
CANADA / JUDGMENT

R. v. Hewitt

2011 BCSC 313

COURT

Supreme Court of British Columbia

DECIDED

15 March 2011

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2011 BCSC 313 R. v. Hewitt

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Hewitt,

2011 BCSC 313

Date: 20110315

Docket: 58407-1

Registry: Chilliwack

Regina

v.

Jeromy Andrew Hewitt

Before: The Honourable Mr. Justice Joyce

On appeal from: A decision of the Provincial Court of British Columbia,

October 19, 2010 (R. v. Hewitt, Abbotsford Registry Docket: 72703-1)

Reasons for Judgment

Counsel for the Crown (Respondent):

S.H. Quendack

Counsel for the Accused (Appellant):

P.A. Riddell

Place and Date of Hearing:

Chilliwack, B.C.

February 18, 2011

Place and Date of Judgment:

Chilliwack, B.C.

March 15, 2011

INTRODUCTION

- [1] The appellant appeals his conviction by a Provincial Court judge, under s. 254(5) of the Criminal Code of Canada, R.S.C. 1985, c. C-46 [Criminal Code], of failing to provide a breath sample for analysis by an approved screening device pursuant to a demand made under s. 254(2)(b) of the Criminal Code.
- [2] The appellant raises two grounds of appeal:
1. That the trial judge erred in law in misapplying the doctrine of reasonable doubt as it applied to the issue of credibility.
 2. That the trial judge erred in law and fact in finding that the appellant had been given a reasonable period of time in which to determine if he was going to provide a sample of his breath.

FACTS

- [3] On November 11, 2009, at 1:48 a.m., Corporal Wheeler, a police officer, observed the appellant drive his vehicle through a red light without stopping. The appellant drove for about a block and then pulled into a gas station and parked. Cpl. Wheeler approached the appellant and noted that he had blood shot eyes and a slight odour of liquor on his breath. The appellant told Cpl. Wheeler that he had consumed two beer.
- [4] Cpl. Wheeler formed the reasonable suspicion that the appellant had liquor in his body. No issue is taken on appeal as to the grounds for forming the reasonable suspicion required to demand a breath sample.
- [5] Cpl. Wheeler retrieved a roadside screening device from his police vehicle and returned to the appellant's vehicle. The appellant had placed some chewing gum in his mouth and Cpl. Wheeler told him to spit out the gum. The appellant told Cpl. Wheeler that he "had to think about it". Cpl. Wheeler told the appellant that if he continued to chew the gum he would be obstructing a police officer in the course of his duties, whereupon the appellant removed the gum from his mouth.
- [6] At 1:50 a.m., Cpl. Wheeler read to the appellant from a card a demand that he provide a breath sample suitable for analysis using an approved screening device, pursuant to s. 254(2)(b) of the Criminal Code. No issue is taken with respect to the form of the demand.

- [7] In response to the demand, the appellant said that he "had to think about it". Cpl. Wheeler explained to the appellant the consequences of failing to provide a breath sample and the appellant again said that he "had to think about it" and wanted to know what his options were. Cpl. Wheeler again told the appellant about the Criminal Code offence for failing to provide a breath sample as well as the Provincial penalty of an automatic driving prohibition. The appellant again said he "had to think about it". Cpl. Wheeler gave the appellant a few seconds to think about it and then again explained the consequences. Cpl. Wheeler then presented the screening device. The appellant did not provide a sample and said again that he "had to think about it". At 1:53 a.m. Cpl. Wheeler deemed the appellant to have refused to provide a breath sample, placed him under arrest, advised him of his rights under the Canadian Charter of Rights and Freedoms [Charter], and gave him the standard warning.
- [8] At trial, the appellant testified that he could not recall exactly what Cpl. Wheeler said to him when dealing with him, but he agreed that Cpl. Wheeler's evidence was true. The appellant testified that when he said he "had to think about it" he was trying to weigh the consequences and that he did not realize "it was such a consequence to refuse". The appellant further testified that he "was looking for at least 30 seconds or a minute, a clear time to myself to make a decision" and that he did not think he was given that time. He testified that at no time prior to being arrested had he made a decision about what he wanted to.
- [9] The appellant also testified at trial that he had been on medication for depression in the past, but was not taking medication at the time of this incident. He said that he is slower in making judgments when he is not taking anti-depressant medication.

TRIAL DECISION

- [10] The learned trial judge began her reasons by correctly stating the issues at para. 2 as follows:

2 The issues in this trial are, firstly, whether the Crown has proven a wilful or deliberated failure on the part of the accused to provide a breath sample into an ASD, an approved screening device, and if so, whether the accused had a reasonable excuse for that failure. It is only after the Crown has proven the first beyond a reasonable doubt the burden then shifts to the accused to prove the second on a balance of probabilities.

- [11] The trial judge then made the following comments regarding credibility at para. 3:

3 The evidence which has been led is not extensive but the further issue at trial is one of credibility of the witnesses, and in particular the credibility of the accused. The accused in his evidence was quite frank in saying that he was concerned about losing his licence; that he was trying to weigh the consequences of not providing a breath sample; that he was nervous; and that he was concerned about the speed at which the event was occurring but that he does not remember what the officer said to him. He was clearly concerned about losing his licence and he did not know which was the worst, he said, to provide a breath sample and potentially lose his

licence for a long period of time or to not provide a sample. He testified he was scared of what might happen to him if he provided a sample. However, he was clear that he could not remember what the officer said to him on three occasions about providing a sample. The accused testified that he did not remember what the officer said to him but he was sure that what the officer said in his evidence this morning was true.

