

CANADA / JUDGMENT

R. v. Moir

2016 BCSC 386

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2016 BCSC 386 R. v. Moir

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Moir,

2016 BCSC 386

Date: 20160303

Docket: 53172

Registry: Chilliwack

Regina

v.

Dustin Blue Robert Moir

Ban of Publication made pursuant to s. 486.5(1) and s. 486.5(9) regarding any information identifying police undercover operators.

Ban of Publication made pursuant to s. 517(1)(b) and s. 648(1) until the trial has ended. -- This latter publication ban re ss. 517(1)(b) and 648(1) has expired as of March 3, 2017.

Before: The Honourable Madam Justice S. Griffin

Oral Reasons for Judgment re

Voir Dire Ruling No. 2 re Expert Evidence of Psychologist

Counsel for the Crown:

John D. Hempstead

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Joseph J. Saulnier

Place and Dates of Trial:

Chilliwack, B.C.

January 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 18, 19, 21, 22, 25, 26, 27, 28, 2016

Additional Written Submissions:

On behalf of the Accused

On behalf of the Crown

February 10, 2016

February 15, 2016

Place and Date of Judgment:

Vancouver, B.C.

March 3, 2016

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Introduction

- [1] The accused is charged with committing first degree murder of Chelsey Acorn, contrary to s. 235(1) of the Criminal Code, R.S.C. 1985, c. C-46, between October 1, 2005 and December 31, 2005 inclusive, at or near Hope, BC.

- [2] Over the course of August 2006 to November 2006 the accused was targeted by undercover police officers. The police officers pretended to be people who were part of a criminal organization or who had criminal intentions. In these undercover roles, they established relationships with the accused and recorded statements by him. The Crown seeks to have some of these statements admitted at trial, and in particular, a statement made by Mr. Moir to an undercover operator posing as a crime boss, the "Mr. Big" in the scenarios. In the statement to the fictitious crime boss, Mr. Moir confessed to his involvement in the death of Chelsey Acorn. The statement was made in November 2006 and implicates Mr. Moir and his father, Jesse West.
- [3] The undercover operation then went into a "maintenance" phase in order to allow time for undercover operators to target Mr. Moir's father. The investigations culminated with an arrest of both Mr. Moir and Mr. West in March 2007. Mr. West has been tried separately.
- [4] A trial by jury is scheduled to commence later this year.
- [5] A voir dire was necessary to determine the admissibility of evidence obtained during the Mr. Big investigation, including the confession to the purported crime boss.
- [6] During the course of the voir dire on the Mr. Big evidence, the defence sought to call expert opinion evidence from a psychologist, Wilbert Reimer, Ph.D. The Crown objected. A second voir dire was held in which Dr. Reimer's evidence was called. These reasons deal with the admissibility of Dr. Reimer's evidence.

Outline of Dr. Reimer's Evidence

- [7] The defence originally sought to qualify Dr. Reimer as an expert in the field of clinical forensic psychology, qualified to give opinion evidence on the cognitive functioning and psychological profile of the accused, Mr. Moir, through the administration and interpretation of intelligence, memory, and personality testing, and by applying those results to this case.
- [8] Dr. Reimer's evidence was set out in a report dated January 10, 2016 and expanded upon in his oral testimony.
- [9] His evidence can be divided into two areas.
- [10] First, Dr. Reimer performed what he called a neuropsychological assessment on Mr. Moir. He administered certain intelligence and memory tests (Weschler tests), and reported on the results. Generally speaking this aspect of his report relates to the cognitive functioning of Mr. Moir.

- [11] Second, Dr. Reimer administered two personality tests, and then interpreted these results and the results of the cognitive tests to offer opinions on Mr. Moir's personality and psychological profile, and his reactions and emotions at the time of the Mr. Big investigation. This aspect of his opinion relied heavily on an interview of Mr. Moir, who did not give evidence during either voir dire.
- [12] After conclusion of this voir dire and in the course of submissions, the defence decided to only seek to have admitted the first area covered by Dr. Reimer's evidence, the cognitive testing. Since the Crown objects to both aspects of the opinion, I will consider the second area of Dr. Reimer's evidence excluded.
- [13] The only aspect of Dr. Reimer's written opinion which is sought to be admitted is Appendix D to his report, setting out the results of the Weschler cognitive testing, and paragraphs numbered six to eight on page four of his opinion under the heading of "Facts and Assumptions", which summarized those results.
- [14] Appendix F, his curriculum vitae, and page one to the middle of page two (before the heading of Facts and Assumptions), is also relevant background.

