
CANADA / JUDGMENT

R. v. Davis

2012 BCSC 1069

COURT

Supreme Court of British Columbia

DECIDED

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2012 BCSC 1069 R. v. Davis

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Davis,

2012 BCSC 1069

Date: 20120718

Docket: X074677

Registry: New Westminster

Regina

v.

Mary Ochuwa Davis

Before: The Honourable Mr. Justice Williams

On appeal from Reasons for Judgment issued February 9, 2011 in the Provincial Court of British Columbia, R. v. Davis , Surrey Registry, File No. 169141-1

Reasons for Judgment

Counsel for the Appellant,

Mary Ochuwa Davis:

L.J. Helps

Counsel for the Crown:

J.L. Fogel

Place and Date of Hearing:

New Westminster, B.C.

July 6, 2012

Place and Date of Judgment:

New Westminster, B.C.

July 18, 2012

Introduction

- [1] This is an appeal from a conviction entered in Provincial Court on February 9, 2011.
- [2] The appellant was charged with two counts: impaired driving and driving with a blood alcohol in excess of 80 milligrams. The charges arose from the same circumstances.
- [3] The trial extended over parts of two days. At the conclusion of the hearing, following submissions by counsel, the trial judge found that the second count had been proven. Both Crown and defence counsel agreed that there was no basis to support a conviction on the charge of impaired driving, Count 1.
- [4] The submissions at trial were focused on one particular issue: whether the evidence established that the investigating police officer had the requisite "reasonable suspicion" that would lawfully entitle him to make a demand that the appellant provide a breath sample for the Approved Screening Device in accordance with s. 254(2) of the Criminal Code. Ultimately, the trial judge concluded that the test had been satisfied.

Grounds of Appeal

- [5] The basis for the appeal in this case is quite narrow and precise. The appellant says that the Reasons for Judgment do not show that the trial judge properly concluded that, at the time the officer made the demand, he had the suspicion that the Criminal Code requires. In her submission, there is nothing in the Reasons to show that the trial judge addressed the "timing issue". As I understand, this encompasses the timing of the driving, the formation of the suspicion and the making of the demand. She says the conviction cannot stand and this Court should substitute a verdict of acquittal or order a new trial.
- [6] The Crown respondent disputes this contention, arguing that the Reasons for Judgment properly address the issue as it had been crystallized.

Analysis

Applicable Legal Principles

- [7] The parties agree as to the legal concepts which this matter engages. They are as follows:

1. There is a duty on a judge to provide meaningful reasons which justify and explain the result of the trial. The object is to tell the parties what has been decided and why the decision was made. There must be a clear "pathway to conviction". The reasons must enable an appellate court to satisfy itself, by reviewing the reasons and the record, that the trial judge properly examined the issues and correctly applied the law: *R. v. Sheppard*, 2002 SCC 26; *R. v. R.E.M.*, 2008 SCC 51; and, *R. v. Thomas*, 2006 BCCA 411;
2. A trial judge is presumed to know the law;
3. There is both a subjective and an objective aspect to the proof of the suspicion which a police officer must have in order to be lawfully entitled to demand a breath sample; and
4. The smell of alcohol on a driver's breath is sufficient for an investigating police officer to form the suspicion necessary to demand that the driver provide a sample of breath into an Approved Screening Device: *R. v. Lindsay* (1999), 134 C.C.C. (3d) 159 (Ont. C.A.); *R. v. Green*, 2003 BCPC 454; and, *R. v. Antonick*, 2004 BCPC 404.

Discussion

- [8] I will commence with an observation of a general nature. The law in relation to drinking driving offences is complex. The statutory provisions are detailed and quite extensive. Because there has been, and continues to be, a great deal of litigation in the area, there is also a large body of relevant case authority. Additionally, the Canadian Charter of Rights and Freedoms often arises in such litigation, and that, too, contributes to make this particular area of criminal practice complicated and challenging.
- [9] As a result, what might be seen as straightforward and non-exceptional cases can often consume substantial amounts of court time and give rise to a significant number of issues.
- [10] The trial in the present matter was notably and commendably efficient and focused. The Crown called four witnesses. The appellant was represented by experienced counsel. She elected not to call a case. At the conclusion of the evidence, the impaired driving count was dealt with summarily. The Crown advised that it would not be making submissions on that count, and invited the trial judge to dismiss it. Defence counsel then identified what he considered to be the critical issue on the remaining count: did the investigating officer have a reasonable suspicion when he made his demand?
- [11] That background informs the assessment that this Court must conduct.
- [12] The oral Reasons for Judgment were concise; the analysis and pronouncement of decision with respect to Count 2 are contained in five paragraphs.

