

CANADA / JUDGMENT

R. v. Grzelak

2020 BCSC 1487

COURT

Supreme Court of British Columbia

DECIDED

6 October 2020

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2020 BCSC 1487 R. v. Grzelak IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Grzelak, 2020 BCSC 1487 Date: 20201006 Docket: 28151 Registry: Vancouver Regina v. Patrick Henry Grzelak Before: The Honourable Associate Chief Justice H. Holmes On appeal from: An order of the Provincial Court of British Columbia, dated April 8, 2019 (R. v. Grzelak, Richmond Registry, File No. AJ10992213). Reasons for Judgment Counsel for the Crown: J. Horneland The Accused, Patrick Henry Grzelak: In Person Place and Date of Hearing: Vancouver, B.C. August 5, 2020 Place and Date of Judgment: Vancouver, B.C. October 6, 2020

INTRODUCTION

- [1] Patrick Grzelak appeals his conviction by a judicial justice for using an electronic device while driving, contrary to s. 214.2 of the B.C. Motor Vehicle Act.
- [2] Mr. Grzelak was alone in his car, driving home after a long day of work. His iPhone was in the centre cubbyhole in the dashboard, but its battery was dead. Mr. Grzelak had earbuds in his ears because, he explained in the trial, he had been using them during a long day of telephone conference calls, and he had developed a habit of leaving them in his ears for the drive home to help block out the drone of the highway. The wire from the earbuds was plugged into the iPhone.
- [3] The judicial justice concluded that Mr. Grzelak was "using" the iPhone because he was "hold[ing] it in a position in which it may be used", within the meaning of the definition of "use" in s. 214.1(a). Mr. Grzelak was holding the earbuds in his ears, and the earbuds were effectively part of the iPhone because they were connected to it by their wire. It did not matter that the iPhone's battery was dead, because the temporary inoperability of an iPhone does not remove it from the definition of "electronic device", or from the s. 214.1(a) definition of "use": R. v. Tannhauser, 2020 BCCA 155.

- [4] Mr. Grzelak accepts that the judicial justice was bound by the reasoning in Tannhauser to conclude that it made no difference that the iPhone's battery was dead. However, he submits that the judicial justice erred in his conclusions that the earbuds, connected to the iPhone, were effectively part of the iPhone, and that Mr. Grzelak was holding that device by having the earbuds in his ears.
- [5] The Crown submits that the judicial justice did not err, but also submits that, even if he did, Mr. Grzelak's conduct in any event fell within the definition of "use" in s. 214.1(d), because Mr. Grzelak had earbuds in both ears, while lawful hands-free use, as regulated by s. 7 of the Regulation, restricts earbuds to only one. DISCUSSION
- [6] The general prohibition against using an electronic device while driving is set out in s. 214.2 of the MVA: 214.2 (1) A person must not use an electronic device while driving or operating a motor vehicle on a highway.
- (2) Without limiting subsection (1), a person must not communicate by means of an electronic device with another person or another device by electronic mail or other text-based message. (There was no suggestion in the trial or in Mr. Grzelak's appeal that he qualifies for any of the occupation-related exemptions from the general prohibition that are available under the MVA or the Regulation.)
- [7] To prove the violation, the Crown was required to prove beyond a reasonable doubt that the item in question was an "electronic device" (a defined concept that I will discuss below), and that Mr. Grzelak's actions amounted to "use" of that device, within the meaning of one or more of the definitions in s. 214.1: "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.
- [8] I will start by considering the Crown's primary position, which the judicial justice accepted in finding the violation proven. The Crown says that, with the earbuds in Mr. Grzelak's ears, he was using an electronic device by holding the device in a position in which it may be used (s. 214.1(a)).
- [9] These two elements of the violation ("electronic device" and "use") were interrelated in the circumstances of this case. Because Mr. Grzelak was not touching the iPhone itself (which, as I said, was in a cubbyhole), he can only have been "holding" an electronic device if the earbuds in his ears were part of an electronic device.
- [10] Were the earbuds part of an electronic device?

