
CANADA / JUDGMENT

R. v. Elliott

2013 BCSC 2169

COURT

Supreme Court of British Columbia

DECIDED

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2013 BCSC 2169 R. v. Elliott

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Elliott,

2013 BCSC 2169

Date: 20131030

Docket: 28831

Registry: Cranbrook

Between:

Regina

Appellant

And

Michael Edwin Elliott

Respondent

Before: The Honourable Mr. Justice Butler

(Appearance via teleconference)

On appeal from: Provincial Court of British Columbia, March 18, 2013,

R. v. Elliott, Cranbrook Registry No. 28831-1

Oral Reasons for Judgment

Counsel for the Crown (Appellant):

L.E. Doerksen

The Accused (Respondent) appearing in person:

M.E. Elliott

Place and Date of Hearing:

Cranbrook, B.C.

October 28, 2013

Place and Date of Judgment:

Cranbrook, B.C.

October 30, 2013

- [1] THE COURT: The Crown appeals from the March 18, 2013 decision of a Provincial Court judge acquitting Michael Edwin Elliott of a charge of operating a motor vehicle while his blood alcohol content was over .08 contrary to s. 253(1)(b) of the Criminal Code. The trial judge acquitted the respondent after he concluded the Crown failed to prove that the breath samples relied on were taken "as soon as practicable after the time when the offence was alleged to have been committed" as required by s. 258(1)(c)(ii). The respondent was also acquitted on a charge of driving while his ability to do so was impaired, but the Crown does not appeal from that decision.
- [2] The sole issue on this appeal is whether the trial judge erred in law in concluding that the Crown failed to prove that the breath samples were taken as soon as practicable after the time of the offence such that the Crown could not rely on the presumption of identity permitted by s. 258(1)(c) of the Criminal Code.

Facts

- [3] None of the facts are contentious. The incident that gave rise to the charge occurred in the early morning on September 17, 2010, in Kimberley, B.C. The respondent was observed driving in an erratic manner by Constable Greenough, an RCMP officer, who was the only witness at trial. When he pulled the respondent's vehicle over at 00:55 hours, Constable Greenough noted slurred speech and an odour of liquor on the respondent's breath. He made a demand for a breath sample for an Approved Screening Device which recorded a fail. At 1:01, Constable Greenough made a further breath demand and advised the respondent of his Charter rights. After making notes and instructing a second officer who came to the scene, Constable Greenough left with the respondent for Kimberley at 1:08 and arrived at the detachment five minutes later. The respondent asked to speak to duty counsel and was afforded that opportunity. The call to Legal Aid counsel ended at about 1:28, after which he was immediately taken to the DataMaster room to provide the breath samples.

- [4] At 1:29, Constable Greenough began an observation period of the respondent. After about 20 minutes, at 1:49 or 1:50, the first breath sample was taken. The sample was thus taken 55 minutes after the offence was alleged to have been committed. Constable Greenough then started a second observation period of the respondent at 1:50 and the second sample was taken at 2:09 or 2:10. Both samples produced readings of 120 milligrams of alcohol in 100 millilitres of blood.
- [5] Constable Greenough testified that the purpose of the observation period was to ensure there were no signs of mouth alcohol caused by burps or belches that could bring stomach contents into the respondent's mouth. If the individual providing the sample does burp or belch, it could cause a false high reading on the DataMaster analysis. During the observation period, the officer also said he watched the respondent to make sure he did not put anything into his mouth.
- [6] Constable Greenough also testified that he has been designated as a qualified technician, having taken the approved week-long training course put on by members of the RCMP breath test lab. He relied on the information he received in that training course when he conducted the observations of the respondent. He testified that he was trained to observe the individual giving a breath sample for a minimum of 20 minutes to ensure there is no presence of mouth alcohol. He also testified that an observation period of 19 minutes before the second sample was taken is in accordance with the training he received. Of course, it is also consistent with s. 258(1)(c)(ii) which requires a minimum wait of 15 minutes between the two samples.

