

CANADA / JUDGMENT

R. v. Antonio

2024 BCSC 2300

COURT

Supreme Court of British Columbia

DECIDED

16 October 2024

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2024 BCSC 2300 R. v. Antonio IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Antonio, 2024 BCSC 2300 Date: 20241016 Docket: 35799-1 Registry: Vancouver Rex v. Christian Albert Antonio Before: The Honourable Madam Justice Fitzpatrick Oral Reasons for Judgment In Chambers Counsel for the Crown: D. Meagher Counsel for the Accused: C. Antonio (by telephone) Place and Date of Trial/Hearing: Vancouver, B.C. October 16, 2024 Place and Date of Judgment: Vancouver, B.C. October 16, 2024

- [1] THE COURT: This is a summary conviction appeal advanced by Christian Antonio with respect to a violation ticket that he received pursuant to an alleged infraction under the Motor Vehicle Act, R.S.B.C. 1996, c. 318 [Act].
- [2] For reasons that are not evident, at the commencement of this hearing, Mr. Antonio did not appear, despite the Crown having made substantial efforts to ensure that he was aware that the matter was scheduled to proceed today.
- [3] Mid-way through the delivery of the Court's reasons for judgment, Mr. Antonio phoned Crown counsel on his cell phone. In the unique circumstances here, and with Mr. Antonio's agreement, I continued to deliver my reasons on this appeal, with Mr. Antonio listening on that cell phone.
- [4] Mr. Antonio seeks an order overturning his conviction and inevitably, the fine that was imposed as a result.
- [5] The Crown supports a setting aside of Mr. Antonio's conviction.

Background

- [6] On July 2, 2023, Mr. Antonio was issued a violation ticket, alleging two things: firstly, that he was using an electronic device (a cell phone) while driving; and, secondly, that he was driving with illegally tinted windows on his vehicle.
- [7] Mr. Antonio disputed the ticket. On February 26, 2024, Mr. Antonio appeared in court and entered a guilty plea to the tinted window charge; the matter of the cell phone was adjourned.

- [8] On May 23, 2024, Mr. Antonio appeared at the trial before Judicial Justice Osborne. Mr. Antonio was self-represented at that time.
- [9] Although no transcript of the trial or reasons for judgment were produced on this appeal, I agree with the Crown that the matter can be disposed of on the basis of Crown counsel's submissions after having listened to the DARS.
- [10] At the trial, there was conflicting evidence concerning where Mr. Antonio's cell phone was located at the time. Mr. Antonio said that his cell phone was tucked in a console out of sight (although in his notice of appeal, he said it was tucked away in the glove compartment). The ticketing officer said that, while he was driving, Mr. Antonio had his cell phone in a bag on the passenger seat which was attached by a USB cable to his car, and that Mr. Antonio was listening to a podcast.
- [11] I agree with the Crown's submission that the appeal can be determined, even accepting the officer's evidence concerning the location of Mr. Antonio's cell phone.
- [12] The Judicial Justice appears to have based her reasons to convict Mr. Antonio on this alleged infraction based on the fact that Mr. Antonio had an "N" licence, or what is also called a Class 7 driver. The Judicial Justice reasoned that Mr. Antonio was not allowed to have a phone in the car while he held a Class 7 driver's license.
- [13] On this appeal, Mr. Antonio argues that there is no rule that, as an "N" or Class 7 driver, he is not allowed to have his phone in the car with him.
- [14] The statutory provisions that are relevant to this appeal include ss. 214.1 through 214.6 of the Act.
- [15] Section 214.2(1) is the most relevant section which provides that a person must not: use an electronic device while driving or operating a motor vehicle on a highway.
- [16] There is no question that Mr. Antonio's cell phone is an "electronic device" as defined by s. 214.1 of the Act.
- [17] "Use" is also defined in s. 214.1 of the Act: "use", in relation to an electronic device, means one or more of the following actions:
- (a) holding the device in a position in which it may be used;
 - (b) operating one or more of the device's functions;
 - (c) communicating orally by means of the device with another person or another device;
 - (d) taking another action that is set out in the regulations by means of, with or in relation to an electronic device.
- [18] The Crown has also referred to the Use of Electronic Devices While Driving Regulation, B.C. Reg. 308/2009 [Regulation]. Sections 7-10 of the Regulation provide for various exceptions in terms of allowing persons to use electronic devices (such as cell phones) while driving or