The Criteria for Admission of Expert Evidence

- [15] I will now set out the criteria for the admission of expert evidence, which are:
1. it must be relevant to a material issue;
 2. the opinion is necessary to assist the trier of fact because the subject matter is outside ordinary experience and knowledge;
 3. the evidence is not subject to any other exclusionary rule of evidence;
 4. the witness must be qualified to give the opinion, which qualifications include independence and a lack of bias;
 5. even after the above analysis, the trial judge must fulfill the court's role as a gatekeeper and be satisfied that the probative value of the opinion is worth the potential prejudice, which includes consideration of the same factors above. To put it another way, the benefits of the proposed evidence must outweigh the costs.

See *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23; *R. v. Mohan*, [1994] 2 S.C.R. 9; *R. v. Orr*, 2015 BCCA 88; *R. v. M.C.*, 2014 ONCA 611; *R. v. Singh*, 2014 ONCA 791.

Relevance Framework

- [16] The defence seeks to tender the opinion of Dr. Reimer to support its position that the confession and other statements made by the accused during the Mr. Big investigation ought not to be admitted at trial.

- [17] Thus, it is necessary to understand the issues relating to the admissibility of Mr. Big confession evidence in order to consider whether the proposed expert evidence is relevant to those issues.
- [18] The Supreme Court of Canada in *R. v. Hart*, 2014 SCC 52, set out the proper analytical approach to the admissibility of evidence obtained by the police on a Mr. Big investigation.
- [19] In *Hart*, the Court was concerned about the admissibility of Mr. Big evidence because of the risk of unreliable confessions leading to wrongful convictions, and because of the potential prejudice to an accused caused by leading evidence that the accused was willing to take part in a criminal organisation. At the same time the Court was mindful that used skillfully by police the technique can obtain important evidence and solve serious crimes.
- [20] The judgment of Moldaver J. in *Hart* set out that the evidence obtained from a Mr. Big investigation is presumptively inadmissible. For the evidence to be admitted, there must be a voir dire addressing a two-pronged approach to its admissibility as follows (see paras. 10, 11, 88, 102-105, 108, 115-118, 141):
1. The Crown seeking to admit the evidence has the burden of showing on a balance of probabilities that the probative value of the evidence outweighs its prejudicial effect. In many cases the prejudicial effect will be similar. The focus of the voir dire will therefore typically be on the reliability of the evidence. Factors to consider in relation to the reliability of the confession will include the circumstances under which the confession was elicited, including:
 - a) the length of the operation;
 - b) the number of interactions between the police and the accused;
 - c) the nature of the relationship between the undercover officers and the accused;
 - d) the nature and extent of any inducements offered, both financial and social;
 - e) the presence of any threats;
 - f) the conduct of the interrogation;
 - g) the personality of the accused, including age, sophistication, and mental health; and
 - h) whether the confession contains any indicators of reliability.
 2. Even if the Crown meets the above test, the accused may establish that the police conduct in obtaining the evidence amounted to an abuse of process. If this is established, the Court may fashion a remedy including exclusion of the confession or a stay of proceedings. Factors to consider in relation to the abuse of process issue could include:
 - a) inducements or threats which may have overcome the will of the accused and coerced a confession;

- b) physical violence or threats of violence against an accused; and,
 - c) operations that preyed on an accused's vulnerabilities, such as mental health problems, substance addictions, or youthfulness.
3. Regardless of the above two-pronged test, the Court retains a residual discretion to exclude the evidence where its admission would compromise trial fairness.

[Emphasis added.]

[21] Considering the Hart factors, evidence as to Mr. Moir's cognitive abilities may potentially be relevant to the material issue of the reliability of statements made by him, and may be relevant to the question of whether there was an abuse of process because the police preyed on certain vulnerabilities.

Necessity to Assist Trier of Fact

[22] Other case law has considered whether expert evidence is admissible on a Mr. Big voir dire as being necessary to assist the trier of fact.

