
CANADA / JUDGMENT

R. v. Milos

2007 BCSC 1873

COURT

Supreme Court of British Columbia

DECIDED

19 September 2007

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2007 BCSC 1873 R. v. Milos

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Milos,

2007 BCSC 1873

Date: 20070919

Docket: 24161

Registry: Vancouver

Between:

Regina

Respondent

And:

Nickolas Joseph Milos

Appellant

Before: The Honourable Madam Justice Gerow

Oral Reasons for Judgment

In Chambers

September 19, 2007

Counsel for the Respondent:

G. Parson

Counsel for the Appellant:

M.R. Slay

Place of Hearing:

Vancouver, B.C.

- [1] THE COURT: Mr. Milos drove his vehicle through a fence and into the side of a house located at 1502 Oxford Street, North Vancouver, B.C., at approximately 5:20 a.m. on November 12, 2005. The collision rendered his vehicle inoperable. Following the collision, Mr. Milos was convicted of driving with a blood alcohol level in excess of the legal limit. He appeals his conviction on the basis that the learned trial judge erred in finding that the police officer who attended the scene could request that he provide a breath sample for analysis on an approved screening device ("ASD demand"), and in finding that the breathalyser test was taken as soon as was practicable.
- [2] The issues are:
1. Did the learned trial judge err in finding that Mr. Milos was operating or had the care or control of his vehicle at the time the attending officer made an ASD demand to him?
 2. Did the learned trial judge err in finding that the breath samples taken pursuant to s. 254(3) of the Criminal Code, R.S.C. 1985, c. C-46 were taken as soon as was practicable?

BACKGROUND FACTS

- [3] Mr. Milos was the operator and sole occupant of the motor vehicle which collided with the residence at approximately 5:20 a.m. At trial, the Crown admitted that as a result of the collision, the motor vehicle was rendered inoperable and undriveable.
- [4] The residents of the household were awoken by the collision. One of the residents left the residence and assisted Mr. Milos while the other resident called 911. A police officer, Constable Jang, arrived within 10 to 15 minutes of the collision. Constable Jang made the ASD demand within seven minutes of his arrival at the scene.
- [5] Mr. Milos failed the ASD demand and was arrested, warned, and placed in the back of Constable Jang's police cruiser at approximately 5:40 a.m. At some time, another police officer, Constable Jardine, arrived and Constable Jang turned over the scene investigation to Constable Jardine.
- [6] Constable Jang left the scene with Mr. Milos at 6:05 a.m. Constable Jang testified that between 5:40 a.m., when he arrested Mr. Milos and put him in the back of the police cruiser, and 6:05 a.m., when he left the scene, he talked with and answered questions from the Fire Department, Mr. Milos' father, the homeowners, and Constable Jardine.

Did the learned trial judge err in finding that Mr. Milos was operating or had the care or control of his vehicle at the time the attending police officer made the ASD demand to him?

[7] I will deal first with the issue of whether the learned trial judge erred in finding that Mr. Milos was operating or had the care or control of his vehicle at the time the ASD demand was made to him. Mr. Milos argues that the learned trial judge erred in finding that he was operating or had care or control of his vehicle within the meaning of s. 254(2) of the Criminal Code at the time the ASD demand was made.

[8] Section 254(2) of the Criminal Code provides:

Where a peace officer reasonably suspects that a person who is operating a motor vehicle or vessel or operating or assisting in the operation of an aircraft or of railway equipment or who has the care or control of a motor vehicle, vessel or aircraft or of railway equipment, whether it is in motion or not, has alcohol in the person's body, the peace officer may, by demand made to that person, require the person to provide forthwith such a sample of breath as in the opinion of the peace officer is necessary to enable a proper analysis of the breath to be made by means of an approved screening device and, where necessary, to accompany the peace officer for the purpose of enabling such a sample of breath to be taken.

[9] Mr. Milos takes the position that the trial judge erred in finding that he was operating or had care or control of his vehicle as defined under this section when:

- (1) his vehicle had been rendered inoperable by the collision; and
- (2) the ASD demand was made 22 minutes after Mr. Milos had stopped driving the vehicle.

[10] He argues that where a vehicle has been rendered inoperable and 22 minutes have elapsed since the driver had care or control of the vehicle, a police officer can no longer make an ASD demand because the "is operating" requirement in the section is not met.

[11] Mr. Milos concedes that some courts have allowed for a certain amount of past signification to be read into s. 254(2); however, he says other courts have not and, as a result, the application of the law has been inconsistent. He says that courts have looked at the circumstances surrounding such a demand in order to determine whether or not the demand is valid. One such circumstance is whether the vehicle is still operable. Mr. Milos relies on *R. v. Schmidt*, [2001] 3 W.W.R. 580 (Sask. Q.B.), for the proposition that once a vehicle has been in a motor vehicle accident which renders it inoperable, the driver no longer has the care or control of his vehicle within the meaning of s. 254(2).

