
CANADA / JUDGMENT

R. v. Doerksen

2004 BCSC 1209

COURT

Supreme Court of British Columbia

DECIDED

11 March 2004

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R. v. DoerksenR.

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment

The Honourable Mr. Justice Chamberlist

March 11, 2004

REGINA

v.

ABRAAM PENNER DOERKSEN

Counsel for the Crown:

W. Hilderman

Counsel for the Defendant:

S. Buckley

(VIA VIDEO CONFERENCE)

(THE DEFENDANT AT NANAIMO, B.C.)

- [1] THE COURT: Abraam Penner Doerksen stands charged with two counts, as follows: Count 1, Abraam Penner Doerksen, on or about the 18th day of February, 2002, at or near 100 Mile House, in the Province of British Columbia, while his ability to operate a motor vehicle was impaired by alcohol or a drug, did have the care or control of a motor vehicle, contrary to section 253(a) of the Criminal Code; Count 2, Abraam Penner Doerksen, on or about the 18th day of February, 2002, at or near 100 Mile House, in the Province of British Columbia, having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded 80 milligrams of alcohol in 100 millilitres of blood, did have the care or control of a motor vehicle, contrary to section 253(b) of the Criminal Code.
- [2] The circumstances giving rise to these charges, were that on February 18th, 2002, between 3:45 to four o'clock p.m. in the afternoon, a car being driven north on Highway 97 by Mr. Doerksen rounded a corner just south of the entrance to the 108 Mile Complex on Highway 97, some eight miles north of 100 Mile House, B.C. The accused's car was observed by Richard Peters, a professional truck driver who was backhauling a loaded semi-trailer from Quesnel to Vancouver. He was heading in a southerly direction. He was driving a 52-foot trailer, fully loaded with 120,000 pounds of freight. He observed the accused's vehicle being driven at normal speeds, when it suddenly swerved immediately in front of him, proceeding westerly past the travelled portion of Highway 97, leaving the highway, and hitting a hydro pole located a short distance from the highway. When the accused's car passed under his line of vision, he at first thought nobody was in the driver's position behind the steering wheel. He initially thought somebody had somehow jumped out of the car.
- [3] He testified that he had the accused's vehicle in his line of vision for two to three minutes before it crossed in front of him. He did not notice anything out of the ordinary until he saw the accused's car swerving towards the east shoulder, when the car then came across the road in front of him. Mr. Peters immediately applied his brakes. His rig came to a stop some 1,000 feet from the accident scene. He ran back to the accident scene.
- [4] In the meantime, other persons had stopped and ran to the accused's car. Tracey Watson was one of the first persons on the scene. She identified the accused. She said when she first saw him, his head was sticking out of the front passenger side window. She noted the accused's body to be draped across the passenger side, with his legs on the driver's side floor. The impact with the pole did considerable damage. Mr. Doerksen was unconscious. She described a smell of alcohol coming from the accused's face when she was attempting to get responses by yelling at him, at that time from six inches to 12 inches away from the accused. She described the accused as having a mangled face with blood all over his face. She did not notice any other persons in the car and did not see anyone else around the car.
- [5] At about the same time that Mr. Peters arrived at the scene, Joseph John Lidster also arrived. He had been travelling northbound when he saw the Peters tractor trailer coming to an emergency stop. He saw the accused's car had impacted on the hydro pole. He noted the

presence of Ms. Watson standing outside the accused's car as he approached the scene. He noted the accused in the motor vehicle, and went back to his own vehicle and called RCMP on his cell phone. He then returned to the car with a first aid kit. He, too, noted the accused on the passenger's side with his legs located in the driver's side foot well. Unlike Ms. Watson, he recalled the passenger side window being closed. He noted the accused to be ashen in colour and suffering a chest injury. He recalled the driver's door being jammed shut. He, too, yelled at the accused to test the accused's alertness.

