug buy was arranged for January 6, 2017.  
2

3 Constable Young parked his undercover vehicle in the same spot. At approximately 2:09  
4 PM, the same SUV parked behind him, and a phone call again instructed him to get into  
5 the SUV. This time, there were three occupants. Sammy was driving. An unknown male  
6 was in the front passenger side, and an unknown female sat behind the driver. Constable  
7 Young sat in the rear passenger seat.  
8

9 As before, the SUV began driving, ending up behind a nearby restaurant. Constable Young  
10 described the unknown male in the front passenger seat as being pretty aggressive and fast-  
11 talking. He immediately began asking Constable Young if he was a cop and trying to get  
12 Constable Young to smoke some of the crack cocaine, presumably to prove that he was not  
13 a police officer. This man continued questioning Constable Young's cover story.  
14

15 Once the SUV parked, Constable Young observed Sammy pry open the centre console and  
16 break pieces off a crack cookie, stacking them on a scale. Sammy then asked Constable  
17 Young, Are you a cop? Constable Young replied, No, I'm not a fucking cop.  
18

19 Sammy and the passenger, male passenger, conversed briefly in a foreign language.  
20 Apparently satisfied that he was legitimate, the drug deal proceeded. Constable Young  
21 handed \$800 to the male passenger, and Sammy handed him one-half ounce of crack  
22 cocaine.  
23

24 As Sammy drove back to the undercover vehicle, the passenger introduced himself as  
25 Marco and, in a fast-talking manner, coached Constable Young on selling the crack and  
26 how much profit could be made.  
27

28 Constable Young described the conditions of the second buy as occurring in the middle of  
29 the afternoon, in daylight. He sat 2 to 2 and a half feet away from the driver. On this  
30 occasion, Constable Young noted the driver was wearing a black toque and had a neatly  
31 trimmed black beard.  
32

33 At trial, Constable Young testified that he had only seen Sammy on the two occasions of  
34 the drug buys, December 14th, 2016, and January 6, 2017. Despite that, he had no  
35 hesitation identifying the accused as the Sammy who had sold him drugs two and a half  
36 years earlier.  
37

38 Constable Young agreed that the accused at trial looked different than the image in the  
39 Facebook photograph. At trial, the accused is clean shaven with a different haircut than the  
40 individual in the photo. He appears older and of a heavier build than the man in the photo.  
41 Constable Young testified that the first time he met Sammy, Sammy's hair was poofy on

1 top and his beard was shorter compared to the photograph. Constable Young clarified that  
2 in identifying the accused at trial, he recognized the accused's nose, which he described as  
3 "skinny and pointy."  
4

5 In cross-examination, Constable Young agreed that the undercover course had taught him  
6 the importance of making detailed notes specifically because he might be called upon to  
7 make an identification of the trafficker two and a half years after the fact.  
8

9 Constable Young testified that since December 2016, he has made about 50 undercover  
10 drug purchases.  
11

12 Constable Young conceded in cross-examination that following the December 14th drug  
13 buy, he had not made any notes of the facial characteristics of Sammy, not in his notes and  
14 not in his report. Indeed, in respect of the December 14th, 2016, buy, Constable Young  
15 made no notes even that Sammy had a beard .  
16

17 Following the January 6, 2017, drug buy, Constable Young noted that Sammy had a neatly  
18 trimmed black beard. However, Constable Young made no notes of any other facial  
19 characteristics, no notes of the eyes of Sammy, of his nose, of his chin, of his cheekbones,  
20 of his complexion. In short, apart from the beard, no note of any facial characteristic  
21 peculiar to Sammy.  
22

23 Constable Young made no estimate of Sammy's weight except a December 14th note  
24 describing Sammy as having a "thin build." I should note at this point that Constable  
25 Young agreed that the accused in the box does not have -- or does not appear to have what  
26 he would describe as a thin build. It also appears to me that the individual in the photograph  
27 on page 4 of Exhibit 3 does not have a noticeably thin build.  
28

