
CANADA / JUDGMENT

R. v. Miller

2009 BCSC 591

COURT

Supreme Court of British Columbia

DECIDED

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2009 BCSC 591 R. v. Miller

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Miller,

2009 BCSC 591

Date: 20090430

Docket: S-082860

Registry: Vancouver

Between:

Regina

Respondent

And

Mark Andrew Miller

Petitioner

Before: The Honourable Mr. Justice Leask

Reasons for Judgment

(In Chambers)

Counsel for the Petitioner

M.D. Sanders

Counsel for the Respondent

J. Penner

Date and Place of Hearing:

September 22, 2008, February 3 and April 8, 2009 and Written Submissions October 29 and November 20, 2008

Vancouver, B.C.

1. Introduction

- [1] On December 26, 2007, Mr. Miller received a violation ticket for having a noisy muffler on his vehicle. He did not dispute that ticket within 30 days and a deemed conviction was entered on his driving record on January 26, 2008.
- [2] The petitioner, Mr. Miller, in his amended petition to the Court, applies for judicial review of the following determinations:
 - 1. The deemed plea of guilty to the offence of "Unnecessary Noise (Exhaust)" contrary to s. 7A.01 of the British Columbia Motor Vehicle Act Regulations which was entered automatically by operation of section 16(1) of the British Columbia Offence Act on January 26, 2008.
 - 2. The statutory determination that the Petitioner may not appeal or seek leave to withdraw or apply to strike that deemed plea of guilty (and consequent conviction) by sole virtue of the fact that he did not have a "genuine intent to dispute the ticket" (within 30 days of receiving it).
- [3] The petitioner applies for an order declaring that s. 16(1)(2.1) of the Offence Act, R.S.B.C. 1996, c. 338, is invalid and of no force and effect by reason of its inconsistency with s. 11(d) of the Charter of Rights and Freedoms, and an injunction directing the Superintendent of Motor Vehicles to delete the impugned conviction from the petitioner's driving records.
- [4] In his original petition the petitioner sought orders pursuant to the inherent jurisdiction of this Court striking out the petitioner's conviction and allowing the petitioner to dispute the ticket in accordance with ss. 15 to 15.4 of the Offence Act.
- [5] Among the issues raised by the respondent was a challenge to the procedure for bringing this matter before the Court. The respondent submits that a declaration of constitutional invalidity cannot be brought by way of petition, but must be brought by writ and statement of claim.
- [6] During the hearing I indicated to counsel that I would amend the petition to overcome the irregularity by converting it into a writ and statement of claim. In addition to powers granted under Rule 2 to prevent dismissal of claims for procedural irregularities, Rule 24(5) gives the Court the power to order amendments during hearings:

Unless the court otherwise orders, where an amendment is granted during a trial or hearing, an order need not be taken out and the amended document need not be filed, delivered or served.

As a writ and statement of claim Mr. Miller's petition would be in the proper procedural form. Thus, pursuant to R. 2 and R. 24(5), I ordered the petition be amended to the proper form.

2. Facts

[7] On December 22, 2007, Hi-Lite Truck Accessories Ltd. installed a new MBRP Cool Dual Back exhaust system on the petitioner's 2005 Dodge Ram truck. At 5:30 p.m. on December 26, 2007, the petitioner was driving his truck in North Vancouver when he turned onto the Main Street on-ramp of Highway One and was pulled over by a police officer. The officer served the petitioner with a British Columbia Offence Act Violation Ticket for "Unnecessary Noise (exhaust)", pursuant to Regulation 7A.01 of the Motor Vehicle Act Regulations, B.C. Reg. 26/58. Regulation 7A.01 reads as follows:

7A.01 No person shall start, drive, turn or stop any motor vehicle, or accelerate the vehicle engine while the vehicle is stationary, in a manner which causes any loud and unnecessary noise in or from the engine, exhaust system or the braking system, or from the contact of the tires with the roadway.

[en. B.C. Reg. 70/68.]

[8] On the face of the ticket the monetary penalty of \$109 was clearly specified. Nowhere did it mention that it also carried a 3-point penalty on the offender's driving record.

[9] In addition to the violation ticket, the police officer told the petitioner that his exhaust system "doesn't look legal", or words to that effect, and served the petitioner with a Notice of Inspection, requiring him to have his truck inspected at a licensed inspection facility within 30 days.