[23] A brief review of case law dealing with expert evidence in Mr. Big cases was set out in *R. v. Pearce*, 2012 MBQB 22, aff'd 2014 MBCA 70, although that case dealt with expert evidence on false confessions and not a Mr. Big scenario. In summary, several cases suggest that general expert evidence regarding the risks of a false confession is usually not admissible. However, evidence regarding the accused's particular cognitive functioning can be admitted.

[24] The Court in *Pearce* summarized some of the relevant case law as follows at paras. 30-32:

[30] In *R. v. Phillion*, 2009 ONCA 202, 246 O.A.C. 317, [2009] O.J. No. 849 (QL), the Court had before it a reference by the Minister of Justice under s. 696.1 of the Code to determine if Phillion was wrongly convicted of murder 35 years earlier. One of the issues on the reference was the admissibility on appeal of expert evidence regarding the reliability of Phillion's confession to the police. The defence wished to put before the Court evidence from two forensic psychologists, one of whom was described as the world's leading expert on the psychology of false confessions. While the Court refused to permit the evidence to be tendered because it did not meet the test for fresh evidence on appeal, in doing so, Moldaver J.A. commented:

217 I have identified the Crown's objections to the admission of Dr. Gudjonsson's evidence in considerable detail because, at the very least, they show that the admissibility of expert evidence on false confessions is anything but obvious and should be approached with considerable caution. Of particular concern is whether the proposed evidence reaches the level of scientific reliability required by Mohan to warrant its reception.

218 That said, I want to be clear that, in cases such as this where the reliability of a confession is in issue, expert evidence regarding an accused's personality traits that is relevant to and probative of the issue will be admissible. As the Crown points out, that type of evidence was properly led at the appellant's trial.

[31] The evidence to which the Court referred as having been properly admitted at Phillion's trial was evidence of a psychiatrist and a psychologist that Phillion had an antisocial personality disorder which made him prone to lie in order to get attention.

[32] In *R. v. Balbar*, 2009 BCSC 1901, the defence wished to call a psychologist to testify about the accused's intellectual capacity and to testify that the accused was more likely to make a false confession or exaggerate his involvement in the killing because he was of lower intelligence and more easily influenced. The court allowed the witness to testify about the accused's intellectual capacity but not about whether that would make him more likely to confess, finding that the latter was a matter within the knowledge of the ordinary person.

[Emphasis added.]

[25] I will address first Dr. Reimer's qualifications before addressing the necessity for Dr. Reimer's opinions regarding Mr. Moir's cognitive functioning.

Qualifications

[26] Given the decreased scope of the opinions that the defence seeks to have admitted, the question regarding whether Dr. Reimer is qualified is similarly narrowed.

[27] The Crown accepts that Dr. Reimer is a registered clinical psychologist licenced to practice in British Columbia.

[28] The Crown objected to Dr. Reimer's description, in his written report, of performing a neuropsychological assessment of Mr. Moir. Dr. Reimer agreed in cross-examination that his report was not a "neuropsychological report", but this was not really explained other than saying the report was not designed to determine if the patient had brain trauma. Likewise, Dr. Reimer admitted that he did not perform a "full" neuropsychological assessment on Mr. Moir and that it was potentially misleading to refer in his report to a neuropsychological assessment. However, it was not explained what tests he did not perform to make it such an assessment.

[29] In chief, Dr. Reimer explained that he has ample experience performing aspects of neuropsychological assessments on patients. In BC, clinical psychologists do not have a registered specialty of "neuropsychology", rather this work is within the clinical psychology domain. His evidence in chief made it clear that he has had considerable experience in administering personality, cognitive, and memory tests to patients.

- [30] A neuropsychology subspecialty does exist in Australia, where Dr. Reimer was employed for a time, and it does not appear that he was registered in that subspecialty there. However, he was not pressed on this in cross-examination. He may have had good reasons not to obtain that subspecialty, as his employment appears to have been related to setting up and developing a clinical program at a university. He gave evidence that he was involved in setting up and supervising a program for psychological assessments, including neuropsychological, intelligence, and personality testing.
- [31] I am satisfied that Dr. Reimer is qualified to provide psychological opinion evidence including on the applications and results of neuropsychological testing applied to Mr. Moir, as it relates broadly to Mr. Moir's cognitive functioning.