Reasons for Judgment at Trial

- [7] The trial judge set out the arguments of the defence in some detail. The arguments focused on the 20-minute period of observation which took place before the first breath sample was taken. The defence argued the total length of any delay in taking breath samples is not significant. The question is whether any delay is adequately explained.
- [8] The defence maintained that the Crown had not put forward admissible evidence to explain how long an observation period should be. The defence took the position the officer's statement that he observed the respondent for at least 20 minutes because he was trained to do so was hearsay. The result, the defence argued, is that the first observation period is an unexplained delay. The defence relied on three decisions, all from the East Kootenays, where courts refused to accept the evidence provided by an officer regarding the observation period: *R. v. Foy*, 2009 BCSC 1861; *R. v. Krebs* (20 January 2012), Cranbrook 27555-1 (B.C.P.C.); and *R. v. Smith* (29 February 2012), Cranbrook 28387-1 (B.C.P.C.).
- [9] The trial judge also set out the Crown's argument and made reference to the decision in *R. v. Carter* (1981), 55 C.C.C. (2d) 405 (B.C.C.A.), for the proposition that the Crown is not required to explain every delay. The requirement is merely to show that the samples were taken within a reasonably prompt time under the circumstances.

[10] The trial judge rejected the Crown's submissions and concluded at para. 38 as follows:

Although I perceive that the Crown presents a compelling argument, I am constrained to follow R. v. Foy and, for reasons of comity, I am also persuaded by the reasoning in R. v. Krebs and R. v. Smith that I am constrained to find the evidence regarding the observation period is hearsay. That is to say the officer's reasons for the delay are inadmissible hearsay evidence as opposed to evidence being offered with respect to, for example, the officer's state of mind

The trial judge then acquitted the respondent.

Arguments on Appeal

Argument of the Crown

[11] The Crown advances two principal arguments on this appeal. First, it says the trial judge did not apply the proper test as to whether the breath samples were taken "as soon as practicable". The Crown notes that the proper meaning to be given to this phrase as used in s. 258(1)(c) has been litigated extensively. The trial judge did not consider the leading cases on this issue and accordingly failed to apply the proper test. He failed to consider the entire chain of events in order to determine if the samples were taken within a reasonably prompt time under the circumstances. He failed to consider the touchstone issue - whether the police were acting reasonably. The Crown says that if the court had considered the chain of events here and applied the proper test, it would have concluded that the samples were taken reasonably promptly. The Crown argues not only that the police acted reasonably, but says Constable Greenough's investigation was a textbook case of how a police officer should act.

[12] The second argument the Crown advances is that the trial judge erred by concluding that Constable Greenough's evidence as to the reason for the observation period was inadmissible hearsay. The Crown says the judge misapplied the decision in Foy and that the Provincial Court judge who decided both Krebs and Smith did the same. The Crown says there is no reason why the court could not consider Constable Greenough's statement as to his training when deciding if the samples were taken as soon as practicable. It is not inadmissible as hearsay. It is evidence which shows the officer's state of mind and explains why he took that time to make the observation. The Crown argues that no direct or expert evidence of the reason for the observation period is required.

Argument of the Respondent

[13] Mr. Elliott was self-represented on this appeal. He did not file a statement of argument in reply to the Crown's statement and did not make any oral submissions on the legal issues. He says that the trial judge was correct. He says I should conclude there is no basis on which to overturn the trial decision. Quite simply, he argues that the Crown failed to prove beyond a reasonable doubt that the breath samples were taken as soon as practicable. He argues that the trial judge correctly relied on and applied the decisions in Foy, Krebs and Smith.

Law

[14] Section 258(1) provides in part:

(1) In any proceedings under subsection 255(1) in respect of an offence committed under section 253 or in any proceedings under any of subsections 255(2) to (3.2),

(c) where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3), if

(ii) each sample was taken as soon as practicable after the time when the offence was alleged to have been committed and, in the case of the first sample, not later than two hours after that time, with an interval of at least fifteen minutes between the times when the samples were taken,

(iii) each sample was received from the accused directly into an approved container or into an approved instrument operated by a qualified technician, and

(iv) an analysis of each sample was made by means of an approved instrument operated by a qualified technician,

evidence of the results of the analyses so made is conclusive proof that the concentration of alcohol in the accused's blood both at the time when the analyses were made and at the time when the offence was alleged to have been committed was, if the results of the analyses are the same, the concentration determined by the analyses and, if the results of the analyses are different, the lowest of the concentrations determined by the analyses

[15] Section 258(1)(c)(ii) is a crucial part of the scheme in the Criminal Code to ease the proof of concentration of alcohol in the accused's blood for proving the offence of driving over .08 pursuant to s. 253(1)(b). It creates what is referred to as the presumption of identity - the presumption that the blood alcohol was the same at the time of the offence as at the time of the analysis. Because of its importance to proof of the offence, the interpretation of the phrase, "as soon as practicable" has been considered by many courts.