[10] On January 3, 2008, the petitioner returned to Hi-Lite Truck Accessories to complain that the exhaust system they had installed was not legal according to the ticket he had received. Hi-Lite Truck Accessories advised the petitioner that the exhaust system was compliant and agreed to handle the inspection on his behalf. The petitioner's truck underwent two government safety inspections on January 8 and 15, 2008. The exhaust system passed the safety test, for which the relevant question was, "Is the exhaust system tight and not leaking?" The plaintiff received certification that "this vehicle conforms to all the safety requirements of the Motor Vehicles Act and Regulations."

[11] On April 3, 2008, the petitioner received a Notice of Intent to Prohibit from the Superintendent of Motor Vehicles, which required either acknowledgement and acceptance of the driving prohibition or a submission requesting a review of the decision to prohibit. The intended driving prohibition was made pursuant to s. 93(1)(a)(ii) of the Motor Vehicle Act, R.S.B.C. 1996, c. 318:

Prohibition against driving by superintendent

93. (1) Even though a person is or may be subject to another prohibition from driving, if the superintendent considers it to be in the public interest, the superintendent may, with or without a hearing, prohibit the person from driving a motor vehicle

(a) if the person

(ii) has a driving record that in the opinion of the superintendent is unsatisfactory.

[12] The petitioner's driving record was attached to the Notice and showed a total of fifteen Motor Vehicle Act convictions between June 2003 and March 2008; one four-month period of probation in 2006; and one four-month driving prohibition in 2007. The second most recent of his convictions was the Unnecessary Noise ticket, for which a deemed conviction had been entered on January 26, 2008. Since his most recent driving prohibition had ended in August 2007, the petitioner had received three points on his driving record for the Unnecessary Noise conviction, and two additional points for a subsequent conviction on March 16, 2008 for failure to obey a traffic sign or signal. The petitioner first learned of the three points assigned to the Unnecessary Noise ticket when he received the Notice to Prohibit on April 8, 2008. He formed the intention to dispute the Unnecessary Noise ticket at that time, having been unaware before that time that the deemed conviction would also result in points being added to his driving record.

[13] The petitioner did not dispute the Unnecessary Noise ticket during the 30 days prescribed by s. 16 of the Offence Act, despite receiving the positive vehicle test results that indicated his exhaust system to be legally compliant with all safety rules and regulations under the Motor Vehicle Act. He submits that he did not do so because he did not know there were points attached to the regulatory offence and that "it wasn't worth his time" to dispute a \$109 fine.

3. Issues

[14] Was there a violation of the petitioner's s. 11(d) Charter rights? If so, what is the proper remedy?

4. The Legislative Framework

[15] Section 16 of the Offence Act sets out the consequences of a failure to dispute a ticket within 30 days, and the procedure for appeal after the 30 day limit has expired. The relevant subsections of s. 16 read as follows:

Failure to respond to ticket

16 (1) If a person who has been served with a violation ticket under section 14 has not, within 30 days after the ticket was served on the person, either paid all or a portion of the ticketed amount or disputed the allegation or the fine portion of the ticketed amount in accordance with section 15,

- (a) the person is deemed to have pleaded guilty to the alleged contravention, and
 - (b) the ticketed amount indicated on the ticket is immediately payable to the government,
- (2) Subject to subsection (3), if a person who
- (a) is served with a violation ticket, and
 - (b) is convicted under section 15 or deemed to have pleaded guilty under subsection (1)

wishes to dispute the allegation or the amount of the fine, the person must apply to a justice and the justice, on being satisfied of the matters in subsection (2.1) by affidavit in the prescribed form and with or without hearing from the applicant, may make an order striking out the conviction, if any, and allowing the person to dispute the allegation or the amount of the fine portion of the ticketed amount in accordance with sections 15 to 15.4.

(2.1) Before making an order under subsection (2) allowing a dispute to proceed, a justice must be satisfied that

- (a) through no fault of the defendant, he or she did not have an opportunity to dispute the allegation or the amount of the fine,
- (b) the defendant had a genuine intention to dispute the ticket before the dispute period under subsection (1) expired,
- (c) no undue prejudice will result from the extension of the dispute period,
- (d) the defendant has an arguable defence to the violation ticket, and
- (e) it is in the interests of justice to allow the dispute to proceed.