- [13] At the outset, the trial judge identified the specific issue: whether there was sufficient evidence to justify the officer having made the demand. The trial judge then succinctly and correctly articulated the test to be met: the demand must be made on reasonable suspicion; the officer's subjective belief that the person has alcohol in his or her body must be considered, and it must also be supported by objective evidence.
- [14] The trial judge examined the testimony of the investigating police officer. The officer described having made an observation of what he considered to be slightly erratic driving and deciding to stop the vehicle. The vehicle was pulled over and the officer approached on the passenger side. The appellant was driving and opened the window. She was verbally abusive towards the officer. He then went to the driver's side of the vehicle and asked the appellant to produce her driver's licence. There was some exchange between the two of them; the appellant was upset and shouting. The officer asked her to step out of the vehicle, which she did. He said that as this occurred, while he was in close proximity to her, he detected a slight odour of liquor on her breath and noted that her eyes were watery and slightly bloodshot. On that basis, he testified that he formed a suspicion that she had alcohol in her body, and then read the demand to her from a card.
- [15] In cross-examination, the officer agreed the appellant's state of upset might constitute an explanation for her bloodshot eyes. The officer did not allege any slurring of words or that the appellant was unsteady on her feet.
- [16] Dealing first with the subjective aspect, the officer testified that he held the requisite suspicion. In terms of considering whether it was an honestly held belief, the trial judge looked at the matter critically; he took into account the cross-examination which quite directly challenged the officer on the point. The trial judge concluded that the officer had shown himself in the course of his testimony to be fair-minded, prepared to make reasonable concessions, and not apparently biased in the matter. In the result, the trial judge found that the officer had the requisite subjective suspicion.
- [17] In my view, the manner in which the trial judge considered the specific matter of the officer's subjective belief was appropriate. It was directed at assessing, as best he could, whether the officer's belief was based on specific, discernible evidence and whether it was genuinely held.
- [18] As for the objective aspect of the suspicion, the trial judge considered what evidence there was concerning the observations that had been made. In short, it is apparent that the trial judge accepted the officer's testimony that there was a slight smell of liquor emanating from the appellant's person and that she had bloodshot, watery eyes. He found that that was a proper objective basis upon which to make the demand. I see no error in that.
- [19] The precise point raised by the appellant is that the Reasons for Judgment do not show that the trial judge specifically considered the issue of whether the officer had the requisite suspicion at the time he made the demand.

- [20] In my view, that deficiency, such as it is, cannot support the conclusion that the appellant urges.
- [21] The thrust of the submission of counsel at trial was that any other indicia that the officer described (other than the smell of liquor) was equivocal and not necessarily suggestive of the appellant having alcohol in her system. He submitted that no other problems, such as difficulty in walking, had been noted.
- [22] In his submission, counsel stated that:
- ... Your Honour is left with the only real objective indicia of being [sic] the slight odour of alcohol before the -- before the demand was made, and in my respectful submission it's not a reasonable -- not a reasonable suspicion.
- [23] Given the focus of this submission - that is, whether the evidence of the officer's observations established the necessary suspicion - it is not at all surprising that no specific finding concerning timing was articulated by the trial judge.
- [24] The need for such a finding did not arise from the submissions.
- [25] As the Supreme Court of Canada stated in *R.E.M.*, "courts of appeal considering the sufficiency or reasons should read them as a whole, in the context of the evidence, the arguments and the trial" (at para. 16). There is no question that it is necessary that reasons for judgment provide a meaningful response to the issues presented; where a specific issue is not raised and is implicitly not contested, the proposition is less clear.
- [26] Additionally, on the particular facts of the case at bar, it seems reasonable to think of the temporal element of the suspicion issue as being, at best, a subtle sub-issue of the matter. As there was no basis to consider it specifically and separately, it was reasonable to treat it as part of the suspicion issue at large.
- [27] In this case, the evidentiary context which must be considered in assessing the sufficiency of the Reasons includes the time sequence as described in the testimony of the investigator. He said that the appellant's vehicle was initially stopped between 21:37 hours and 21:40 hours. The officer then got out of his police vehicle, approached the passenger's side of the appellant's vehicle, and spoke briefly with her. He then moved to the driver's side where he spoke to her and directed her to get out of the car. As she did so, and as she was speaking to him in a loud voice, he noticed the smell of liquor on her breath. He testified that he formed the suspicion at 21:44 hours and that he made his demand at 21:45 hours.
- [28] Against that evidentiary backdrop, it is reasonable to find that the trial judge must be taken to have properly considered and concluded that the officer's suspicion was formed in a timely way, after stopping the vehicle, given the events described. In other words, considering the matter from the perspective of the temporal issue, the Reasons are logical, sensible and adequate when examined in light of the evidence adduced at trial.

[29] In all the circumstances, there was no need for anything more to be said. If one examines the Reasons and the trial record, there is really no basis to doubt that the issue of the timing was taken into account in the conclusion reached by the trial judge or whether that issue was properly considered.

Conclusion

[30] In my view, the Reasons for Judgment were sufficient and in keeping with the standards set by the authorities.

[31] This appeal stands dismissed.

[32] On July 18, 2011, a justice of this Court ordered a stay of the driving prohibition that was imposed in the Provincial Court following the conviction. That stay order was to continue until the determination of this appeal. In the result, that stay order is now exhausted and at an end. The appellant is required to surrender her driver's licence, no later than 4:00 p.m. on Thursday, July 19, 2012. The prohibition order will resume and take effect at that time.

"The Honourable Mr. Justice Williams"

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