- [11] Mr. Grzelak does not disagree that the iPhone, considered on its own, was an "electronic device", within the meaning of the definition in s. 214.1, as amplified by the Regulation s. 3(1): MVA s. 214.1: In this Part: "electronic device" means
- (a) a hand-held cellular telephone or another hand-held electronic device that includes a telephone function,
 - (b) a hand-held electronic device that is capable of transmitting or receiving electronic mail or other text-based messages, or
 - (c) a prescribed class or type of electronic device; Regulation s. 3(1): 3(1) The following electronic devices are prescribed for the purposes of paragraph (c) of the definition of "electronic device" in section 214.1 of the Act:
 - (a) electronic devices that include a hands-free telephone function;
 - (b) global positioning systems;
 - (c) hand-held electronic devices, one of the purposes of which is to process or compute data;
 - (d) hand-held audio players;
 - (e) hand microphones;
 - (f) televisions.
- [12] Also, and as noted earlier, Mr. Grzelak agrees that it made no difference that the iPhone's battery was dead. A cell phone "remains an electronic device within the meaning of the MVA regardless of its immediate functionality": Tannhauser, at para. 4.
- [13] Further, the Crown agrees with Mr. Grzelak that wired earbuds or headphones, considered on their own, do not fall within the definition of electronic device. The wired earbuds clearly did not "[include] a telephone function" (s. 214.1(a)), and were not themselves "capable of transmitting or receiving electronic mail or other text-based messages" (s. 214.1(b)). Nor did they fall within any of the classes or types of devices listed in s. 3(1) of the Regulation.
- [14] The issue, then, is whether, as the judicial justice found and the Crown submits, the earbuds, when connected to the iPhone, became part of an "electronic device".
- [15] We know, from Tannhauser, that the legislator intended a very broad scope for the definition of "electronic device". The Crown refers, for example, to the following comments in that decision:

- [41] The scheme captures a large number of devices. Unlike the definition of "use" - which, as will be discussed below, makes exceptions for certain forms of use - there are no exceptions to exclude certain devices from the category of "electronic device". Notably, any device intended to "process or compute data" - a huge array - is captured. Further, the definitions overlap; most of the devices commonly referred to as "phones" at this moment in time would be capable of performing any of the functions of a device on the above list.
- [16] However, the Court made those comments in its consideration of whether a device that would otherwise fall within the definition is removed when the device is non-functional. The comments presuppose that the device in question falls within one or more of the broadly-described and overlapping classes or types of item listed in the definition in s. 214.1 and s. 3(1) of the Regulation. The question in this case relates to whether the definition intends to also to encompass accessories or other equipment connected to devices that are themselves within the definition.
- [17] There is no express indication in the MVA that the legislator intended this result. The definition of "electronic device" in s. 214.1 makes no mention of accessories or attachments connected to the described devices.
- [18] Nor does s. 3(1) of the Regulation expressly include accessories or attachments in the classes or types of electronic device it prescribes for the purposes of the s. 214.1 definition.
- [19] However, s. 7(1) of the Regulation (which sets out the conditions for lawful hands-free use of a cellular telephone) makes indirect reference to earpieces and, I conclude, assumes that a cellular telephone may "include" its earpieces. The material part of s. 7(1) reads as follows:
7(1) Subject to subsection (2), a person may use an electronic device in a hands-free telephone function while driving or operating a motor vehicle on a highway, if the device
- (c) in the case of a device that includes an earpiece, the earpiece is worn only in one ear.
[emphasis added]
- [20] I do not suggest that s. 7(1) of the Regulation has direct application in the present context. However, in my view it casts some light on the intent behind the statutory regime.
- [21] A regulation may shed light on the legislative purpose of the enabling statute where the statute and the regulation form an integrated scheme to achieve a particular object: *Aheer Transportation Ltd. v. Office of the British Columbia Container Trucking Commissioner*, 2018 BCCA 210 at para. 47. The MVA and the Regulation clearly form such an integrated scheme.
- [22] While, as I said, s. 7(1) has no direct application in the present context, it gives some indication of the intent of the statutory scheme that, in turn, casts light on the interpretation of "electronic device". The provision does appear to assume that a device may "[include] an earpiece".