[16] The provision of s. 16 which affects the petitioner is subsection (2.1)(b). He honestly informed the Judicial Justice of the Peace that he did not have an intention to appeal within 30 days of receiving the ticket. Hence the Judicial Justice of the Peace was unable to strike the deemed conviction and permit the petitioner to dispute the allegation.

4. Analysis

[17] The petitioner submits that he should be allowed to dispute the ticket because he has a valid defence to the charge and he only chose not to dispute the charge because he was not aware that points would be added to his driving record.

[18] The Supreme Court of Canada dealt with a similar issue in *R. v. Richards*, [1996] 3 S.C.R. 525. In *Richards*, the Court considered whether failure to dispute a speeding ticket during the limitation period under the New Brunswick Motor Vehicle Act, R.S.N.B. 1973, c. M-17, constitutes waiver of constitutional rights under s. 11(d). The Court answered in the affirmative, but made the important caveat that for the waiver to be valid the accused must have full knowledge of the consequences of his waiver:

32. In my view, in a context in which litigants cannot be imprisoned for offences of a regulatory nature, it is open to both the provincial legislatures and Parliament to infer from the failure of those litigants to act that they have waived their right to be presumed innocent and their right to a hearing and at the same time to have consented to a conviction made against them, provided that under the procedural scheme applicable to them, they are fully informed of the consequences of failing to act and there are sufficient safeguards to prevent injustices from incurring. (emphasis added)

[19] The petitioner submits that he was unaware that 3 points would be added to his driving record, and that therefore he was unaware of the consequences of his failure to act. Consequently, he did not waive his s. 11(d) rights.

[20] The violation ticket Mr. Miller received is Form A under the Offence Act Forms Regulation, B.C. Reg. 422/90, and it is prescribed under s. 2 of that Regulation as the form a violation ticket must take for Motor Vehicle Act violations. The ticket described the offence with which he was charged, informed him of the specific regulation that created the offence, and the Act under which that regulation had been made. It indicated a \$109 fine in the space provided for fines to be indicated. The ticket did not indicate any points, nor is there a space on the violation ticket in the prescribed Form for points to be written in. At the bottom of the ticket the accused is provided with information regarding the consequences of a failure to act within the 30 day period:

If the allegations or fines are not disputed (see reverse) within 30 days, this ticket will be treated as not disputed, you will be deemed to have pleaded guilty to the alleged offence(s) and to owe the Crown the ticketed amounts. Your signature indicates you have received this ticket and is not an admission of guilt.

On the reverse side of the violation ticket, the following information is provided:

WHAT HAPPENS IF I DO NOT PAY?

If you do not pay or dispute the ticket within thirty (30) days of the Date of Service, the ticketed amount shown on the front will be payable to the Crown. The described offence(s) will be added to your record as convictions. In addition, you will be subject to collection activity.

The back of the ticket also offers instructions on how to dispute the ticket, which can be done by mail or in person, and informs the alleged offender that, once disputed, he will receive notice by mail of a date of dispute at the Provincial Court.

[21] Counsel for the Attorney General argues that Mr. Miller waived his s. 11(d) rights because he did not dispute the ticket, and that he was aware of the consequences of that choice. He states that the relevant consequence of which he needed to be aware was that he would be deemed guilty after 30 days and automatically convicted of the offence. I do not agree. The test for waiver under Richards requires that the accused be fully aware of the consequences of his waiver for that waiver to be valid. The penalties that attached to a conviction in this case were a fine of \$109 and 3 points on the petitioner's driving record.