[16] In Carter, the B.C. Court of Appeal concluded that the first breath sample was taken "as soon as reasonably practicable" even though the observation period of 20 to 25 minutes was not otherwise explained. The court adopted the reasoning of the Alberta Court of Appeal in R. v. Mudry (1979), 50 C.C.C. (2d) 518 (Alta. C.A.), where the court concluded at 521-23:

Where something is required to be done at the earliest 'practicable' moment, the doing of the act is not required to be done at the very earliest moment, the adjective 'practicable' importing a difference according to circumstances, and meaning, ordinarily that the thing must be done as soon as reasonably can be expected.

I am not at all satisfied that the language of ss. 235 and 237 require the term "as soon as practicable" to be read other than as within a reasonably prompt time under the circumstances and I am satisfied that the 20 to 25 minutes for observation as found by the learned trial Judge does not of itself infringe it.

- [17] Many cases have found that the Crown is not required when prosecuting a case under s. 253(1)(b) to account for every minute of time that elapses between the offence and the taking of the two breath samples: *R. v. Rasmussen* (1981), 64 C.C.C. (2d) 304 (B.C.C.A.); and *R. v. Cambrin* (1982), 1 C.C.C. (3d) 59 (B.C.C.A.).
- [18] In *R. v. Vanderbruggen* (2006), 206 C.C.C. (3d) 489, at paras. 12 and 13, Rosenberg J.A. of the Ontario Court of Appeal summarized the jurisprudence which has considered the meaning of the phrase, "as soon as practicable":
- [12] That leaves the question that is at the heart of this appeal--the meaning of as soon as practicable. Decisions of this and other courts indicate that the phrase means nothing more than that the tests were taken within a reasonably prompt time under the circumstances. There is no requirement that the tests be taken as soon as possible. The touchstone for determining whether the tests were taken as soon as practicable is whether the police acted reasonably.
- [13] In deciding whether the tests were taken as soon as practicable, the trial judge should look at the whole chain of events bearing in mind that the Criminal Code permits an outside limit of two hours from the time of the offence to the taking of the first test. The "as soon as practicable" requirement must be applied with reason. In particular, while the Crown is obligated to demonstrate that -- in all the circumstances -- the breath samples were taken within a reasonably prompt time, there is no requirement that the Crown provide a detailed explanation of what occurred during every minute that the accused is in custody. (citations omitted)
- [19] Courts in British Columbia have expressly adopted the test as articulated in *Vanderbruggen*: *R. v. Stevens*, 2010 BCSC 1573; *R. v. Plonka*, 2008 BCSC 881 at para. 22; and *R. v. Carto*, 2009 BCSC 1536 at para. 15.
- [20] It is somewhat surprising that the series of cases relied on by the defence have rejected the reasonableness of a 20-minute observation period. I say this because the position as summarized in *Vanderbruggen* is not new. Indeed, there is longstanding authority which has accepted the rationale for such an observation period. In *R. v. Cander* (1981), 59 C.C.C. (2d) 490 (B.C.C.A.), the court summarized the testimony of the officer as follows:

The police officer testified that during the interval from reading the breath demand to the respondent and delivering him to the qualified technician he completed the investigational guide for impaired drivers which took approximately five minutes. He testified that the balance of the remaining time prior to the breath testing was spent maintaining an observation of the respondent to ensure that he neither burped nor belched as the witness understood that such actions would affect the breathalyzer reading. The police officer testified that such observation period is a matter of policy.

[21] In *Cander*, the conviction entered at trial was overturned on the summary conviction appeal on the basis that the 20-minute observation was time where the officer waited "for no reason that is justified in law." The Court of Appeal restored the conviction for the reasons of the trial judge and found that the summary appeal judge applied a wrong legal interpretation of the phrase "as soon as practicable".

[22] The reasonableness of a 20-minute observation period has been widely accepted. The evidence relied on as to the reason for the observation period has, of course, varied from case to case. The decision which perhaps goes furthest in accepting the reasonableness of an observation period is *R. v. Wiens* (14 December 2005) Williams Lake 26145-1 (B.C.P.C.). Judge Bayliff concluded at page 9 that the samples were taken as soon as practicable where there was no evidence for the purpose for the waiting time. She stated:

Second, I note that there was no direct evidence from Cst. Beck about the purpose of the "observation" period. He said that he was watching for burping, belching and vomiting but he did not explain why he was doing this. Thus, in saying as I have on several occasions above that the purpose of watching for these things was to rule out the presence of mouth alcohol so as to ensure that the breath samples when and if taken would be accurate, I am going beyond the evidence that was adduced in this case. I have concluded that this is something I am entitled to take judicial notice of. It is a fact that, in my view, is "so notorious as to not be the subject of dispute among reasonable persons" . . . [Emphasis in original.]