Necessity of Expert Evidence re Cognitive Functioning

- [32] I turn now to the substance of Dr. Reimer's opinions regarding Mr. Moir's cognitive functioning and whether his opinions are necessary to assist the trier of fact because they provide information that is beyond ordinary experience and knowledge.
- [33] Appendix D to Dr. Reimer's report sets out the results of the administration of the following tests of Mr. Moir by Dr. Reimer:
1. the Wechsler Adult Intelligence Scale - Fourth Edition (WAIS-IV);
 2. the Wechsler Memory Scales - Fourth Edition (WMS-IV); and
 3. the Wechsler Individual Achievement Test - Third Edition (WIAT III).
- [34] The opinion of Dr. Reimer based on the Weschler assessments applied to Mr. Moir, was that Mr. Moir has borderline to mildly impaired intellectual abilities. As Dr. Reimer summarized at page four of his report as follows at items 6, 7 and 8:
6. Mr. Moir's intellectual abilities were in the mildly impaired to borderline range. He has very low verbal comprehension skills. His perceptual reasoning skills were in the low average range. His working memory was in the very low range with extremely low processing speed.
 7. Mr. Moir's logical memory for stories was in the impaired range as was his memory for word pairs. He benefitted very little from repeated exposure to information. His visual spatial memory was in the low average range and a relative strength for him. His visual motor memory was in the impaired range.
 8. Mr. Moir's academic skills were variable. His receptive vocabulary was in the average range a relative strength for him. His oral comprehension scores were in the very low range. His math skills were in the extremely low to very low range. His reading comprehension and word reading skills were in the low average range with very low phonetics skills. His grammar skills were in the very low range with low average ability to organize his thoughts on paper. His spelling skills were in the extremely low range.

- [35] Dr. Reimer explained in a summary way how the Weschler tests are structured, the various sub-tests within them, and Mr. Moir's scores as compared to normative samples.
- [36] This evidence is very similar to evidence that was admitted in relation to a Mr. Big investigation in *R. v. Balbar*, 2009 BCSC 1901 at paras. 3-4.
- [37] I accept that as a trier of fact in the Mr. Big voir dire I can bring to bear ordinary experience in assessing Mr. Moir's intellectual abilities to some extent, based on a reading of the transcripts of the undercover operation, listening to the audio recorded conversations during that investigation, and observing and listening to Mr. Moir in the video-recorded Mr. Big interview and subsequent police interrogation. I can also learn, based on what Mr. Moir told the undercover operators, what Mr. Moir believed to be his own academic limitations, including his difficulties reading and his belief that he has "ADD".
- [38] From observing Mr. Moir's involvement in the undercover operation, and understanding his history of employment, it was readily apparent to me that Mr. Moir's strengths lay other than in intellect and that he was not a person who excelled academically.
- [39] I did not need expert evidence to be able to draw these inferences from the evidence myself.
- [40] However, Dr. Reimer explained that an ordinary person may not be able to gauge a person's intellectual abilities simply from observing them in conversation and performing relatively straightforward tasks. As he explained it, most ordinary conversation takes place at a grade three or four level.
- [41] What Dr. Reimer's evidence adds, which I am unable to determine based on ordinary experience, is where Mr. Moir falls more specifically within the range of intellectual abilities.
- [42] Dr. Reimer explained that as a result of his tests, overall Mr. Moir operates at about a grade three level academically. However, the specific results on individual tests varied widely.
- [43] According to Dr. Reimer's tests, Mr. Moir's ability to converse and understand words spoken to him was closer to a grade 12 and nine months level. He was in the average range of understanding the meaning of words, adequate to converse in day to day life, and to discern what he wants to say and to say it. Mr. Moir's abstract reasoning was lower than average but his ability to figure out visual puzzles involving spatial reasoning was average.
- [44] Dr. Reimer did not assess Mr. Moir for mental illness or a learning disability.
- [45] Dr. Reimer's tests indicated, in his opinion, that Mr. Moir's ability to express himself in written form, for example by composing and building sentences and in spelling, was in the impaired range. Mr. Moir's ability to do math was tested as being in the very low range, which is above "impaired" but below average. His reading abilities were very low but he did have an average ability to comprehend and read words. His memory testing suggested he learns more effectively through what he sees than what he hears.

- [46] I find on a preliminary basis that Dr. Reimer's assessment of Mr. Moir's cognitive abilities, via application of the Weschler tests, to be relevant evidence on the Hart voir dire, which is necessary to provide information beyond my ordinary knowledge.