29 Constable Young made no estimate of the height of Sammy, although, in fairness, he only  
30 dealt with Sammy sitting in the driver's seat.  
31

32 Constable Young made no note of any deformity or scar or tattoo or of any distinguishing  
33 feature of Sammy at all.  
34

35 Constable Young did not note the colour of Sammy's eyes.  
36

37 Constable Young made no note of the description of Sammy's clothing, except the toque,  
38 in either drug buy and has no present recollection of any of Sammy's clothing.  
39

40 Constable Young, at trial, described remembering that Sammy had a "innocent or sad"  
41 look, although he made no notes of that characteristic on the occasion of either drug buy



1 nor in any report he made. I should note that the individual in the Facebook photograph  
2 does not to me appear to have any noticeable innocent or sad look.  
3

4 Constable Young conceded he made no notes of his investigation on Facebook.  
5

6 Constable Young was never shown any photographic lineup, including a photograph of the  
7 accused, nor did he take any part in any other identification lineup in respect of the accused.  
8

9 Constable Young agreed that he reviewed the Facebook photograph on Monday and  
10 Tuesday this week before testifying to refresh his memory.  
11

12 Constable Young testified that when he received the name of the driver at the truck stop,  
13 he believed that the driver had been identified by the production of a driver's license with  
14 a photograph. Constable Young could not recall who gave him the name that had been  
15 obtained at the traffic stop. He could not recall how he was given that name or when he  
16 was given that name or where he was given that name. He made no notes at all of this or  
17 of the Facebook search that ensued.  
18

19 In cross-examination, it was suggested to Constable Young that the undercover course had  
20 taught him that it was not a good idea to look at a single photograph of a suspect. His reply  
21 was important. He answered -- and again, I rely on my notes -- "It's all situational. I could  
22 see how in some circumstances it could be problematic."  
23

24 The Law  
25

26 Please note that I intend to omit citations where I can.  
27

28 In *R. v. Mezzo*, the Supreme Court approved of the statements in *Smierciak* at paragraph  
29 30 of *Mezzo*:  
30

31 Both the trial judge and Matas J.A. rely on *R. v. Smierciak* in their  
32 assessment of the impact of the lineup. The accused in that case  
33 was charged with attempting to pass a forged cheque by presenting  
34 it to a bank teller. When the teller asked for a registration card, the  
35 accused searched his pockets and remarked that he must have left  
36 it in his car. He then walked out of the bank and did not return.  
37 Although the teller would not have taken any special care to  
38 observe the accused at the time of the transaction, the conditions  
39 for observation were very good. The police subsequently showed  
40 her a single photo of a suspect, which she identified as the man.  
41 He was convicted. On appeal, Laidlaw J.A. stated at paragraph

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177:

In addition to such matters, and of the utmost importance, is the method used to recall or refresh the recollections of a witness who is to be relied upon to identify a person suspected of wrongdoing or who is under arrest. If a witness has no previous knowledge of the accused person so as to make him familiar with that person's appearance, the greatest care ought to be used to ensure the absolute independence and freedom of judgment of the witness. His recognition ought to proceed without suggestion, assistance, or bias created directly or indirectly. Conversely, if the means employed to obtain evidence of identification involve any acts which might reasonably prejudice the accused, the value of the evidence may be partially or wholly destroyed. Anything which tends to convey to a witness that a person is suspected by the authorities or is charged with an offence is obviously prejudicial and wrongful. Submitting a prisoner alone for scrutiny after arrest is unfair and unjust. Likewise, permitting a witness to see a single photograph of a suspected person or of a prisoner, after arrest and before scrutiny, can have no other effect, in my opinion, than one of prejudice to such a person.