Analysis

[23] Before dealing with the substantive issue raised by this appeal, I turn to the standard of review. The issue raised is the meaning of the phrase "as soon as practicable". This is a question of law. Similarly, the application of the test created by that phrase to the facts as found is also a question of law: *Stevens* at para. 18. Accordingly, the standard of review on this appeal is correctness.

[24] My analysis will proceed by examining the two arguments of the Crown. For the reasons that follow, I am allowing the appeal and setting aside the acquittal and entering a conviction on the count under s. 253(1)(b).

1. Did the trial judge apply the proper test as to whether the breath samples were taken "as soon as practicable"?

- [25] As I have already noted, the trial judge did not apply the proper test to determine if the breath samples were taken as soon as practicable. The court is required to examine the whole chain of events to ask if the breath samples were taken within a reasonably prompt time under the circumstances. Here, no such analysis was made and the court did not look at the touchstone issue as to whether the police acted reasonably. The court's focus was very narrow on the 20-minute observation period rather than on the whole sequence of events.
- [26] When the entire chain of events is examined, I agree with the Crown's submission that this was a textbook case as to how to handle an individual charged with this offence. The respondent was promptly taken from the scene of the arrest to the detachment after being read his Charter rights. He was given the opportunity to consult counsel and then was taken to the DataMaster machine to give a breath sample.
- [27] Constable Greenough explained in some detail the reason for the observation period and said that he observed the respondent for the minimum period of time. In doing so, he referenced his training to explain what the officer is looking for during the observation period, as well as the reason for taking that time which is to avoid false readings. The entire time taken from the apprehension of the respondent to the first test was 55 minutes, less than half the maximum time set out in the Criminal Code.
- [28] The entire process was handled efficiently. Each step taken by Constable Greenough was directly related to the investigation and the proper handling of the respondent, whether it was to read him his Charter rights, provide him access to counsel, or ensure that he did not have mouth alcohol present at the time of the breath samples in accordance with his instruction. To use the language in Vanderbruggen, the breath samples were taken reasonably promptly under the circumstances that existed. Throughout the incident, the police acted reasonably.
- [29] Applying the body of law that includes Carter, Mudry, Rasmussen, Cambrin, Cander, and Vanderbruggen, I conclude that when the proper test is applied to the facts as found in this case, the Crown has proved beyond a reasonable doubt that the breath samples were taken "as soon as practicable". Of course, in arriving at this conclusion, I have considered and accepted the evidence of Constable Greenough regarding the purpose of the observation period. This brings me to consider the second issue.
2. Did the trial judge err in concluding that Constable Greenough's evidence as to the reason for the observation period was inadmissible hearsay?
- [30] The trial judge decided that he was constrained to follow the decisions in Foy, Krebs, and Smith and that he could not accept Constable Greenough's explanation as to why he observed the respondent for 20 minutes because that was information that he was taught. In other words, it was hearsay which the judge concluded was being offered for the truth of the statement. As I will endeavour to explain, this conclusion was based on a misapplication of Foy which occurred both in this case and in Krebs. I need not consider whether it also happened in Smith.

[31] A careful reading of the decision in Foy indicates that Melnick J. found two faults with the evidence led by the Crown. First, the officer did not give any explanation for the time taken in observation other than that the period concluded when the technician was "satisfied". Further, Melnick J. said he could not determine if there was any evidence at all about what happened in regard to the observation period of the accused because, on a close reading of the evidence, the officer may have just been describing a usual practice: paras. 15 and 16. Faced with the problem of hearsay from the technician who was not called as a witness to indicate the reason for his satisfaction and the problem of whether the officer had testified at all as to the circumstances of the procedure in question, Melnick J. concluded that the evidence was insufficient to prove beyond a reasonable doubt that the breath samples were taken as soon as practicable. Nowhere in his reasons does he suggest that evidence from an investigating officer as to the reason for the observation period will be considered hearsay and inadmissible.

[32] In Krebs, at para. 26, the court concluded there was a requirement for direct evidence from the technician as to the reason for the observation period:

There was no direct evidence, as required by Foy, from the technician to explain why the observation periods are 20 minutes long. The evidence of what Cst. Michaud was taught at depot is hearsay evidence, inadmissible to explain the delay as noted in Foy.

