

CANADA / JUDGMENT

R. v. Pawson

2020 BCCA 94

COURT

British Columbia Court of Appeal

DECIDED

20 March 2020

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2020 BCCA 94 R. v. Pawson COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Pawson, 2020 BCCA 94 Date: 20200320 Docket: CA46604 Between: Regina Respondent And Erik John Henning Pawson Appellant Before: The Honourable Mr. Justice Frankel (In Chambers) On appeal from: An order of the Provincial Court of British Columbia, dated October 4, 2019 (R. v. Pawson, Sechelt Docket No. 17524-2-C). Counsel for the Appellant: B.H. Moscoe Counsel for the Respondent: J.R.W. Caldwell Place and Date of Hearing: Vancouver, British Columbia March 12, 2020 Place and Date of Judgment: Vancouver, British Columbia March 20, 2020 Summary: Application by P. for a stay of driving prohibitions pending his appeal from conviction on a charge of causing an accident resulting in bodily harm while operating a motor vehicle with a blood alcohol concentration in excess of .08. Held: Application dismissed. P. failed to establish that the prohibitions cause him hardship. As well, in view of P's driving record, public confidence in the administration of justice would not be served by granting the stay. Reasons for Judgment of the Honourable Mr. Justice Frankel:

Introduction

- [1] Erik John Henning Pawson applies for an order staying driving prohibitions imposed on him as a consequence of his conviction on a charge of causing an accident resulting in bodily harm while operating a motor vehicle with a blood alcohol concentration in excess of .08. That charge was laid under what was formerly s. 255(2.1) of the Criminal Code, R.S.C. 1985, c. C-46 [now s. 320.14(2)]. The trial judge found him guilty of that offence on October 4, 2019.
- [2] On December 16, 2019, the trial judge sentenced Mr. Pawson to 90 days' imprisonment to be served intermittently (i.e., on weekends). In addition, pursuant to then s. 259 of the Criminal Code [now s. 320.24], the judge prohibited Mr. Pawson from driving for 18 months. Mr. Pawson was also automatically prohibited from driving for 12 months by s. 99 of the Motor Vehicle Act, R.S.B.C. 1996, c. 318. Mr. Pawson has appealed his conviction. On January 21, 2020, a judge of this Court granted him bail pending appeal.
- [3] For the reasons that follow, I would dismiss this application. Circumstances of the Offence

- [4] On July 28, 2017, Mr. Pawson lost control of the vehicle he was driving and struck and seriously injured a person standing at a bus stop on the side of the road. There were skid marks consistent with Mr. Pawson having swerved into the oncoming lane, and then off the road. The road was relatively straight, driving conditions were good, and it was light out. Mr. Pawson was arrested at the scene after his breath sample registered "fail" on an approved screening device. He was taken to the police detachment where two breathalyzer tests were administered. Those tests showed his blood alcohol concentration to be .14 and .15. Grounds of Appeal
- [5] Mr. Pawson states his grounds of appeal as follows in his notice of appeal: The trial judge erred in fact and law in determining that the sample was taken within two hours of driving. The trial judge erred in law in determining that the changes from Bill C-46 did not apply retroactively. The trial judge erred in fact and law in determining that the approved screening device demand and breath demand were valid. Jurisdiction to Stay a Driving Prohibition
- [6] Prior to December 18, 2018, jurisdiction to stay a Criminal Code driving prohibition pending appeal was conferred on a chambers judge by s. 261 of the Criminal Code. It is now conferred by s. 320.25: see An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts, S.C. 2018, c. 21. Counsel were uncertain as to which stay provision applies in the present case, given that Mr. Pawson's offence was committed before the amendments came into force. However, there is no need to determine that question here.
- [7] Jurisdiction to stay a Motor Vehicle Act prohibition is conferred by s. 101(2) of that statute. Positions of the Parties
- [8] The parties agree that to obtain a stay, the Court must consider the following criteria:
- (a) whether Mr. Pawson's appeal is frivolous;
 - (b) whether the driving prohibition will cause him hardship; and
 - (c) whether the public interest and confidence in the administration of justice would best be served by granting a stay. See: R. v. Bader, 2010 BCCA 515 at para. 8 (Chambers), 5 M.V.R. (6th) 21; R. v. Braut, 2004 BCCA 362 at para. 7 (Chambers), 3 M.V.R. (5th) 212.
- [9] The Crown accepts the appeal is not frivolous. That is something Mr. Pawson established on his application for bail pending appeal: see Criminal Code, s. 679(3)(a).
- [10] Mr. Pawson contends he will suffer hardship if not granted a stay because he needs to drive to run his boat repair and maintenance business. The Crown's position is that while the driving prohibition may inconvenience Mr. Pawson, it does not give rise to a hardship.

- [11] With respect to public confidence in the administration of justice, the parties focus their submissions on Mr. Pawson's driving record. Mr. Pawson submits his driving record is not so serious as to give rise to public safety concerns should he be permitted to drive while his appeal is outstanding. The Crown, on the other hand, says his driving record is "problematic" and raises public safety concerns.