[12] After reviewing the evidence of Cpl. Wheeler, which the appellant accepted was true, the trial judge discussed the testimony of the appellant at para. 13:

13 The accused testified that he had been on medication for depression but was not on medication at the time of the incident. He testified that he is slower in making judgments when he is not on his anti-depressants. He clearly was slower and quiet in the giving of his evidence. However, he was able to recount what occurred at the scene and was only reliant on the officer's recall of the exchange regarding the request to provide the sample, the statement of the consequences and the comments that the accused made at the time. The accused was quite frank in saying that he was trying to weigh the consequences. When the accused was asked what he needed to think about for so long about providing a sample into the ASD, he testified that he was just weighing the options of which alternative had more consequences to it. He testified that he did not fully appreciate the consequences of a refusal. He testified that it happened so fast that he did not have sufficient time to think about it or to absorb what the consequences long term might be. He agreed he had a few beer. He testified that he was scared and nervous and did not know what to decide. He also thought he would not have blown over had he actually provided a sample. However, he was frank to say that he was still scared of what might happen if he did provide a sample.

[13] At trial, counsel for the appellant argued that the appellant's statements that he "had to think about it" were equivocal and do not establish a clear refusal. He argued that the Crown had not proven a wilful or deliberate failure to provide a sample. The defence argued before the trial judge that the defendant needed more time to make a decision and that he was not afforded sufficient time. The Crown at trial argued that the court must consider the whole of the evidence, not just the words of the defendant, when deciding whether there had been a deliberate refusal and that the evidence as a whole established, beyond a reasonable doubt, a wilful refusal.

[14] The trial judge accepted the evidence of Cpl. Wheeler as to what he said and as to the sequence of events, noting that the defendant could not recall the sequence of events.

[15] With regard to the appellant's evidence she said at para. 19:

19 The accused gave his evidence, I agree, in a slower manner than perhaps most witnesses might but he clearly understood the questions asked of him by counsel, both in direct and in cross-examination. He was clearly concerned at the time that there were consequences for not providing a sample or in the alternative, providing a sample, and he was conscious that he had consumed alcohol.

[16] The trial judge then stated her conclusion briefly at paras. 20-21:

20 Having considered the totality of the evidence, I find that the Crown has proven a wilful or deliberate failure by the accused to provide a breath sample into the approved screening device and secondly that the accused has not provided a reasonable excuse for his failure to provide a breath sample. I find that the accused's words in addition to his actions, albeit over a short period of time, can all be considered in determining whether or not the Crown has proven a wilful failure by the accused to provide a breath sample into the ASD.

21 I find, accordingly, that the Crown has proven the charge beyond a reasonable doubt and convict the accused.

DISCUSSION

1. Did the trial judge err in law in her approach to credibility?

[17] The appellant submits that a determination of the appellant's credibility was essential in determining whether or not the Crown had proven its case beyond a reasonable doubt.

[18] It is clear that having heard the evidence of the defendant, the trial judge was of the opinion that the credibility of the witnesses was in issue, particularly the credibility of the defendant.

[19] There was no issue on the evidence as to what took place in terms of the sequence of events, what Cpl. Wheeler said and what the appellant said in return. The appellant accepted the testimony of the police officer in that respect.

[20] However, as the trial judge recognized, the offence could not be made out unless she was satisfied, beyond a reasonable doubt, that the defendant had wilfully and deliberately failed or refused to provide a sample of his breath. In that respect, the defendant's evidence was that he was weighing the consequences. Further, and importantly, the defendant testified that at no time before he was arrested had he made a decision about what he was going to do. It appears to me that that evidence was capable of giving rise to a reasonable doubt whether the failure to blow, within the three minute time period before Cpl. Wheeler deemed the defendant to have refused, was wilful and deliberate. It must have been that evidence which raised the credibility issue in the trial judge's mind of which she spoke in para. 3 of her reasons.

[21] The appellant argues that the trial judge's Reasons for Judgment set out no explanation for the finding of credibility with regard to the appellant and no proper application of the test in *R. v. W.(D.)*, [1991] 1 S.C.R. 742 (S.C.C.) [W.(D.)].

- [22] It is not necessary for a trial judge who is faced with a credibility issue arising from the testimony of the accused to expressly refer to W.(D.) and repeat, as a mantra, the test articulated in that case. But the trial judge's reasons must be sufficient to satisfy the appellate court that, in coming to her conclusion, she engaged in the required analysis of the issue.
- [23] It was, of course, open to the trial judge to reject the evidence of the defendant on this issue entirely and to find that in the context of the whole of the evidence it did not raise any reasonable doubt whether the necessary mental element had been proven. While it appears from her conclusion that she rejected the evidence of the defendant with regard to the mental element of the offence, the difficulty with the decision is that the trial judge did not, in my respectful opinion, articulate why she rejected this evidence and why it did not raise a reasonable doubt in her mind. The conclusion is stated without analysis.
- [24] I conclude that the trial judge did commit an error of law and that the appeal must be allowed and a new trial ordered. In light of my conclusion with respect to the first ground of appeal, it is not necessary, nor desirable in my view, for me to comment on the second ground of appeal.

"B.M. Joyce. J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/11/03/2011BCSC0313.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-hewitt-2011>

Prepared on 28 October 2026 · Esheria