

CANADA / JUDGMENT

Bandi v. Gustard

2016 BCSC 920

COURT

Supreme Court of British Columbia

DECIDED

24 May 2016

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2016 BCSC 920 Bandi v. Gustard IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Bandi v. Gustard, 2016 BCSC 920 Date: 20160524 Docket: S156046 Registry: Vancouver Between: Erfan Bandi Petitioner And: Keith Gustard Attorney General of British Columbia Vancouver Police Department Respondents Before: The Honourable Mr. Justice Leask Reasons for Judgment Counsel for Petitioner: N. Isaac, W. Skinner, Articling Student Counsel for Respondents Keith Gustard and Vancouver Police Department: B. Toy Counsel for Attorney General of British Columbia: No One Appearing Place and Date of Hearing: Vancouver, B.C. January 15, 2016 Place and Date of Judgment: Vancouver, B.C. May 24, 2016

Introduction

- [1] The petitioner, Erfan Bandi, sought an order in the nature of certiorari quashing the decision of the respondent Constable Keith Gustard to issue Mr. Bandi a 24-hour driving prohibition pursuant to s. 215(3) of the Motor Vehicle Act, R.S.B.C. 1996, c. 318. Section 215(3) of the Motor Vehicle Act permits a peace officer to issue a 24-hour driving prohibition if he or she "has reasonable grounds to believe that a driver's ability to drive a motor vehicle is affected by a drug, other than alcohol."
- [2] At the hearing, I granted the order and set aside the 24-hour driving prohibition with written Reasons to follow. These are my Reasons for Judgment.

Facts

- [3] The petitioner was stopped during the early morning hours of March 5, 2015, while driving his vehicle southbound on Main Street, in the City of Vancouver. Cst. Gustard, while driving northbound, suspected that the petitioner was speeding. When Cst. Gustard turned his vehicle around and decided to conduct a traffic stop, the petitioner was not speeding. The petitioner's speed was not caught on radar.

- [4] While speaking with the petitioner through the open driver's side window of his car, Cst. Gustard smelled a strong odour of Axe Body Spray deodorant and noted that a container of Axe Body Spray was in plain view on the back seat of the petitioner's vehicle. Cst. Gustard believed that the petitioner had just applied the body spray to himself and that his reason for doing so was to mask the smell of either alcohol or marijuana. Cst. Gustard also observed that the petitioner had bloodshot and glassy eyes.
- [5] Cst. Gustard suspected that the petitioner had recently smoked marijuana. Cst. Gustard requested that the petitioner get out of the car so he could continue with his investigation. Cst. Gustard was not trained as a Drug Recognition Expert ("DRE"), nor at that time had he taken the course to qualify himself as able to administer the Standard Field Sobriety Test ("SFST"). Cst. Gustard's evidence is that after he explained to the petitioner the serious ramifications for failing to disclose that he had recently smoked marijuana, the petitioner responded by saying that he had smoked some marijuana two to three hours previously. The petitioner denies he said this.
- [6] Based on the totality of the circumstances, Cst. Gustard issued the petitioner a 24-hour driving prohibition pursuant to s. 215(3) of the Motor Vehicle Act.
- [7] The Notice of 24-Hour Driving Prohibition and Report to ICBC issued by Cst. Gustard has an "Officer's Report" form on the reverse. Section 1 of the form, entitled "Driver", contains spaces for the officer to provide evidence that the person named had care or control of the motor vehicle. The notes under this heading are as follows: Vehicle was pulled over for speeding BANDI was driving. Glassy and blood shot eyes. BANDI just sprayed a large amount of axe on him to cover smells. Admitted to smoking pot about 2-3 hours ago." Standard of Review
- [8] The test for judicial review of a police officer's decision made pursuant to s. 215(3) of the Motor Vehicle Act is the test of reasonableness as defined in *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 47. A decision is unreasonable when it fails to display justification, transparency and intelligibility within the decision making process. Or, as Johnston J. stated in *Giorio v. Wilson*, 2014 BCSC 786 at para 33, when its result does not fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."
- Discussion
- [9] I set aside the Notice of 24-Hour Prohibition in this case on the basis that the officer had a proper evidentiary basis for concluding that the petitioner had recently consumed marijuana but no proper evidentiary basis for concluding that his abilities to drive a motor vehicle had been affected.
- [10] In reviewing past decisions of this court, my conclusion is that the court will uphold a police officer's decision to issue a Notice of 24-Hour Driving Prohibition under s. 215(3) when the driver: (1) demonstrated clear evidence of erratic driving; and/or (2) exhibited an impaired physical ability. Clear Evidence of Erratic Driving