- [23] For this reason, I find no error in the judicial justice's conclusion that Mr. Grzelak's earbuds, connected to his iPhone, were part of that electronic device.
- [24] I turn now to whether Mr. Grzelak was "holding" the electronic device by having the earbuds in his ears.
- [25] I have to conclude that he was. "Holding" is not restricted to an action a person does with their hands. It includes supporting a device with a part of the body: *R. v. Rajani*, 2020 BCSC 779 at para. 27. I see no reason to conclude that a person with earbuds in their ears is not holding the earbuds with that part of their body.
- [26] If Mr. Grzelak was therefore holding the electronic device, was he doing so "in a position in which it may be used"? Here, again, Mr. Grzelak acknowledges that the reasoning in *Tannhauser* supports the Crown's position that he was, even though the iPhone's battery was dead. Although the electronic device could not actually have been used at the time Mr. Grzelak was holding it (by having earbuds in his ears) because the iPhone's battery was dead, the position in which the device was held was suitable for the device's use. The MVA prohibits "the holding of a device in certain positions, not the holding of a device with certain functions": *Tannhauser*, at para. 4. It did not matter that Mr. Grzelak's iPhone could not distract him: *Tannhauser* at paras. 55-56.
- [27] For these reasons, I find no error in the judicial justice's conclusion that Mr. Grzelak was holding an electronic device in a position in which it may be used (s. 214.1(a)), and was thus using the electronic device contrary to s. 214.2 MVA.
- [28] With this conclusion, it is unnecessary to consider the Crown's alternative position that Mr. Grzelak's actions also fell within the scope of the "use" definition in s. 214.1(d). However, I will briefly express my view that they did not. I do so because the Crown submitted that it was unfortunate that the judicial justice did not address this issue.
- [29] To recall, s. 214.1(d) reads as follows: "use", in relation to an electronic device, means one or more of the following actions:
- (d) taking another action that is set out in the regulations by means of, with or in relation to an electronic device. [emphasis added]
- [30] The Crown contends that this definition encompasses hands-free use of an electronic device, as described in s. 7 of the Regulation, which reads as follows: Hands-free use of electronic device 7(1) Subject to subsection (2), a person may use an electronic device in a hands-free telephone function while driving or operating a motor vehicle on a highway, if the device
- (a) is installed in accordance with section 4 and within easy reach of the driver's seat, or worn securely on the person's body,
 - (b) is voice-activated or requires only one touch in order to initiate, accept or end a call, and

- (c) in the case of a device that includes an earpiece, the earpiece is worn only in one ear.
- (2) Subsection (1) (c) does not apply to a person who is driving or operating a motorcycle on a highway. [emphasis added]
- [31] The Crown contends that because Mr. Grzelak engaged in an action addressed by s. 7 but failed to comply with the section's requirements (by wearing two earbuds rather than one), those actions amounted to "use" within the meaning of s. 214.1(d).
- [32] I cannot agree. Rather, I agree with Mr. Grzelak that s. 7(1)(c) sets out one of several conditions for an exemption from the broad prohibition of use in s. 214.2. It does not add to the s. 214.1 definition of "use", or enlarge in any other way the scope of the broad prohibition. Mr. Grzelak acknowledges that he could not have relied on s. 7 for an exemption from liability under s. 214.2 because he did not meet the condition in s. 7(1)(c). However, the unavailability of that exemption does not of itself prove "use".

CONCLUSION

- [33] The judicial justice did not err in concluding that Mr. Grzelak used an electronic device within the meaning of s. 214.1(a).
- [34] I do not accept the Crown's alternative position that Mr. Grzelak's actions also fell within the definition of "use" in s. 214.1(d).
- [35] The appeal must be dismissed. "The Honourable Associate Chief Justice H. Holmes"

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Prepared on 25 October 2026 · Esheria