- [6] Shortly thereafter, a group of what has been described as forestry people arrived. Three of them managed to open the driver's side door. Upon the door being opened, Mr. Lidster noted a smell of alcohol. He could not recall, with the passage of time, exactly where the smell was coming from, but was sure that it was coming from the interior of the vehicle. He noted some beer cans in the vehicle. He recalled the whole car smelling of alcohol. He opined, based on his own drinking experiences, that it was a beer smell he smelled at the time. He saw a half dozen beer cans in the car. He estimated three to be empty and three to be full. He recalled the police arriving within five minutes, followed by the B.C. Ambulance Service. He described the chest injury to the accused as being similar to the shape of a steering wheel in the accused's chest.
- [7] Both Mr. Lidster and Mr. Peters described the road condition at that time as being clear and dry, with good visibility.
- [8] When Mr. Peters arrived at the scene, he also noted what he thought was someone passed out on the passenger side, with his feet on the driver's side. He described what appeared to be a huge bone sticking out of the accused's chest. He noted the steering wheel to be broken. He confirmed the driver's door could not be opened. His recollection was that the windows were, in fact, open. He recalled the accused uttering, "Don't touch my beer."
- [9] He, too, recalled seeing beer cans on the floor of the accused's car, but could not remember if they were empty or full. He recalled seeing the beer cans on the back seat and on the floor around the accused. He said he could smell beer and gas around the vehicle. Mr. Peters described the accused as being "soaked in beer".
- [10] Shawn Collard, a B.C. Ambulance attendant, who arrived on the scene shortly after the accident and after the RCMP were in attendance, described his attendance at the scene. He quickly did a scene survey to determine if it was safe to work around the accident scene. He described looking for hazards and other persons who might have been ejected. He concluded that no one else had been in the vehicle. He described the driver's door now being open, and the passenger side window rolled down. He noted a strong smell of alcohol emanating from the vehicle. He crawled into the vehicle with the hard collar while his partner stabilized the accused's head. On entering the vehicle, he, too, saw beer cans on the back seat. He testified he saw two oversized Wildcat beer cans. He said that they were both open. He opined that there could have been more, but he did not see any other open or full cans. He described the accused as being in a state of decreased consciousness. He recalled

the accused saying, "Get me the [expletive] out of here."

- [11] He described the accused having his right foot lying on the transmission hump between the two bucket seats, while his left foot was in the driver's area and the gas pedal and brake pedal area. He testified to having asked the accused if he had anything to drink today, to which the accused responded, "Eight beers, a bottle of vodka and two joints." The ambulance attendant did not ask what size of vodka bottle.
- [12] He described the accused as having slurred and slow speech. Mr. Collard then proceeded to place a hard collar on the accused. The ambulance service then proceeded to transport Mr. Doerksen to the 100 Mile House Hospital. Mr. Collard noted abrasions to the accused's head, with minimal traces of blood. Although he observed signs of chest wall damage, he did not notice any damage to the windshield that would indicate any head contact with the windshield. The accused was placed on a spine board and taken to the hospital, where the ambulance service arrived at 4:45 p.m. Mr. Collard testified having been at the accident scene for about one half hour.
- [13] Mr. Collard is an ambulance attendant with some three years of training. He testified that at the time of the accident he was still in paramedic training, and at that time, he had dealt with a minimum of ten people who were under the influence of alcohol. He testified that, based on his experience and paramedic training, he noted three indicia of impairment relative to the accused. These consisted of slurred speech, the smell of alcohol and the accused's combativeness while at the hospital. He described the accused at the hospital emergency room as not following instructions and not listening. He described how it took the nurse, an RCMP officer and himself to subdue Mr. Doerksen. While he had smelled a strong smell of alcohol coming from the vehicle, he did not note a smell of alcohol coming from the accused's person.
- [14] Under cross-examination by Mr. Buckley, Mr. Collard described how he questioned the accused to assess his level of consciousness and any other injury, if Mr. Doerksen could safely be removed from his car. He agreed, under further cross-examination that he had not, in his notes made at the time, noted any slurred speech. He also agreed that he had no firm recollection of Mr. Doerksen slurring his words. He also agreed that, although he testified to the accused exhibiting combativeness, that could have been merely the accused not wanting to go on his side at the emergency room because it hurt him to be on his back. He also agreed that the accused, in rolling to his side, demonstrated motor coordination in that regard.
- [15] The two RCMP officers and attendants at the scene of the accident were Constables Maloney and Leslie. Constable Maloney was qualified to give expert testimony relating to how the accident had occurred. He is a 16-year veteran of the force and has recently completed training as a collision analyst. Constable Maloney attended at the accused's car and observed the accused's position in the car. He also described the accused as having his back against the passenger door. Constable Maloney bent down and smelled a strong odour of alcohol

