

CANADA / JUDGMENT

R. v. Drewcock

2020 BCSC 2054

COURT

Supreme Court of British Columbia

DECIDED

29 December 2020

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2020 BCSC 2054 R. v. Drewcock

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Drewcock,

2020 BCSC 2054

Date: 20201229

Docket: 73133-1

Registry: Prince George

Between:

Regina

Respondent

And

Timothy Drewcock

Appellant

Corrected Judgment: The text of the judgment was corrected at paragraph [48] on January 12, 2021

Before: The Honourable Mr. Justice Tindale

On appeal from: Provincial Court of British Columbia, December 10, 2019

(Matter of Violation Ticket EA60006737-1, Prince George Registry)

Reasons for Judgment

Counsel for Crown (respondent):

B. Bouchard

Counsel for Appellant:

J.C. LeBlond

Place and Date of Hearing:

Prince George, B.C.

September 1, 2020

Place and Date of Judgment:

Prince George, B.C.

December 29, 2020

- [1] The appellant Timothy Drewcock appealed his conviction for speeding by a Judicial Justice of the Peace on December 10, 2019.
- [2] The Crown is opposed to this appeal.

Background

- [3] On February 17, 2019 Constable Witwicki who is a member of the Royal Canadian Mounted Police ("RCMP") was on duty conducting radar checks on Tyner Boulevard in the city of Prince George province of British Columbia.
- [4] At approximately 21 minutes after midnight Constable Witwicki observed a vehicle travelling southbound on Tyner Boulevard. Constable Witwicki who was using a Stalker Dual DSR radar unit checked the speed of the oncoming vehicle.
- [5] Constable Witwicki obtained a speed of 88 km/h from the oncoming vehicle which was travelling in a 50 km speed zone. He activated his emergency lights and pulled the vehicle over. The appellant was the driver of the vehicle.
- [6] Constable Witwicki issued the appellant Violation Ticket EA60006737 (the "Violation Ticket") charging the appellant with offenses pursuant to ss. 146 (1) and 33 (1) of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 ("MVA").
- [7] On December 10, 2019 the hearing of the Violation Ticket was heard before a Judicial Justice of the Peace.
- [8] On December 10, 2019 the Judicial Justice of the Peace pronounced Reasons for Judgment (the "Reasons") convicting the appellant of both counts on the Violation Ticket.
- [9] On January 6, 2020 the appellant filed a Notice of Appeal seeking reversal of the conviction and entry of an acquittal of both counts on the Violation Ticket.

Position of the Parties

Appellant

- [10] The appellant seeks a reversal of the conviction and entry of an acquittal on his conviction for speeding. In the alternative the appellant seeks a new trial.
- [11] The appellant argues that the Judicial Justice of the Peace did not have the proper foundation to admit the radar evidence from Constable Witwicki. The appellant says there was no evidence as to when or by whom the radar unit was tested and what tests were carried out.
- [12] On December 10, 2019 Constable Witwicki gave the following evidence which can be found at p. 3, lines 11 - 20 of the Proceedings at Trial:

The radar unit is a Stalker Dual DSR. I'm training qualified to operate this radar instrument and have been since the spring of 2003. It was tested according to manufacturers, before my shift, and I was satisfied it could accurately measure speeds of moving vehicles.

I'm also an instructor. I teach other police officers, both RCMP and I've also taught some municipal police forces how to use this radar instrument.

- [13] The appellant argues that the Judicial Justice of the Peace misapprehended the law as established in *R. v. Khadikin*, [1999] B.C.J. No. 2575 with regard to what the Crown must establish in order for radar evidence to be admitted into evidence.
- [14] The appellant argues that there must be evidence of testing a radar unit's accuracy by a qualified operator which would include a description of the tests undertaken: *Khadikin* at paras 14 - 15.
- [15] The appellant further argues that the Judicial Justice of the Peace misapprehended the law as set out in *R. v. Geraghty* (B.C. Co. Ct.), [1980] B.C.J. No. 2433 that there must be evidence that a particular radar unit was capable of accurately registering the speed of an alleged offending vehicle that is in motion.
- [16] The appellant argues that the Judicial Justice of the Peace erred in finding that the Geraghty requirement was only intended to describe what function a radar unit performs.

Crown

- [17] The Crown argues that hearings pursuant to the Offence Act, R.S.B.C. 1996, c. 338 are meant to be simple, inexpensive and balanced hearings: *R. v. Cooper* 2005 BCCA 256 at para. 27.
- [18] The Crown argues that the Judicial Justice of the Peace had sufficient evidence before him on the necessary requirements as found in *Khadikin*.
- [19] Constable Witwicki testified that he was not only a qualified operator for the particular radar unit but he was also qualified to teach other police officers as to its use.

- [20] Constable Witwicki testified that the radar unit was tested "according to manufacturers" which is evidence of what types of tests were done.
- [21] The Crown argues that it was open for the Judicial Justice of the Peace to infer from the evidence of Constable Witwicki that he performed the tests on the radar unit.
- [22] The Crown also argues that the speed from the radar unit was a match to Constable Witwicki's visual assessment of the appellant's vehicle's speed.
- [23] The Crown argues that the standard for appellant intervention in a finding of fact that there must be a palpable and overriding error: *R. v. Swales* 2014 BCCA 350 at paras. 46 - 50.
- [24] The Crown says that the appellant has failed to establish any error let alone a palpable and overriding error.
- [25] The Crown argues that the more recent decision of *Khadikin* has effectively subsumed the decision of *Geraghty*. The Judicial Justice of the Peace effectively applied the correct tests by relying on the decision in *Khadikin*.
- [26] The Crown argues that the Judicial Justice of the Peace took the time to hear the appellant's arguments at the hearing of this matter and it was open to him to make the findings that he did.
- [27] The Crown argues that the appeal should be dismissed.