Whether Subject to Another Exclusionary Rule

- [47] The Crown does not argue that the proposed opinion evidence is subject to another exclusionary rule.

Probative Value versus Potential Prejudice

- [48] I turn then to my role as gatekeeper, considering the probative value of the evidence versus the potential prejudice.
- [49] I have found Dr. Reimer's opinion evidence to meet the criteria of being potentially relevant and of assistance to the trier of fact, with respect to his assessment of Mr. Moir's intellectual abilities.
- [50] On the other hand, as already mentioned, it is apparent to the ordinary person from observing Mr. Moir interact with police officers that Mr. Moir is not intellectually gifted.
- [51] The Crown argues that Dr. Reimer's opinions regarding these assessments are unhelpful because they do not tell us what Mr. Moir was like in 2006 at the time of the undercover operation. Considerable time has passed since then, over nine years.
- [52] The Crown argues that Mr. Moir's cognitive functioning when tested in 2015 could have been affected by Mr. Moir's use of medications; and by long-term marihuana use.
- [53] As for medications, Dr. Reimer understood that Mr. Moir was taking Lyrica for back pain at the time of his assessment. He did not know the dosage. However, Dr. Reimer was of the opinion that this medication would typically not negatively affect the results of cognitive testing. He agreed in cross-examination there was no way to know for sure that the medication had no effect, but he thought it was highly unlikely it did.
- [54] Dr. Reimer admitted in cross-examination that chronic marihuana use can lead to memory difficulties, but said this is hard to quantify. However, he considered it less of a factor in determining cognitive abilities for an adult if the person has not been using marihuana close in time to the testing. It was his view that if marihuana use affected Mr. Moir, it probably affected him more at the time of the undercover operation than it did when he was assessed by Dr. Reimer.
- [55] According to the evidence of Brea Moir, Mr. Moir's wife who was his girlfriend in 2006, Mr. Moir had the habit of engaging in marihuana use several times a day in 2006. Mr. Moir was in custody at the time of his assessment by Dr. Reimer. His last period of frequent marihuana use was not in evidence.

- [56] In my view the Crown's position that Dr. Reimer's assessment in 2015 cannot shed light on Mr. Moir's cognitive abilities in 2006 is only a matter of argument going to the ultimate reliability and weight to give the evidence but not to its threshold admissibility. It is also arguable, if not logical, that if an adult had intellectual weaknesses in 2015, the same adult could have the same weaknesses if also an adult nine years earlier, absent some intervening event such as a head injury or illness. No intervening event has been pointed out in evidence other than possible continued marihuana use and the use of Lyrica.
- [57] The Crown challenged Dr. Reimer's opinions as having several weaknesses, including: that he did not provide "raw data" test scores, only percentiles; he did not provide fulsome explanations as to how he reached his clinical opinions from the data; he did not take into account academic report cards from Kent institution grading Mr. Moir's academic ability; he did not seek out a wider range of background information; and he may have not fully considered that Mr. Moir was "faking bad".
- [58] I find all of the Crown challenges to Dr. Reimer's evidence to go to the ultimate reliability and weight of the evidence, but in my view they do not defeat the threshold admissibility of the evidence.
- [59] The evidence of Mr. Moir's intellectual capacity is relevant. In light of the narrowed scope of the evidence sought to be admitted, there is very little prejudice to its admissibility.
- [60] I conclude that the evidence of Dr. Reimer regarding Mr. Moir's intellectual capacity should be admitted.
- [61] I have already identified the admissible areas of Dr. Reimer's written report but for ease of reference will summarize them again:
- a) Appendix D, setting out the results of the Wechsler assessments;
 - b) page four, items six through eight;
 - c) Appendix F, Dr. Reimer's curriculum vitae; and
 - d) page one through to the end of the paragraph headed "Informed Consent" on page two.
- [62] The remainder of the report is not admitted.
- [63] As for Dr. Reimer's oral testimony, the parties have not specifically addressed this. I take it counsel agree that I ought to self-instruct to give no weight to his oral evidence based on the excluded portion of his report, and to only give weight to his oral evidence based on the admitted portion of his report?

MR. SAULNIER: Yes that makes sense.

MR. HEMPSTEAD: Yes.

"The Honourable Madam Justice S. Griffin"

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