- [22] British Columbia has adopted by regulation under the Motor Vehicle Act a penalty points system that is designed to discourage bad driving and to remove by means of driving prohibition bad drivers from the road. The Supreme Court of Canada described the system in *R. v. Goltz*, [1991] 3 S.C.R. 485:
55. [T]he Motor Vehicle Act provides for a penalty point system which calculates accumulating demerits, ranging from two to ten points depending on the severity of the offence. At various levels of accumulated points, the Superintendent is notified. The Superintendent then takes measures to issue a letter of warning to a driver, indicating that if he or she continues to accumulate penalty points the Superintendent may take remedial steps. Once a driver accumulates 15 penalty points, the Superintendent is again alerted and he will then decide to either place the driver on probation, send a notice of intent to prohibit which gives the driver 21 days to show why his or her licence should not be suspended, or actually issue a notice of prohibition.
56. If the Superintendent ultimately sends a notice of prohibition, it is his practice to invite the person to make submissions in writing as to why the prohibition order should be cancelled or shortened in duration and to indicate that the Superintendent will review the person's case if such submissions are received. If a driver disputes the accuracy of the driving record, the Superintendent's practice is to hold the prohibition in abeyance while determining whether an error was made in the calculation of points. Of course, it is also open to the driver to dispute the merits of a traffic rule infraction at the time of the alleged infraction. Finally, in exercising his authority to prohibit a person from driving in the public interest, he must at all times exercise it in accordance with the principles of natural justice (*Hundal v. Superintendent of Motor Vehicles* (1985), 64 B.C.L.R. 273 (C.A.), [page 511] per Nemetz, C.J.B.C., at pp. 275-76, *Motor Vehicle Act Regulations*, Division 28).

The immediate consequence of a conviction of a listed driving offence is to have points added to one's driving record, pursuant to Division 28 of *Motor Vehicle Act Regulations*, B.C. Reg. 26/58. The indirect and potential consequence of the attributed points - if a driver is "bad" and has many points - is that those points may lead to a driving prohibition being ordered by the Superintendent. For most drivers, such a prohibition is a much more serious consequence than payment of a fine. In *Richards*, the Supreme Court of Canada emphasizes that the legality of the system of penalty points and the discretion of the Superintendent is grounded in the accused person's right to appeal the points and in the Superintendent exercising his discretion in accordance with the principles of natural justice. One of the fundamental principles of natural justice is that an accused person receives notice of the violation with which he has been charged and of any and all consequences of a conviction under that charge.

- [23] The system of points is designed to discourage bad or dangerous driving; and, where necessary, to remove by prohibition very bad drivers from the road. The excessive noise regulation has no rational connection with bad or dangerous driving. It is within the government's prerogative to attach points to such regulations, despite their lack of rational connection to the purpose of the penalty points scheme, but in doing so the principles of

natural justice require that explicit and clear notice of those points be provided to accused drivers.

- [24] In my view, the petitioner was not "fully informed of the consequences of failing to act" as required by the Supreme Court of Canada decision in Richards. Consequently his s. 11(d) rights were violated.
- [25] I do not find that the system for appealing tickets under s. 16 of the Offence Act nor the attachment of points to an excessive noise violation under the Motor Vehicle Act Regulations violate the accused's s. 11(d) rights. I do find, however, the prescribed Form A under the Offence Act Forms Regulation to be deficient in that it does not provide a space in which an enforcement officer may write the number of points attached to the violation charged. If the Form did contain such a space, and the enforcement officer were required to write down the number of points in that space, the driver would be provided with sufficient notice of the consequences of a deemed conviction. Such a form would satisfy the notice required by the principles of natural justice, and would be sufficient to support a waiver of an accused's s. 11(d) rights under s. 16 of the Offence Act.
- [26] In the circumstances of this case I find that the accused did not have sufficient notice of the consequences of a conviction for the charged excessive noise violation and therefore he did not waive his s. 11(d) Charter rights.

5. Remedy

- [27] I consider the appropriate remedy under s. 24(1) of the Charter is to quash the deemed guilty plea and order that the Provincial Court conduct a hearing to permit the petitioner to dispute the ticket issued to him on December 26, 2007.
- [28] I have given consideration to making an order declaring that Form A, prescribed under s. 2 of the Offence Act Forms Regulation as the form a violation ticket must take for Motor Vehicle Act violations, is invalid as being in contravention of the petitioner's s. 11(d) rights. I decline to make such an order. I believe the petitioner's circumstances occur rarely. In the short-term, to avoid recurrence of s. 11(d) violations of citizen's rights in circumstances similar to the petitioner's, police officers issuing violation tickets can simply specify on the face of the ticket the points, if any, that will be added to the driving record of an accused, if convicted. It would be my respectful recommendation that Form A be amended to provide a space for indicating "points" similar to the space currently provided for indicating the amount of the fine. Once this is done, there will be no danger of future violations of other citizens' s. 11(d) rights.
- [29] The petitioner should also have his costs on Scale B in this Court.

Leask J.

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