[12] In *R. v. Campbell*, 2005 BCCA 619, the Court considered the issue of whether in order for a police officer to make a valid demand under s. 254(2) he must actually observe the person on whom the demand is made to be operating or in care or control of the motor vehicle at the time the demand is made. At ¶13, the Court confirmed that the words "is driving" or "has the care or control" are to be given some past signification. The Court noted that the cases differ in outcome as a result of factual findings as to whether the Crown has established on

the evidence that the accused's driving occurred within a time frame reasonably contemplated in giving "is" a past-tense interpretation, or that the accused had care or control at the time of the demand. The Crown must prove that the accused is driving or has care or control of the vehicle at the time of the demand, but may do so through means other than the officer's knowledge or observation.

[13] Other courts have also held that s. 254(2) is to be given past signification: *R. v. Phillips* (1992), 120 A.R. 146 (Alta. C.A.); *R. v. Petit*, 2005 QCCA 687, [2005] R.J.Q. 2463 (Que. C.A.); *R. v. Johnson*, [1987] 3 W.W.R. 765 (Man. C.A.); and *R. v. Letkeman* (1983), 28 Sask. R. 307 (Q.B.).

[14] The policy reasons for giving past signification to the words of s. 254(2) are discussed by the Ontario Court of Appeal in *R. v. Campbell* (1989), 44 C.C.C. (3d) 502, at p. 505:

I think that it is sufficient to say that the verb "is" (and, therefore "has") can and should have some degree of past signification. To interpret these words as having a strictly literal present-tense-only meaning could defeat the purpose of the provision and lead to absurd results. For example, as far as "has care or control" is concerned, if the provision is confined to a literal present-tense meaning, it would not apply to a person who, when a police officer approaches, steps out of his car and throws the keys away or who runs away and is finally caught by the police a substantial distance from the car.

[15] In my view, an equally absurd result would occur if the meaning urged by Mr. Milos was given to the words. It would mean that the provision would not apply to a driver involved in a police chase who has to stop the vehicle because of a flat tire caused by a spike belt or because he runs out of gas, as well as a driver who causes an accident that renders his car undriveable. An ASD demand could not be made of those drivers, whereas it could be made of a driver in the same situation whose vehicle was still driveable.

[16] Similar sentiments were expressed in *R. v. Petit* by the Quebec Court of Appeal at ¶27:

I conclude my analysis by stating that accepting the appellant's submission would lead to an absurdity whereby s. 254(2) Cr.C. would not apply in cases of accidents in which a drunk driver's car was destroyed, while an ASD test could be ordered in cases where the vehicle remained roadworthy.

[17] Mr. Milos also asserts that too long a time had passed between when he had last driven and when the ASD demand was made. He argues that because 22 minutes had passed, there was no longer authority under s. 254(2) to make the ASD demand.

[18] In *R. v. Phillips*, the Alberta Court of Appeal dealt with an ASD demand that was made 40 to 45 minutes after the accident. In finding that the demand was a valid demand under s. 254(2), the Court noted that the section contains no express time limit on when the demand may be made and that finding evidence of violations is not usually the legitimate top priority when police arrive at the scene of an accident. Often the first priority of the police is to determine such things as whether there is a need for an ambulance, or whether the vehicles and debris from the accident threaten to cause a new accident, and to ensure that no one

who may be an important witness leaves the scene without providing his or her name or address. The Court concluded that the margin of time that was allowed under the statute is a reasonable time, not just a very few minutes or the minimum time that is physically possible.

- [19] The evidence before the learned trial judge in this case was that the police officer arrived approximately 10 to 15 minutes after the accident and conducted an initial investigation for approximately seven minutes prior to reading the ASD demand to Mr. Milos. In submissions at trial, Mr. Milos' counsel conceded that the seven-minute period was a reasonable period of time for the police to investigate the collision.
- [20] In my view, there was sufficient evidence before the learned trial judge to support the conclusion that Mr. Milos was in the care or control of his vehicle at the time that the ASD demand was made, and that the finding was one that was reasonably open to her on the facts.

Did the learned trial judge err in finding that the breath samples taken pursuant to s. 254(3) of the Criminal Code were taken as soon as was practicable?

- [21] I turn next to the issue of whether or not the learned trial judge erred in finding that the breath samples taken pursuant to s. 254(3) of the Criminal Code were taken as soon as was practicable.
- [22] Mr. Milos submits that the learned trial judge erred in finding that the breath samples taken were authorized pursuant to s. 254(3) of the Criminal Code because the breath samples were not taken as soon as was practicable. Mr. Milos argues that once Constable Jardine arrived at the scene of the accident and Constable Jang turned over the scene investigation to him, Constable Jang should have left the scene immediately and not spent time answering questions from the Fire Department, the homeowners, and Mr. Milos' father.