[33] The conclusion in Krebs extended by a considerable degree the actual finding in Foy. The difficulty in Foy was that there was likely no evidence at all as to the reason for the observation period. To say that the technician is satisfied tells the court nothing. However, even that statement was suspect because it appeared that the officer was simply describing his usual practice which was to have the technician let him know that he was satisfied as to the length of the waiting period. Faced with that evidence, it is not surprising Melnick J. found that the Crown had not proved the samples were taken as soon as practicable beyond a reasonable doubt.

[34] In the present case, the evidence of Constable Greenough has neither of the shortcomings that were present in Foy. He did not give evidence as to the technician's views about anything. He indicated directly why he took the steps he did and why he waited 20 minutes for the first observation period. Second, he gave direct evidence as to what he did on this occasion. He did not simply give evidence of his usual practice.

[35] On a broader note, there is no reason why an officer like Constable Greenough cannot give evidence as to what he has been taught about the proper procedure for taking a breath sample. While this is institutional practice or policy, it does not offend the hearsay rule. It is not being led for the truth of its contents. It is being led to explain why the officer took the steps he did. It is evidence which shows that his actions were not arbitrary, unfocused, or unrelated to the investigation. Of course, it addresses the substance of the test established by the authorities: were the police actions reasonable in the circumstances? It is reasonable to follow procedures you have been taught, particularly where that procedure has an

obvious purpose which is also explained by the officer.

- [36] This conclusion is supported by authority. In *R. v. Van Der Veen* (1988), 44 C.C.C. (3d) 38 (Alta. C.A.), the court concluded that when deciding whether a police officer acted reasonably it could rely on hearsay given by the arresting officer as to the reason for delay at the detachment. The court stated as follows:

In my view, an examination of the circumstances involves a determination as to whether the police officer involved acted reasonably. This is one, but only one, of the circumstances to be considered. Whether breath samples have or have not been taken as soon as practicable is to be decided having regard to both subjective and objective factors.

In determining whether the police officer involved has acted reasonably, statements made to the police officer are admissible, not to prove the truth of the contents of the statements, but to establish the state of mind of the officer. It was not, therefore, improper for the trial judge in this case to consider evidence as to the information given to the police officer, even though it was hearsay evidence.

- [37] Applying this principle to the case at hand, the court can accept statements made to the officer when deciding whether he acted reasonably. That includes statements made to the officer in the course of his or her training. To hold otherwise would place an intolerable burden on the police and the court system. When the issue is reasonableness of the time taken to obtain a breath sample, it would be absurd to require the Crown to present expert evidence as to the instruction given to police officers and the scientific basis behind that instruction.

- [38] In short, the evidence of Constable Greenough's training to explain the reasons for the 20-minute observation period was admissible to establish the reasonableness of the actions of the police. The trial judge erred in rejecting that evidence. I should note that in light of the evidence in this case, I do not need to consider whether a court can take judicial notice of the reasonableness of the observation period as suggested in *Wiens*.

Summary

- [39] I find that the trial judge erred in law in his interpretation and application of the test as to whether the breath samples were taken "as soon as practicable" after the time of the offence. I conclude the samples were taken as soon as practicable.
- [40] The trial judge was also in error in excluding the Certificate of Qualified Technician. Indeed, there was no rationale given by the trial judge for doing that other than his conclusion that the breath sample was not taken as soon as practicable. That finding does not make the Certificate inadmissible. Accordingly, I also conclude that the Certificate was admissible in evidence.

- [41] My conclusion that the breath sample was taken as soon as practicable means that the presumption of identity applies and so the Crown has proved beyond a reasonable doubt that the respondent operated a motor vehicle with a blood alcohol level in excess of .08. Accordingly, I would substitute a conviction on what I believe was Count 2 in the indictment and I would refer the matter back to the trial judge for sentencing.
- [42] That concludes my reasons for judgment.
- [43] MR. DOERKSEN: My Lord, it is Doerksen speaking. I wonder if a direction could go to have this matter returned to Provincial Court on a remand day and direct Mr. Elliott to return on that date?
- [44] THE COURT: Yes, I think that is what we need to do here.
- [45] MR. DOERKSEN: I would suggest, and I have not canvassed with Mr. Elliott, but we have dates in November - November 4 or 18, and December 2 or 16, and, unless Mr. Elliott prefers any of those days, it does not matter to the Crown.
- [46] THE COURT: All right. Mr. Elliott, which of those dates would work best for you?
- [47] MICHAEL ELLIOTT: December 16, sir.
- [48] THE COURT: December 16?
- [49] MICHAEL ELLIOTT: Yes.
- [50] THE COURT: All right. Well, then, this will be sent back to Provincial Court, December 16, for sentencing.

"Butler J."

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