And the *Zurowski* case from the Alberta Court of Appeal reiterated this concern at paragraph 60 and 61: (as read)

Insofar as two of the Crown witnesses are concerned (Boyes and Merritt), this case closely parallels *R. v. Dhillon* where the Court found the identification procedure was "seriously compromised" when a witness was shown photographs of only one person, who was later accused. The risk of mistaken identification is even greater when, as in this case, a single photograph is shown to a witness. The danger is that the witness will identify the picture as opposed to the face viewed at the scene of the crime. The Ontario Court of Appeal explained in *Goldhar* and *Smokler* :

...while no doubt it is often necessary to assist the police in their search that photographs should be exhibited to someone who may be able to pick out a photograph of the

1 person to be sought for, there is always the risk that  
2 thereafter the person who has seen the photograph will have  
3 stamped upon his memory the face he has seen in the  
4 photograph, rather than the face he saw on the occasion of  
5 the crime. The usefulness of such person as a witness may  
6 thereafter be seriously impaired. It is important that trial  
7 judges, as well as the police, should have this in mind.  
8

9 Deutscher and Leonoff point out that the use of a single paragraph  
10 has been strongly criticized by the Courts.  
11

12 They cite *Smierciak*, *Sutton* and *Babb*, and *Richards*.  
13

14 The procedure has been termed "irregular" and "unjustified"; and  
15 the Ontario Court of Appeal has characterized evidence obtained  
16 in such a manner as "valueless."  
17

18 Justice Hopkins, at paragraph 37 of the 2017 case of *Windle*, referred to the well known  
19 case of *Atfield* from the Alberta Court of Appeal. Paragraph 37 of the *Windle* decision  
20 reads as follows: (as read)  
21

22 In *Atfield*, the Court of Appeal instructed triers of fact to closely  
23 examine the evidence which reflects adversely on the accuracy of  
24 the evidence tendered by the eyewitnesses for the Crown. The  
25 Court of Appeal stated, at paragraph 3:  
26

27 The authorities have long recognized that the danger of  
28 mistaken visual identification lies in the fact that the  
29 identification comes from witnesses who are honest and  
30 convinced, absolutely sure of their identification, and  
31 getting surer with time, but nonetheless mistaken. Because  
32 they are honest and convinced, they are convincing and  
33 have been responsible for many cases of miscarriages of  
34 justice through mistaken identity. The accuracy of this type  
35 of evidence cannot be determined by the usual tests of  
36 credibility of witnesses but must be tested by a close  
37 scrutiny of other evidence. In cases where the criminal act  
38 is not contested and the identity of the accused as the  
39 perpetrator the only issue, identification is determinative of  
40 guilt or innocence; its accuracy becomes the focal issue at  
41 trial and must itself be put on trial, so to speak... [T]he jury

1 (or the judge sitting alone) must be satisfied of both the  
2 honesty of the witness and the correctness of the  
3 identification. Honesty is determined by the jury (or judge  
4 sitting alone) by observing and hearing the witness, but  
5 correctness of identification must be found from evidence  
6 of circumstances in which it has been made or in other  
7 supporting evidence. If the accuracy of the identification is  
8 left in doubt because the circumstances surrounding the  
9 identification are unfavourable or supporting evidence is  
10 lacking or weak, honesty of the witnesses will not suffice  
11 to raise the case to the requisite standard of proof, and a  
12 conviction so founded is unsatisfactory and unsafe and will  
13 be set aside...  
14

15 As was pointed in the cases submitted by both Crown and defence, judicial warnings of the  
16 frailties of eyewitness identification abound. In *Barreda*, Justice Owen-Flood noted,  
17 beginning in the second sentence at paragraph 18:  
18

19 I have to be bear in mind that Courts are under a very special duty  
20 to be careful when considering identification evidence. I note the  
21 dicta of O'Halloran, J.A., in *Rex v. Harrison* at page 145, where  
22 the learned trial judge wrote:  
23

24 A generalized statement by a witness, "That is the man,"  
25 cannot be accepted as a substitute for a trustworthy  
26 statement of physical characteristics. A witness can say  
27 "That is the man" only if it is founded on physical features,  
28 characteristics, traits, or mannerisms which is the witness  
29 is able to describe and which, when reliably described, are  
30 peculiar to the accused and are not common in a populace  
31 area to many people who could easily have been at the place  
32 at the time.  
33

