

CANADA / JUDGMENT

# R. v. Hrynyk

2021 BCSC 1026

## COURT

Supreme Court of British Columbia

## DECIDED

13 May 2021

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2021 BCSC 1026 R. v. Hrynyk IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Hrynyk, 2021 BCSC 1026 Date: 20210513 Docket: EA85016209-1 Registry: Victoria Regina v. Kimberly Hrynyk Before: The Honourable Mr. Justice Baird On appeal from: An order of the Provincial Court, dated August 13, 2020 (R. v. Hrynyk, EA85016209-1). Oral Reasons for Judgment In Chambers Counsel for the Crown: N. Grabe Appearing on her own behalf: K. Hrynyk Place and Date of Hearing (via teleconference): Victoria, B.C. May 13, 2021 Place and Date of Judgment (via teleconference): Victoria, B.C. May 13, 2021

## Introduction

- [1] This is the Crown's appeal of a decision of the Provincial Court of British Columbia made on August 13, 2020, acquitting the respondent, Kimberly Dawn Hrynyk of what is commonly known as "distracted driving", or more formally as "using an electronic device while driving or operating a motor vehicle on a highway", an offence contrary to s. 214.2(1) of the Motor Vehicle Act, R.S.B.C. 1996, c. 318. Relevant Legislation
- [2] Sections 214.1 and 214.2(1) read as follows: 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 "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. Prohibition against use of electronic device while driving 214.2 (1) A person must not use an electronic device while driving or operating a motor vehicle on a highway.
- [3] Sections 2 and 7 of the Use of Electronic Devices While Driving Regulation, B.C. Reg. 308/2009 read as follows: "Use" further defined 2 A person who watches the screen of an electronic device uses the device for the purposes of paragraph (d) of the definition of "use" in section 214.1 of the Act. 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.

## Background

- [4] On August 22, 2019 at around 9:00 p.m., the respondent and her nine-year-old son stopped outside a Starbucks in Victoria, B.C. The respondent was driving a Honda Pilot. She activated the Starbucks application on her cell phone to order a cup of tea. She discovered that the Starbucks was closed for the day.
- [5] Thereafter respondent pulled onto Tillicum Road and headed to the intersection of Burnside Road West on her way home. Her plan was to turn left on Burnside. She entered the dedicated left-hand turn lane. The light was red. The respondent stopped. She realised that she had not closed the Starbucks application on her cell phone. She did not want to waste data by leaving it open.
- [6] She put the car in "park". She reached for her cell phone, which I will accept for present purposes was in a holder of some kind on her centre console. With one hand she braced the back of the phone so it would not move. With the other, she activated the screen of her cell phone, entered a digital code, and closed the Starbucks application by swiping her finger across the screen.

- [7] Sadly, a police officer was stopped directly to the respondent's right in the through lane. He looked to his left and saw the respondent's face illuminated by what was obviously an electronic device of some kind. He got out of his car and looked in on the respondent. He could see her holding her cell phone and swiping her finger across the screen. He knocked on the respondent's window and spoke to her. He told her to proceed through the intersection and pull over.
- [8] The respondent complied. A brief discussion ensued. The police officer served the respondent with a violation ticket alleging the infraction in question. Dispute
- [9] The respondent disputed the violation ticket and ended up in what most of us call traffic court. She represented herself. The facts were not disputed. Most of what I have said so far comes from the respondent's testimony at the hearing. She has never attempted to deny that she used her cell phone in precisely the manner I have described. Her objection to the ticket was that she had taken the precaution of coming to a stop and putting the vehicle in "park"; she was not telephoning or texting anyone; she was only turning off her Starbucks application, she said, a task that took little time and endangered no one using the highway.
- [10] The respondent also maintains that the police officer told her at first that he was only going to give her a warning, but he changed his mind for some reason and served her with a violation ticket carrying an indicated penalty of \$320. She said that the police officer was brusque and ill-mannered. He upset her son with his rudeness and impertinence. My overall impression is that the respondent's sense of grievance had more to do with the officer's alleged behaviour than with the ticket.
- [11] The presiding justice acquitted the respondent on two bases. First of all, because the respondent had stopped her vehicle and put it in "park" at the red light in question, he found that she could not be said to be "driving or operating a vehicle". Second, he found, essentially, that because the cell phone was in a holder attached to the centre console, the respondent's manipulation of it did not amount to "holding it" in the sense of that term set out in the definition of "use" in s. 214.1 of the Motor Vehicle Act. Discussion
- [12] As I mentioned to the respondent, the only questions for me to answer here are legal ones. In my view, the presiding justice's application of the law to the facts is clearly wrong and cannot stand.
- [13] There is no doubt at all that the respondent was driving or operating her motor vehicle at the material time. She was behind the wheel. She had driven to the intersection and stopped. Her motor was running. She was in a traffic lane. She was poised to carry on driving after only a brief hiatus introduced by the red light in front of her. She manipulated the gear shift to move it from "drive" to "park" with the intention imminently of returning it to "drive" and proceeding on her way. She had not "parked" in the sense of that term defined in the Motor Vehicle Act, and well known to all drivers - that is, she had not stopped off-road or at the right-most extremity of the roadway, outside the flow of traffic.

- [14] Furthermore, the respondent has conceded from the beginning, and confirmed during our exceedingly pleasant exchanges this morning, that she was holding the phone in her hand and actually using it. She was operating one or more of the device's functions by activating it, entering a digital code, and swiping the screen. Referring to s. 2 of the Use of Electronic Devices While Driving Regulation, a point not addressed by the presiding justice in his decision, while the respondent was under the observation of the investigating police officer, she was watching the screen of her cell phone. Her use of the cell phone did not fall into the "hands free" or "one touch" use specifically exempted in s. 7 of the Regulation.

## Conclusion

- [15] The evidence taken at trial establishes that the respondent used an electronic device while operating a motor vehicle and thereby contravened s. 214.2 of the Motor Vehicle Act. The presiding justice's conclusions to the contrary were incorrect and cannot stand. The appeal is allowed, and the acquittal is set aside. [Discussion regarding the appropriate order]
- [16] All right. I allowed the appeal on the basis that the adjudicator below committed the errors of law that I have described. I ordered a new trial of the Information, but there will be no such trial, as Mr. Grabe has now exercised his discretion to stay the ticket information before the court. There will be no further proceedings. This is the end of the matter. "Baird J."

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