- [23] The relevant portion of s. 254(3) provides:

Where a peace officer believes on reasonable and probable grounds that a person is committing, or at any time within the preceding three hours has committed, as a result of the consumption of alcohol, an offence under section 253, the peace officer may, by demand made to that person forthwith or as soon as practicable, require that person to provide then or as soon thereafter as is practicable

- (a) such samples of the person's breath as in the opinion of a qualified technician

are necessary to enable proper analysis to be made in order to determine the concentration, if any, of alcohol in the person's blood, and to accompany the peace officer for the purpose of enabling such samples to be taken.

- [24] Mr. Milos asserts that the learned trial judge misapprehended the evidence in finding that it was reasonable for Constable Jang to have stayed at the scene for a further 20 to 25 minutes after arresting him. He submits that the quality of Constable Jang's evidence was not

sufficient to conclude that matters happened in the manner characterized by the learned trial judge. Mr. Milos points to the fact that Constable Jang conceded in cross-examination that he could have handed over the investigation of the scene to Constable Jardine as soon as Mr. Milos was arrested, and says that in those circumstances it was not reasonable for Constable Jang to have remained at the scene for a further 20 to 25 minutes.

- [25] Whether breath samples are taken as soon as practicable is an issue of fact for the trial judge. The section is designed to expedite trials and aid in the proof of the suspect's blood alcohol level, and it should not be interpreted so as to require an exact accounting of every moment in the chronology. "As soon as is practicable" does not mean immediately or as fast as possible, but rather, reasonably promptly in all of the circumstances: *R. v. Cambrin*, [1983] 2 W.W.R. 250, 1 C.C.C. (3d) 59 (B.C.C.A.); *R. v. Vanderbruggen* (2006), 206 C.C.C. (3d) 489 (Ont. C.A.).
- [26] As stated earlier, the delay was approximately 20 to 25 minutes from the time of the arrest until Constable Jang left the scene with Mr. Milos to take the breath sample. Constable Jang gave the following evidence as an explanation for the delay: the Fire Department arrived at the scene and he answered their questions; he answered questions of the homeowners; he spoke to Constable Jardine; he allowed Mr. Milos to use his cell phone to call home; and he spoke to Mr. Milos' father when he arrived at the scene.
- [27] After reciting the evidence, the learned trial judge stated:
- [7] I am very aware that the statute in question here is a statutory shortcut. The law requires that there be strict compliance. The test has to be administered reasonably promptly, and the police have to act reasonably, again as stated by Judge Kitchen in the *Brown* decision. But in all the circumstances of this case, Mr. Milos, I find that that high standard has been met.
- [8] This was not a straightforward case of an impaired driver being stopped at a roadblock, for example. There had been an accident. The accused had driven through a fence, colliding with the house.
- [9] It was Constable Jang who first attended. He is the one who had the initial discussions with the distraught homeowners. He is the one who had the dealings with Mr. Milos. He was the one who arrested Mr. Milos, the one who allowed Mr. Milos the opportunity to call his father. It is only logical that everyone from the homeowners to the fireman to the father of the accused would be turning to him, Constable Jang, for information or clarification as to what was going to happen. Likewise, it is only logical that Constable Jardine would require some conversation with Constable Jang in order to coordinate who was going to be doing what.
- [10] I think that Mr. Snelling's submission would imply that Constable Jang should have left the scene virtually immediately upon the attendance of Constable Jardine, but in the circumstances of this case, I have to disagree.

- [28] Appellate courts may not interfere with the findings of fact made and the factual inferences drawn by the trial judge unless they are clearly wrong, unsupported by the evidence, or otherwise unreasonable. The imputed error must, moreover, be plainly identified and have affected the result: *R. v. Clark*, [2005] 1 S.C.R. 6, at ¶9. The rule that an appellate court must treat a trial judge's findings of fact with great deference applies not only when the credibility of witnesses is at issue, but also to all conclusions of fact made by the trial judge: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235.
- [29] The trial judge in this case took the whole of the circumstances into account, gave explanations as to why she found the delay at the scene to be reasonable and found that the breathalyser tests were taken as soon as was practicable. In my view, there was sufficient evidence before the trial judge from which she could conclude that the police acted reasonably and that the breath samples were taken as soon as was practicable in the circumstances.
- [30] Having reviewed the transcript of Constable Jang's evidence, it is my opinion that there is no basis for concluding that the trial judge committed a palpable or overriding error regarding her findings of fact.
- [31] Accordingly, Mr. Milos' appeal from conviction is dismissed.
- [32] Is there anything else?
- [33] MS. PARSON: I think the only thing, My Lady, that we have to address, and we discussed this briefly last time, is the stay of driving prohibition is extinguished as of today's date, and so just to confirm from Mr. Milos, the driving prohibition imposed by Judge Auxier, and my friend can confirm, I presume it was a one-year driving prohibition.
- [34] MR. SLAY: That's correct, and so then the balance of the time will be effective as of today.
- [35] THE COURT: As of today, that is right.

"Gerow J."

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