34 I also note the dicta of O'Halloran, J.A., in *Rex v. McDonald* at  
35 page 82, where O'Halloran, J.A., quoted the English judge, Mr.  
36 Justice Darling, with approval. O'Halloran, J.A., wrote:  
37

38 As Mr. Justice Darling is reported to have told the jury in  
39 the *Morrison* case, "You must not convict a man on one  
40 suspicion; you must not convict him on a thousand  
41 suspicions; you must not add a thousand suspicious

1 circumstances together and say "That is proof." No. You  
2 must find somewhere a solid anchorage upon which you  
3 can say, 'I am secure of this basis.'"  
4

5 In the very recent case of *Letendre*, the Alberta Court of Appeal confirmed the dangers of  
6 convicting on eyewitness evidence, and I quote, beginning at paragraph -- well, paragraph  
7 17 to 19 of that decision: (as read)  
8

9 Referencing *Sutherland* (at paragraphs 63 to 68), the trial judge  
10 said an eyewitness police officer is not exempt from the usual  
11 evidentiary considerations and generally should be shown a proper  
12 photo lineup, rather than a single photo, to be reliable.  
13

14 In summary, the trial judge acknowledged that the law recognizes  
15 the inherent frailties of eyewitness identification and that honest  
16 and confident witnesses may nonetheless be mistaken in their  
17 identification, leading to circumstances of wrongful conviction.  
18 Eyewitness evidence is inherently unreliable. The trial judge  
19 specifically listed the *Wilband* factors: opportunity to observe,  
20 duration of the observation, light conditions, distance from the  
21 witness to the person, the eyesight of the witness, colour  
22 perception, previous acquaintance by the eyewitness with the  
23 person, and presence or absence of distinctive features or  
24 appearance of the person.  
25

26 The trial judge recognized that it was incumbent upon a trial judge  
27 to: (1) be alive to the danger of convicting based only on  
28 eyewitness identification; (2) note the factors which may have  
29 affected the identification; and (3) addressed those factors.  
30

31 The same Court further comments at paragraphs 48 to 51. Beginning at paragraph 48: (as  
32 read)  
33

34 There is no issue on this appeal as to the law on eyewitness  
35 identification. It was clearly reviewed by the trial judge, and  
36 neither Ms. Letendre nor the Crown had significant criticism of  
37 the review of the law. The trial judge was correct. Eyewitness  
38 evidence is inherently unreliable. Single eyewitness identification  
39 is particularly problematic where witness has identified a stranger,  
40 the identification was made under circumstances that are not  
41 conducive to an accurate identification, the pretrial identification

1 processes were flawed, and there is no corroborating evidence:  
2 referencing *Tat*. This is especially so where the identification  
3 evidence is "fleeting glance evidence": referencing *Atfield*,  
4 compared to "recognition evidence": referencing *Leaney*, *Berhe*,  
5 and *MB*.

6  
7 [49] Showing a single photograph to a potential eyewitness is a  
8 single person lineup is --  
9

10 I think it's a misstatement. It should -- "in a single person lineup."  
11

12 -- is inappropriate, potentially prejudicial, and does not comply  
13 with the recommendations of the *Sophonow Inquiry*. Furthermore,  
14 the credit and accuracy of police officers must be viewed in the  
15 same manner as other witnesses.  
16

17 And they cite *Graat*, *Beeken*, *Sutherland*, *Bigsky*, and *Reid*.  
18

19 [50] Any frailties can be overcome by a careful trial judge to who  
20 is alive to the danger of conviction based on eyewitness  
21 identification, notes the factors which may have affected the  
22 identification, and specifically addresses these factors.  
23

24 [51] In *Salai*, this Court adopted the words of *Lord Widgery* in  
25 *Turnbull*:  
26