emanating from the vehicle. He described the accused having garbled speech. He testified to smelling a strong odour of alcohol coming from the accused's breath. He described the accused's right shoulder and head being against the passenger door, with his feet across the centre console and his feet dangling in the driver's well. The accused was not seat belted.

- [16] After asking Constable Leslie to assume the impaired driving investigation, Constable Maloney proceeded to take various measurements of tire marks made by the accused's vehicle. He concluded that the vehicle had been travelling between 92 kilometres per hour and 107 kilometres per hour in a posted 100 kilometre-per-hour zone. He further concluded that the accused, coming around the corner in his vehicle, had not straightened out his vehicle and, as a result, the vehicle continued to be driven to the right side of the roadway, leaving the paved portion and entering the gravel shoulder. He opined the driver then attempted to place the vehicle back on the travelled portion, but over-corrected, and then over-corrected twice more, with the result that the vehicle started rotating and eventually shot across the roadway in the manner described by Mr. Peters. Constable Maloney opined that the three steering corrections occurred over a distance of 55 metres and in just a matter of seconds. He also opined that, based on his observation of the tire marks, there had been no braking. He said that such a scenario is commonplace when there is a momentary lapse set in. He also testified to having walked around the accused's vehicle, as did Attendant Collard, and was unable to discern any footprints leaving the area. He further opined that the amount of centrifugal force occasioned by the rotation of the vehicle had the effect of forcing the accused's body to the passenger side of the vehicle, and that he was not seat belted, which is consistent with what Mr. Peters observed, when the car passed in front of his rig, and he noted no one behind the steering wheel.
- [17] Constable Leslie, the other RCMP member at the scene (indiscernible - tape cut out) associated with this event. She is a 24-year veteran of the force, the last nine-and-a-half years being in 100 Mile House and over one-half of her time there being on highway patrol. She, too, observed the accused lying across the front seat. After speaking to Mr. Peters, she returned to the Doerksen vehicle. She noted a strong odour of liquor coming from the Doerksen vehicle. She assisted the ambulance attendants in removing Mr. Doerksen from the vehicle. She also, at that time, received information from Mr. Collard about what had been said to him by the accused regarding his alcohol consumption. She described Mr. Doerksen having both feet under the steering wheel area, with his back up against the passenger side door with a portion of his back against the passenger seat back. She could not recall the position of Mr. Doerksen's knees. She observed Mr. Doerksen's eyes opening and closing and that he was having difficulty breathing. She, too, recalled Mr. Doerksen's face being ashen, as described by Mr. Lidster, and him having a small amount of blood on his right side of his face, but she did not observe any bleeding occurring when she was in attendance. She, too, noted slurred speech and a strong odour of alcohol coming from his breath. Constable Leslie did not note any beer smell coming from the vehicle. She followed the ambulance transporting Mr. Doerksen to the hospital. She estimated the travel time at five to six minutes, arriving at 4:43 p.m. at the hospital. In the trauma room, she assisted

nursing staff in keeping the accused on his back. She felt, at the hospital, he was very responsive to the staff. She remarked that he seemed like a different person at that time and that he did not appear to have any difficulty answering the nursing staff. She recalled him saying he just wanted to roll over and sleep. Again, at this time, she noted a strong odour of alcohol coming from his breath some three to four feet from his face. Constable Leslie attempted to read a blood sample demand to Mr. Doerksen, but he was lapsing in and out of consciousness. She obtained a telewarrant for a blood sample, but thereafter was advised by the treating physicians that no more blood could be taken from him, as he was being prepped for surgery.