- [11] In *Mohammed v. Lafontaine*, 2007 BCSC 1458, the court considered whether a police officer had enough evidence to support her decision to prohibit the petitioner from driving for 24 hours. It is apparent that there was clear evidence that the petitioner was driving erratically. The police officer observed the petitioner driving 20 km/h in a 50 km/h zone and swerving over the centre line several times. Also, the petitioner failed to stop immediately once signalled to stop by activation of police vehicle emergency equipment. Koenigsberg, J. determined that these facts, combined with others, amounted in aggregate to evidence upon which the police officer could infer reasonable and probable grounds to conclude that the petitioner's ability to drive was affected by a drug. The police officer's decision to issue a Notice of 24-Hour Driving Prohibition was upheld by the court.
- [12] A police officer also had clear evidence of erratic driving when determining to issue a Notice of 24-Hour Driving Prohibition in *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2013 BCSC 1458. In *Wilson*, an individual observed the petitioner driving into a ditch. This individual assisted the petitioner in getting her car out of the ditch. The individual followed the petitioner after she got back on the road. The individual described the petitioner as driving all over the road and on several occasions feared that she would drive off the road. All of this was reported to a police officer who was called to the scene by the individual. Based on the driving evidence and other factors, the police officer formed the opinion that the petitioner's ability to operate a motor vehicle was affected by a drug. The police officer's decision to issue a Notice of 24-Hour Driving Prohibition was upheld by the court. Impaired physical ability
- [13] In *Basi v. Saanich (City) Police Department*, 2014 BCSC 593 a police officer was conducting a roadblock when the petitioner passed through. The police officer noticed a powerful odor of marijuana coming from the petitioner's vehicle. The petitioner demonstrated slow delayed speech and very slow motor skills. When questioned, the petitioner admitted to smoking marijuana five hours previously. The police officer decided to conduct a SFST of the petitioner. During the test, the police officer observed that the petitioner had involuntary fluttering of his eyes, was continuously swaying back and forth and was unable to recognize when 30 seconds had passed.
- [14] It was clear that the petitioner demonstrated an impaired physical ability. Based on these observations, the police officer formed the opinion that the petitioner was affected by a drug and therefore issued him a Notice of 24-Hour Driving Prohibition. Halfyard, J. determined that the information relied on by the police officer was capable of supporting the conclusion that there was a reasonable probability that the petitioner's ability to drive a motor vehicle was affected by marijuana.
- [15] A similar set of circumstances occurred in *Giorio*. A police officer was conducting a roadblock when the petitioner drove through. The petitioner smelled of marijuana and his eyes were bloodshot. When questioned, the petitioner mumbled that he had smoked marijuana some time earlier. The police officer decided to conduct a SFST of the petitioner. The petitioner demonstrated involuntary eye movement. During the walk and turn test, the

petitioner started too soon, stepped off the line and turned not as described. The petitioner was also unable to do a one leg stand without swaying back and forth and using his right arm for balance. Given the petitioner's impaired physical ability, the police officer formed the opinion that he had drugs in his system, which affected his ability to drive a motor vehicle. The court upheld the suspension. Application to This Case

- [16] Cst. Gustard relied on the following grounds in making his decision to issue the Notice of 24-Hour Driving Prohibition:
- (a) The petitioner was allegedly speeding;
 - (b) The petitioner had glassy and bloodshot eyes;
 - (c) A powerful odor of axe body spray coming from the petitioner's vehicle; and
 - (d) The petitioner admitted to smoking some marijuana 2-3 hours previously Did the petitioner exhibit clear evidence of erratic driving?
- [17] In his report, Cst. Gustard stated that he pulled the petitioner over for speeding. However, Cst. Gustard thought that the petitioner was speeding while he was travelling in the opposite direction. Cst. Gustard did not detect the petitioner's speed on radar. By the time Cst. Gustard turned his car around to conduct a traffic stop, the petitioner was clearly not speeding. I do not find Cst. Gustard's observations to be persuasive evidence that the petitioner was speeding. Therefore, there was insufficient evidence of erratic driving by the petitioner. Did the petitioner display an impaired physical ability?
- [18] I accept that the petitioner had glassy and bloodshot eyes at the time of the traffic stop. However, I do not believe that the presence of glassy and bloodshot eyes is enough to say that the petitioner displayed an impaired physical ability. Also, I do not believe that the presence of glassy and bloodshot eyes is indicative of a driver's ability to operate a motor vehicle.
- [19] Cst. Gustard made no observations as to the state of the petitioner's motor or cognitive skills. As discussed above, at the time of the traffic stop Cst. Gustard was not a trained DRE and had not taken the course to qualify him as able to administer a SFST. Cst. Gustard had the opportunity to call a fellow police officer who was a trained DRE who would have been able to administer a SFST on the petitioner. He chose not to do so. As a result, there is no evidence that indicates that the petitioner displayed an impaired physical ability at the time that Cst. Gustard pulled the petitioner over.

Conclusion

[20] The information relied on by Cst. Gustard was not capable of supporting the conclusion that there was a reasonable probability that the petitioner's ability to drive a motor vehicle was affected by marijuana. Therefore, Cst. Gustard's decision to issue the petitioner a Notice of 24-Hour Driving Prohibition pursuant to 215(3) of the Motor Vehicle Act was unreasonable. Accordingly, the Notice of 24-Hour Driving Prohibition is set aside.

[21] In my view, in order to justify a 24-hour suspension under s. 215(3) of the Motor Vehicle Act, a peace officer must have an evidentiary basis to conclude that the motorist had consumed marijuana recently and either:

- (a) Evidence of erratic driving; and/or
- (b) An impaired physical ability. "Leask J."

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