27 The judge should direct the jury to examine closely the  
28 circumstances in which the identification by each witness  
29 came to be made. How long did the witness have the  
30 accused under observation? At what distance? In what  
31 light? Was the observation impeded in any way, as, for  
32 example, by passing traffic or a press of people? Had the  
33 witness ever seen the accused before? How often? If only  
34 occasionally, had he any special reason for remembering  
35 the accused? How long elapsed between the original  
36 observation and the subsequent identification to the police?  
37 Was there any material discrepancy between the  
38 description of the accused given to the police by the witness  
39 when first seen by them and his actual appearance?  
40

41 [52] A similar checklist of considerations when addressing

1 eyewitness evidence is set out in *Wilband*, as referenced in  
2 paragraph 18 above.  
3

#### 4 Conditions of Contact Between Constable Young and Sammy 5

6 During the December 14th, 2017, drug buy, Constable Young sat in the rear passenger seat.  
7

8 During the time Sammy was driving the SUV, he would necessarily have been facing  
9 forward, leaving Constable Young with only a view of Sammy's face from behind and to  
10 the side.  
11

12 While Sammy busied himself retrieving the crack cocaine from his plastic wrapper and  
13 breaking off chunks, his attention would have been on these manual tasks with his head  
14 facing forward and down toward his lap. During that time, Constable Young could not have  
15 had a full face view of Sammy.  
16

17 When Sammy turned to get Constable Young's cash and to give him the crack cocaine,  
18 Constable Young would have been able to see Sammy's face, although common sense  
19 dictates that for some of that time Constable Young's focus would have been on his own  
20 hands, giving the money and receiving items, specifically three loose, unwrapped pieces  
21 of crack cocaine.  
22

23 Therefore, during the December 14th, 2016, drug buy, Constable Young's opportunity to  
24 observe Sammy's face would have been considerably less than the two minutes that the  
25 transaction took in total in circumstances of significant stress, at night, with the benefit of  
26 a dome light for some portion of the time and relying on overhead parking lot lights for the  
27 rest. This was the first drug buy from a seller of unknown reliability who posed an unknown  
28 level of threat to the undercover operator in a business in which violent rip-offs are not  
29 unknown. Further, the unexpected presence of the unknown female must have attracted  
30 some of Constable Young's attention, if only to ensure his ongoing safety.  
31

32 Although the January 6, 2017, drug buy lasted for a longer period, approximately five  
33 minutes, (and I refer 1409 to 1414, according to the Staff Sergeant Bannerholt) and it took  
34 place in daylight, there were other factors affecting Constable Young's observation of  
35 Sammy.  
36

37 This time, there were two additional occupants of the SUV. There was an unknown female  
38 in the rear driver's side seat and an unknown male in the front passenger seat. Common  
39 sense dictates that Constable Young's attention must have been divided amongst all three  
40 to some extent to ensure his safety.  
41

1 According to Constable Young, the unknown male in the front passenger seat almost  
2 immediately began aggressively questioning him about his cover story. He began pressing  
3 Constable Young to smoke the crack cocaine. He challenged Constable Young  
4 aggressively about whether he was a cop. This behaviour, this first sign of aggression and  
5 the first hint of danger to his undercover role, must have demanded virtually all of his  
6 attention. Constable Young had to remember and to stick to his cover story while fending  
7 off this man's aggressively expressed suspicions, and he had to be wary of this unknown  
8 and unexpected male acting aggressively. It would only have been for a short while that  
9 Constable Young actually dealt with Sammy, receiving the drugs from him.  
10

11 Following the first drug buy, it is inexplicable why Constable Young made no notes as to  
12 the physical description, clothing, or especially the facial characteristics of the man with  
13 whom he had dealt. I can only assume that because Constable Young believed Sammy had  
14 been identified by way of a driver's license during the traffic stop, that any notes were  
15 superfluous.  
16

17 Constable Young's failure to make virtually any notes of the description of Sammy  
18 following the second drug buy can only be explained by one of two factors. First, his  
19 attention was drawn throughout to the individual who might have posed a threat to him,  
20 the unknown male, or, second, he already had a photograph of who he believed was Sammy  
21 and therefore believed any such description was unnecessary.  
22