Decision

Issues

- [28] The issues on this appeal are:
- a) Did the Judicial Justice of the Peace misapprehend the evidence of Constable Witwicki regarding his qualifications to operate a radar unit, that he was operating a radar unit, and he tested the radar unit to make sure it was working properly; and
 - b) Did the Judicial Justice of the Peace misapprehend the law and apply the wrong test for the admission of radar evidence.

Law

- [29] The law with regard to the admission of radar evidence is encapsulated in the decisions of *Geraghty* and *Khadikin*.
- [30] In *Geraghty* the court sets out the requirements in cases of radar monitoring for speed at p. 10:
1. That the particular equipment used was properly operated by a qualified person;
 2. That the equipment function and accuracy were tested with whatever tests were required or suggested for it;

3. That the tests or procedures indicated the equipment was operating properly; and
 4. That those tests indicated that the equipment was capable of accurately registering the speed of an alleged offending vehicle.
- [31] In Khadikin after reviewing the applicable case law with regard to the admission of radar evidence McEwan J. stated the following at paras. 13 - 15:
- (13) Having reviewed all of the case law provided by the appellant and by the Crown, including that to which I have not specifically referred, I am of the view that it was open to the presiding Justice of the Peace to find that the Crown had made out its case. He had before him:
 - (a) evidence that the officer was a qualified radar operator;
 - (b) evidence that he was operating a radar unit; and
 - (c) evidence that the unit was tested and found to be working correctly.
 - (14) The Crown must establish that the operator was qualified as a foundation for any inference that he or she reliably performed tests verifying the accuracy of the equipment. There must be evidence of testing before such evidence will be received because radar units are not the sort of simple mechanical devices the court will presume to be accurate.
 - (15) The assertion of qualification, together with a description of the tests undertaken, is a sufficient foundation for the reception of the evidence. I do not think the case law suggests that the court should necessarily presume that as between models of radar units there are distinctions requiring specific training or experience, such that training or experience on the very model employed becomes an element of the offence. Unchallenged, the assertion of qualification and experience on the type of device used (i.e. radar), coupled with evidence that the equipment was tested and working, will, if accepted, found a conviction. In this case there was, as well, the added corroboration of the witness' direct observation of speed.

Misapprehension of the Evidence of Constable Witwicki

[32] The Judicial Justice of the Peace at para. 4 of the Reasons stated the following:

He was operating a radar, a Stalker Dual DSR, which he said he tested at the start of his shift and was satisfied it was working properly .

[33] The Judicial Justice of the Peace then found the following at para. 18 of the Reasons:

In the circumstances I am satisfied the officer (a) was qualified; (b) was operating a radar device; and (c) had tested the device to make sure it was working properly. I am satisfied that the reading given of eighty-eight kilometres per hour is reliable for the court to rely on.

[34] None of Constable Witwicki's evidence in this regard was challenged on cross-examination by the appellant during the hearing on December 10, 2019.

[35] The appellant argued that there was no evidence from Constable Witwicki that the radar unit was capable of accurately registering the speed of a vehicle and there was no evidence of what types of tests were done on the radar unit before it was used.

[36] In addition, the appellant argued that Constable Witwicki did not give any evidence that he personally tested the radar unit before his shift or when it was tested.

[37] Constable Witwicki after giving evidence as to the type of radar unit he was using and the fact that he was qualified to operate that radar unit said the following:

... It was tested according to manufacturer's, before my shift, and I was satisfied it could accurately measure speeds of moving vehicles.

[38] In my view, given the totality of the evidence, it was open to the Judicial Justice of the Peace to draw the inference that Constable Witwicki personally tested the radar unit prior to his shift. Constable Witwicki also said that he was satisfied that the radar unit "could accurately measure speeds of moving vehicles".

[39] I am not satisfied that the Judicial Justice of the Peace misapprehended the evidence of Constable Witwicki and I dismiss this ground of appeal.

Misapprehension of the Law

[40] The Judicial Justice of the Peace in the Reasons did find that the decision in Geraghty is no longer applicable, given that technology has moved on. However he did apply the law as set out in Khadikin.

[41] The appellant argues that there has to be evidence that the radar unit is a device capable of measuring speeds of moving vehicles as set out in Geraghty. While I disagree with the Judicial Justice of the Peace's view that Geraghty is no longer applicable, in my view, this error was of no consequence to his analysis.

[42] First Constable Witwicki gave evidence that he was satisfied that the radar unit could accurately measure speeds of moving vehicles which in my view satisfies the Geraghty requirement.

[43] Secondly the Judicial Justice of the Peace followed the decision in Khadikin which correctly states the law. I agree with the Crown that for practical purposes the Judicial Justice of the Peace did apply the correct analysis to the admission of radar evidence.

[44] The appellant also argued there was no evidence of the types of tests which were performed to verify the accuracy of the radar unit.

[45] Unchallenged, the assertion of qualification and experience on the type of device used, coupled with evidence that the equipment was tested and working, will, if accepted, found a conviction: Khadikin at para. 15.

- [46] Constable Witwicki gave evidence as to his qualifications and experience with regard to radar units as well as that there were tests conducted "according to the manufacturer's".
- [47] While it would have been preferable for Constable Witwicki to have given evidence that the tests were according to manufacturer's specifications it was open to the Judicial Justice of the Peace to accept that there was evidence that the equipment was tested and working.
- [48] I do not accede to the appellant's arguments that the Judicial Justice of the Peace misapprehended the law with regard to the admission of radar evidence.
- [49] I would dismiss this ground of appeal.

Conclusion

[50] The appeal is dismissed.

"The Honourable Mr. Justice Tindale"

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