- [18] While still in the hospital, Constable Leslie had noted a blood sample being obtained from Mr. Doerksen by Nurse Terry Lynn Larum. Constable Leslie subsequently obtained a telewarrant for the seizure of the blood sample taken by Nurse Larum. At the trial, a voir dire was held to determine the admissibility of the vial of blood seized from the hospital. At the conclusion of the voir dire I ruled that the vial of blood was admissible evidence in these proceedings.
- [19] Based on the circumstances of the accident, the strong smell of alcohol on the accused's breath, the mechanics of the accident, slurred speech, the information received from Ambulance Attendant Collard, Constable Leslie formed the opinion that Mr. Doerksen's ability to drive a vehicle was impaired by alcohol and, as a result, these charges were laid.
- [20] I now turn to an analysis of the two charges. Count 2, the s. 253(b) charge, requires the Crown to establish beyond a reasonable doubt that the concentration of alcohol in the accused's blood exceeded 80 milligrams of alcohol in 100 millilitres of blood, in accordance with the provisions of the Criminal Code. In the circumstances of this case, there are no presumptions available to the Crown.
- [21] Evidence was heard from Terry Lynn Larum that she had extracted blood from the accused. She described the procedure she followed, taking the blood sample at 5:(indiscernible - tape cut out) p.m. She identified the vial of blood marked as an exhibit in these proceedings as the vial she had placed the accused's blood into by identifying the barcode attached to the vial she herself had affixed. She then returned to the lab with the blood sample. She gave the sample to another lab technician, as she had to leave the hospital to pick up her son at daycare.
- [22] Another lab technician by the name of Beckie Pincott then took over possession of the blood. This lab technician was not called to give evidence for the Crown; however, Ms. Larum gave evidence of the protocols to be followed on receipt of whole blood by a blood technician. She described how whole blood is placed into a centrifuge machine which separates whole blood from serum, and then placed in an analyzer in the lab. This requires the test tube to be opened by removing a stopper and the sample put in the analyzer. The sample is obtained by a sample probe which is placed onto the test tube, and liquid extracted, then the stopper is replaced.

- [23] Ms. Larum did not see the vial of blood again until the preliminary inquiry. No explanation was given to the court as to why Beckie Pincott was not called to give evidence of what she, in fact, did with the vial of blood while it was in her possession.
- [24] Denise Swift, the supervisor of the 100 Mile Hospital lab for 20 years, gave evidence as to the analyzer, the probe, the protocols observed by the hospital in maintaining the chemistry analyzer and the probe. She gave evidence as to the operation of the analyzer. She, too, described the process followed by the lab once the vial of blood is received by it. The blood is first centrifuged to separate white and red blood. The stopper on the vial is then removed and the vial is placed on a carousel in the analyzer. The sampler, or probe, is then flushed. The probe takes out an amount of liquid and dispenses it into a test tube. She testified that the purpose of the probe flushing itself prior to taking the sample is to ensure that there is no contamination. I noted her comment that "accuracy is our motto." She advised that if the probe is not functioning properly, an alarm goes off and the analyzer stops. She testified that she had been present when the analyzer sounded such an alarm.
- [25] Under cross-examination by Mr. Buckley relating to the maintenance of the analyzer, she, however, conceded that the hospital's protocols for cleaning the analyzer and the probe were not in accordance with the manufacturer's instructions. The manufacturer requires only a solution of 10 percent Clorox bleach and 90 percent water for cleaning the analyzer, but a full 100 percent Clorox solution for cleaning the probe.
- [26] My recollection of her testimony was that usually only a six to 10 percent solution is used for cleaning the probe. She expressed great surprise at this revelation and advised that she would make sure the lab routine was immediately changed to ensure cleaning the probe with 100 percent Clorox bleach.
- [27] This scenario has led me to the conclusion that it would be unwise to give the evidence provided by the hospital to the RCMP forensic lab any weight for the following reasons. Although Ms. Dagenais of the forensic lab is qualified to give expert opinion evidence on the analysis of bodily fluids, she could not say that the sample she tested had not been contaminated with an additional substance that could have affected the readings obtained by the gas chromatograph that was utilized by her at the forensic lab to produce the alcohol content readings she ultimately determined and utilized to come up with her opinion of alcohol concentration at the time of driving. She did say that contaminants other than ethyl alcohol would not affect her analysis, but it is inferential that the presence of any form of alcohol from a source other than the blood sample could affect her conclusions.
- [28] On the charge before me, I do not have evidence from the person who had control of the blood sample after it was turned over to her by Ms. Larum. I do not know exactly what protocols were followed by her while the vial of blood was in her possession. I do not know if the analyzer was functioning properly at the time she inserted the probe into the vial of blood, nor do I know if the probe had flushed itself. I certainly do know that the probe had not been cleaned for a long time, in accordance with the manufacturer's instructions. I do