operating a motor vehicle in certain ways and in specifically prescribed circumstances. For example, s. 7(b) provides that a person may use a cell phone with a hands-free telephone function if the phone is voice activated or requires only one touch to initiate, accept or end a call.

- [19] However, the above exceptions did not apply to Mr. Antonio. Section 6 of the Regulation provides that ss. 7-10 of the Regulation do not apply to a person driving or operating a motor vehicle under a Class 7 licence (i.e. an "N" licence). See *R. v. Sangret*, 2019 BCSC 2131 at para. 17.
- [20] Accordingly, the only issue before the Judicial Justice was whether Mr. Antonio was "using" his cell phone while operating his vehicle, as defined in s. 214.1 of the Act.
- [21] I agree with Mr. Antonio and the Crown that nothing in the Act prohibits a Class 7 or "N" driver from simply having a cell phone in their vehicle. Obviously, the Act prohibits "use". However, even accepting the officer's evidence - that the cell phone was on the passenger seat and not being touched by Mr. Antonio - there is nothing that would prohibit Mr. Antonio from doing so.
- [22] The various authorities to which the Crown refers support that conclusion.
- [23] In *R. v. Jahani*, 2017 BCSC 745, a person's conviction was upheld by reason of that person having held a cell phone while trying to connect the phone to a charger. This was found to be "using" the phone by not only handling the phone but also using one of the phone's functions: paras. 35, 44 and 56.
- [24] In contrast, in *R. v. Bleau*, 2021 BCSC 13 at para. 56, Justice Voith, as he then was, concluded that a person who had a cell phone in a cup holder, while playing a podcast, was not "using" the cell phone, contrary to the Act. He found that operating a cell phone requires some sort of interaction between the driver and the phone:
- [38] The transitive sense of "operating" as it is used in s. 214.1(b) appears to necessarily imply some level of interaction between the driver and the electronic device. The action moves from the implied subject, the driver, through the verb ("operating") to the direct object ("one or more of the device's functions").
- [25] In *Sangret* at paras. 14-18, Justice Watchuk found that having an electronic device mounted to or installed on the dashboard, without any holding, touching or other use of it, did not constitute "use" as defined in the Act.
- [26] This case is distinguishable from those cases where the cell phone was placed on or lodged next to a part of a person's body and which have been found to constitute "use" or "holding" under the Act. See, for example, *R. v. Rajani*, 2020 BCSC 779, aff'd 2021 BCCA 292, where the phone was lodged next to the driver's thigh; and, *R. v. Mirza*, 2023 BCSC 881, where the cell phone was next to the driver's leg and it was therefore being "used" by the driver, when it was "held".

- [27] There is no evidence that Mr. Antonio was handling the cell phone or using it by operating any of its functions. There is no evidence that he had the cell phone next to his body. Finally, there is no evidence that he was looking at his cell phone. Based on the officer's evidence, Mr. Antonio was listening to a podcast which was playing on his cell phone which was on the passenger seat.
- [28] I conclude that, taken at its highest, the officer's evidence concerning the location of Mr. Antonio's cell phone in the vehicle does not establish that he was "using" the device while he was driving, within the meaning of the Act.
- [29] I conclude that Mr. Antonio's appeal must be allowed. Pursuant to s. 109 of the Offence Act, R.S.B.C. 1996, c. 338, which provides that s. 686(1) of the Criminal Code, R.S.C., 1985, c. C-46 applies to this appeal, I find that Mr. Antonio's conviction was unreasonable and cannot be supported by the evidence. The conviction is set aside. "Fitzpatrick J."

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