Analysis

Hardship

- [12] In the affidavit filed in support of this application, Mr. Pawson deposes as follows: • He resides on Gambier Island and, weather permitting, uses his boat to travel between there and Horseshoe Bay. Fuel for a roundtrip costs \$80. Docking costs \$50 per day. • His business is located at Lions Gate Marina in North Vancouver. • He uses taxis, public transit, or gets a ride from someone, to travel between Horseshoe Bay and his business premises. A taxi costs \$45.00 each way. • To use transit, he must take two buses. The closest bus stop is a 25-minute walk from his business premises. • He usually visits multiple job sites each day to oversee and guide his employees and to update his clients on the progress of work. • His fiancée is able to give him a ride to different job sites two days a week, but is only available until 1:30 p.m. • His assistant has been able to drive him part way to and from Lions Gate Marina and to some job sites, but has other duties and responsibilities. • Some job sites are a considerable distance from his business premises. • Having his assistant drive him increases his business costs because it takes her away from other duties.
- [13] Mr. Pawson relies on *R. v. McPherson*, 1999 BCCA 638 (Chambers), 140 C.C.C. (3d) 316, and *R. v. Skelly*, 2004 BCCA 314 (Chambers), 198 B.C.A.C. 318, both of which involve convictions for Criminal Code offences. He also relies on *R. v. Brox*, 2016 BCSC 797, which involves a Motor Vehicle Act offence. Driving prohibitions were stayed in those cases.
- [14] Mr. McPherson was a forestry consultant and analyst whose work required him to inspect prospective logging sites. In finding hardship had been established, Justice Lambert stated the driving prohibition "will present [Mr. McPherson] with very grave difficulties, perhaps insuperable difficulties in relation to his employment": para. 8. Put otherwise, he found that the driving prohibition significantly affected Mr. McPherson's ability to earn an income.
- [15] Mr. Skelly was a lawyer practicing in a large Vancouver law firm. He lived in a suburban area with limited public transit. Mr. Skelly needed to drive not only to get from his home to his office but also to meet clients at various hours of the day, including on weekends, in numerous locations, including the Whistler area [which is approximately 120 kilometres from downtown Vancouver]. In addition, because Mr. Skelly's wife had a serious illness, he was often responsible for taking their children to school. In finding hardship had been established, Justice Esson rejected the Crown's submission that the prohibition was a "mere inconvenience" and could be rectified by Mr. Skelly hiring a full-time driver: para. 7.

- [16] Mr. Brox lived on rural acreage property with his wife. Both were in their 70s. Public transportation was not practical; the nearest bus stop was a mile away. Because of the driving prohibition, Mrs. Brox was responsible for all the driving, which included medical appointments, day-to-day living affairs, and some business travel. In granting the stay, Justice Verhoeven stated that although the evidence of hardship was "not extremely strong", the prohibition nonetheless did cause "an element of hardship": para. 9. I note that in this case the stay was improperly sought. Mr. Brox appealed only the length of the driving prohibition and s. 101(2) of the Motor Vehicle Act provides for a stay only in connection with a conviction appeal. I assume counsel in that case were not cognizant of this jurisdictional limitation, as it evidently was not drawn to the judge's attention.
- [17] In my view, Mr. Pawson has not established that the driving prohibitions have or will cause him hardship. It is evident Mr. Pawson is able to operate his business, albeit he has had to adjust to the fact he is unable to drive. There is nothing in his affidavit to suggest that his inability to drive has detrimentally affected his business's viability.
- [18] Mr. Pawson's circumstances are not materially different from those of the appellant in *R. v. Baker*, [1994] B.C.J. No. 2323 (C.A.), wherein Justice Ryan, in dismissing an application of a stay, stated:
- [3] Mr. Baker is a general contractor. He has placed material before this Court that demonstrates that the driving prohibition imposes restrictions on his ability to run his business. It is difficult for him to travel from his office to construction sites. He must have the office secretary drive him back and forth. In my view, the material does not amount to what may be called a hardship although it is certainly inconvenient. Public Confidence / Public Safety
- [19] Notwithstanding its obvious relevance, Mr. Pawson did not include his driving record in the material he filed on this application. The Crown provided that record. Omitting matters relating to the July 28, 2017 incident, the record contains the following entries, beginning in 1993 when Mr. Pawson was 15 years old:
- Two 24-hour alcohol-related roadside prohibitions.
 - One conviction for excessive speeding.
 - Four convictions for speeding.
 - Two convictions for driving without a licence.
 - One conviction for driving without insurance.
 - One conviction for disobeying a traffic control device.
 - One conviction for driving without reasonable consideration for others using the highway.
 - One conviction for disobeying a stop sign.
- The stop sign violation occurred in January 2018, a little more than two months after Mr. Pawson was charged in connection with the July 28, 2017 incident.
- [20] The record also shows Mr. Pawson was administratively prohibited from driving in 2009 (three months), 2012 (one and one-half months), and 2013 (three months).
- [21] Mr. Pawson says that although his driving record is unenviable, it does not raise public safety concerns. I am not so sanguine.

[22] Mr. Pawson's driving record demonstrates he is someone who is prepared to ignore the rules of the road, thereby putting others at risk, and who takes for granted that driving is a privilege not a right. In the face of that record, I do not consider that public confidence in the administration of justice would be well served if Mr. Pawson were permitted to drive while his appeal is outstanding.

Disposition

[23] The application is dismissed. "The Honourable Mr. Justice Frankel"

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Prepared on 28 October 2026 · Esheria