not even know if an alarm sounded or not, as described by Ms. Swift. I do not know what substance was previously analyzed by the insertion of the probe into the liquid. I do not know what contamination of the probe could have occurred over the years that it was not flushed or cleaned in accordance with the manufacturer's instructions.

- [29] The Crown submits that the rationale in *R. v. Redmond*, 54 C.C.C. (3d) 273, a decision of the Ontario Court of Appeal, could assist me in this regard. The headnote accurately sets forth the reasoning of the Ontario Court of Appeal in that decision, and I will just refer to it, at page 273:

The evidence of the hospital technologist as to the results of the blood sample analysis performed by the hospital equipment was admissible, notwithstanding that the technologists were unable to give evidence as to the capability or reliability of the equipment nor as to the accuracy of the results of the analyses. In any event, in this case there was the testimony of the toxicologist that he was familiar with the equipment which was in general use in hospitals in the province. From this it could properly be inferred that the test results were acceptable from the standpoint of accuracy and reliability because such machines are routinely relied on for blood testing for medical purposes where the health or even the life of the patient may be at stake. It is not necessary for scientific evidence to be given to explain precisely how the machine operated or to prove its capability and accuracy. It is sufficient if the expert operating the machine establishes that the machine is capable of making the required measurements or producing the required data, that the machine was in good working order at the relevant times, and that it was properly used. If these conditions are met, the evidence is admissible and the only question left to the trier of fact is the weight to be given to such evidence.

- [30] The evidence in this case established the capability, accuracy and reliability of the hospital equipment to measure blood/alcohol content. It also established that the machine was in proper working order. The evidence as to the results of the analysis was properly admitted by the trial judge.
- [31] A review of that case in its entirety satisfies me that it is really of no assistance here. In that case, the technician who actually tested the blood gave evidence. We do not have that scenario in this case.
- [32] In *R. v. MacLean*, a decision of the Nova Scotia County Court for district number 4, of McLellan, C.J., November 6, 1979, unreported, McLellan, J. had occasion to deal with the continuity of a vial of blood proffered by the Crown in evidence. He allowed an appeal on conviction on the basis that the Crown had failed to establish the continuity of the blood vial.
- [33] At paragraph 4 of the decision, this appears.

In the case of this blood exhibit, not only was it essential to establish the sample itself had not been tampered with by any unauthorized person, but it was also highly relevant to satisfy the court that the sample analyzed was in the same condition when analyzed as it was when taken from the system of the accused.