23 At trial, Constable Young explained that he recognized the accused as Sammy because of  
24 his "innocent or sad look" and because of his skinny, pointy nose. It is crucial to note that  
25 neither of these determinative factors appear anywhere in Constable Young's notes or  
26 reports and were first mentioned by him two and a half years after the first encounter with  
27 Sammy.  
28

### 29 Corroborative Evidence 30

31 The case authorities are clear that it is unsafe to rely on eyewitness identification, given its  
32 inherent frailties, unless there is some evidence capable of corroborating it - a solid  
33 anchorage, if you will.  
34

35 Mr. Sigurdson, for the Crown, argues that the name provided by the driver of the SUV at  
36 the traffic stop is, because of its relatively unusual nature, capable of providing some  
37 corroboration of Constable Young's identification.  
38

39 Mr. Fagan, for the defence, argues that if the name was provided by the accused, it is a  
40 compelled statement to a person in authority, subject to the confessions rule, proved by the  
41 Crown of voluntariness and, therefore, of admissibility in a voir dire. In the alternative, Mr.



1 Fagan argues that absent proof that the accused uttered the words, the statement of the  
2 name -- the statement -- the stating, I guess, of the name is hearsay. It is an out of court  
3 statement tendered by the Crown for the proof of the truth of its contents. In the absence  
4 of an applicable exception, that hearsay remains inadmissible.  
5

6 I do not need to decide this and decline to do so. I have found that there was a gap in the  
7 continuity of the surveillance of some eight minutes between when Constable Young was  
8 dropped back at the undercover vehicle on December 16th -- December 14th, 2016, and  
9 when Sergeant Bannerholt reacquired the SUV in the A & W drive-through. Therefore, I  
10 am left in doubt that the person driving the SUV at the time of the traffic stop was the same  
11 individual who sold the crack cocaine to Constable Young. Therefore, admissible or not,  
12 the name provided to Constable Macausland is not evidence capable of supporting  
13 Constable Young's identification evidence.  
14

#### 15 Conclusion

16  
17 It is not the law that I must reject eyewitness identification unless it was obtained via a  
18 sequential photographic lineup. Rather, the overriding question is whether the Crown has  
19 proved beyond a reasonable doubt that it was the accused, [REDACTED], who sold crack  
20 cocaine to Constable Young on December 14th, 2016, and January 6, 2017. In my view, it  
21 has not done so. I am left in reasonable doubt. I am obliged to resolve that doubt in favour  
22 of the accused, and I do so.  
23

24 Would you stand, please, sir. I find you not guilty of the two charges remaining in the  
25 Information against you, and you are free to go.  
26

27 THE ACCUSED:

Thank you, Your Honour.

28  
29 MR. SIGURDSON:

Thank you, Sir.

30  
31 MR. FAGAN:

Thank you, Sir.

32  
33 THE COURT:

34 assistance and cogent argument, and I appreciate the way the trial was conducted.  
35

36 MR. SIGURDSON:

Thank you, Sir.

37  
38 MR. FAGAN:

Thank you.

39  
40 THE COURT:

Thank you.  
41

1 THE COURT CLERK:

Order in court. All rise. Court is now closed.

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3

4 PROCEEDINGS CONCLUDED

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1 **Certificate of Record**

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I, Jerrylynn Bohler, certify that this recording is a record made of the evidence in the proceedings in Provincial Court, held in courtroom 1405, at Calgary, Alberta, on the 28th day of June, 2019, and that I was the court official in charge of the sound-recording machine during the proceedings.

1 **Certificate of Transcript**

2  
3 I, Sandy Voga, certify that

4  
5 (a) I transcribed the record, which was recorded by a sound-recording machine, to the best  
6 of my skill and ability and the foregoing pages are a complete and accurate transcript of  
7 the contents of the record, and

8  
9 (b) the Certificate of Record for these proceedings was included orally on the record and  
10 is transcribed in this transcript.

11  
12 Sandy Voga, Transcriber  
13 Order Number: AL-JO-1003-7353  
14 Dated: August 22, 2019  
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