- [34] I adopt that statement in its entirety in the case at bar. As previously stated, there are no presumptions relating to continuity on the facts of this case because the sample was not obtained in the manner prescribed in the Criminal Code. As such, the Crown must establish beyond a reasonable doubt that the sample utilized in the RCMP forensic lab was in the same condition as when removed from the accused's blood system. The protocol evidence that the probe that was likely placed in the vial containing the accused's blood had not been cleaned in accordance with the manufacturer's warranty, coupled with the gaping hole in continuity of the exhibit created by no evidence being offered by the testing technician as to her interaction with the blood of the accused must, of necessity, lead to the conclusion that no weight ought to be attached to the opinion of Ms. Deshene of the RCMP forensic lab in Vancouver.
- [35] The lack of continuity of the evidence relating to the blood sample is critical to the Crown's case. This is not a case of possible tampering with the exhibit, but rather it is a case where I am unable to find beyond a reasonable doubt that the sample utilized in the RCMP lab was in the same condition as when it was removed from Mr. Doerksen's body. In other words, the Crown has not met the onus of adducing evidence that the sample of blood used by the RCMP forensic lab was suitable for its intended purpose of revealing the alcoholic content of the accused's blood at the time of the accident (See *H.E.B.C. v. Regnier*, 20 M.V.R. 124).
- [36] Essentially, the court is being asked by the Crown to infer that a third party who handled the sample did not contaminate the sample of blood. The court did not have the opportunity to assess Ms. Pincott's reliability, but I do have before me evidence that the lab certainly did not follow at least the manufacturer's instructions with respect to maintaining the integrity of the probe which ultimately came into contact with the accused's blood.
- [37] I do not draw inferences from facts which are not established by the evidence before me. To do what the Crown asks would be nothing more than pure speculation to establish a key component of the integrity of the sample ultimately analyzed by Ms. Dagenais. I would, therefore, acquit the accused on the s. 253(b) .08 charge.
- [38] I now turn to the s. 253(a) count. I have determined that the Crown has established that reasonable and probable grounds existed for the laying of charges in this matter. Mr. Buckley has ably addressed each of the indicia of impairment, being slurred or garbled speech and smell of alcohol. It may well be, when looked at individually, there are possible conclusions that could be said to be consistent with the observations, other than impairment by alcohol. My task is, however, to look at all of the evidence and determine if the Crown has established beyond a reasonable doubt that the accused's ability to operate a motor vehicle on February 18th, 2002 was impaired by alcohol or a drug.

- [39] Constable Maloney was very fair when he opined that this type of failure to negotiate a curve is often caused by fatigue and momentary lapse. But fatigue is but one impairment of a person's ability to drive. Impairment of one's ability to drive can also come from illness or alcohol. The accident in question arose as a result of Mr. Doerksen being unable to negotiate a curve in the road. I have found, on all the evidence, the driver of the vehicle in question was indeed the accused, it having been proven beyond a reasonable doubt that he was the driver of the vehicle, being the only occupant of the vehicle at the material time.
- [40] Constable Maloney opined that he has investigated many such accidents where fatigue has caused drivers to have a momentary lapse of attention due to fatigue. Here, the mechanics of the accident cannot be viewed in isolation to the other evidence. The accused was asked at the scene if he had consumed alcohol that day. He replied in the affirmative. He was heard to say, when coming and going out of consciousness, "Don't take my beer." He has been described as being soaked in beer, and having a strong smell of alcohol on his breath from two seasoned RCMP officers, and other witnesses at the scene. There were opened and unopened bottles of beer in his car, which was consistent with his statement to the B.C. Ambulance attendant that he had consumed eight beer and a bottle of vodka. It is obvious, when viewed objectively, that there cannot be any question about the subjectivity of Constable Leslie's belief that the accused had indeed had the care or control of a motor vehicle while his ability to operate it was impaired by alcohol.
- [41] It is true that all the usual indicia of impairment may not be present here, due to the condition of Mr. Doerksen following the accident; i.e., there was no evidence of bloodshot eyes, or inability to walk or slurred speech that could only be associated with impairment. But the other indicia of impairment, coupled with his own statement and the circumstances of the accident lead, in my view, but to one conclusion, namely, that the Crown has proved each of the essential elements of Count 1 beyond a reasonable doubt. The Crown is not required to prove that Mr. Doerksen's driving on the date in question demonstrated a marked departure from that of a normal person (See *R. v. Stellato*, 12 Ontario Reports (3d), 90, a decision of the Ontario Court of Appeal). All that is necessary is for the Crown to establish a degree of impairment. In my view, the Crown has done this in this case. This is not a case of frail evidence of impairment, but rather, in my view, an extremely strong case of impairment when all the evidence of the events of February 22nd, 2002 are considered in their entirety.
- [42] As a result, I find the accused was unable to negotiate the curve in the road while driving his vehicle on Highway 97 north of 100 Mile House at approximately four o'clock p.m. on the date in question, because his ability to drive a motor vehicle was impaired by consumption of alcohol. I, therefore, find Mr. Doerksen guilty on Count 1.

"E.G. Chamberlist, J."

The Honourable Mr. Justice E.G. Chamberlist

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