
CANADA / JUDGMENT

R. v. Sullivan

2008 BCSC 1865

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Supreme Court of British Columbia

DECIDED

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2008 BCSC 1865 R. v. Sullivan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Sullivan,

2008 BCSC 1865

Date: 20081125

Docket: 19983

Registry: Smithers

Between:

Regina

Respondent

And:

John Charles Sullivan

Appellant

Before: The Honourable Madam Justice Koenigsberg

Oral Reasons for Judgment

November 25, 2008

Counsel for Respondent:

D. Simpkin

Counsel for Appellant:

D. Giddings

Place of Trial/Hearing:

Smithers, B.C.

- [1] THE COURT: This is an appeal from a conviction for failing to provide a breath sample, contrary to s. 254(5) of the Criminal Code.
- [2] The appeal is based on a narrow issue set out in paragraph number 4 of the appellant's memorandum of argument:

The issue in this appeal will be the meaning of "forthwith, or as soon as practicable," as it was set out at section 254(3) of the Criminal Code at the relevant time.

"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 . . . "

Continuing with the quote from the appellant's memorandum of argument:

It should be mentioned, that the recent amendments to the Criminal Code have eliminated the word "forthwith" from s. 254(3).

- [3] The issue of the meaning of as soon as practicable and the test to be applied to the facts has been the subject of several decisions of various courts which were brought to my attention during this appeal, ranging from the Ontario Court of Appeal, the British Columbia Supreme Court, and the British Columbia Provincial Court. Some of these cases interpret as soon as practicable in relation to the timing of taking the breath sample. The other line of cases interprets that phrase in relation to the time between forming the opinion of impairment and making the demand, which comports with the matter at issue.
- [4] In my view, the meaning of the words does not change depending on which time period is being referred to. In any event, the meaning is agreed in this case. As soon as practicable means within a reasonably prompt time, not as soon as possible.
- [5] The difficulty in interpreting reasonably prompt arises when one considers what, if any, other activities which may be undertaken by an officer in the time between forming the opinion of impairment and making a demand for a breath sample. For example, in order to conform with the legislation, is the officer restricted to dealing only with matters which pose an immediate threat to safety, or can time be devoted to steps taken in the general investigation of a potentially impaired charge before a demand is made.

- [6] The appellant relies on *R. v. Whitesell* [1998] B.C.J. No.303 (S.C.), a decision of this court. In particular, the appellant relies on para. 15 of that decision:

In *R. v. MacEachern* and the other "tow truck" cases, there was a logical connection between the duties carried out by the police officer, including waiting for the tow truck, and the delay in taking the breath sample, which provided a reasonable explanation for the delay. In this case, there is no such logical connection: neither waiting for the tow truck nor any of the other duties performed by the officer during the time in question provide a reasonable explanation for the failure to make the demand during that time.

- [7] It is important, in my view, to place para. 15 in the context of the facts in that case, which facts are set out at para. 6 of that decision:

The police officer testified that between 2.49 and 3.15 p.m., he secured Mr. Whitesell's vehicle; arrested Mr. Whitesell; advised him of his rights under the Charter; placed Mr. Whitesell in handcuffs and into the police vehicle; contacted the police office to arrange for a tow truck to be dispatched to the location to move Mr. Whitesell's vehicle; made his notes; asked the police officer with him at that time to make notes; completed a 24-hour suspension notice for Mr. Whitesell; searched Mr. Whitesell's vehicle; and waited for the tow truck to arrive and remove Mr. Whitesell's vehicle. He said that most of the time was taken waiting for the tow truck to arrive and remove the vehicle.

- [8] I cannot interpret para. 15 as suggested or submitted by the appellant. In particular, I do not find that the words nor any other duties performed by the officer during the time in question are intended to set such a stringent test as contended by the appellant. To interpret it as appellant counsel has suggested would be to ignore even matters concerning the safety of both the officers and of the person who has been stopped.

- [9] Some if not all of the duties outlined in para. 6 above relate to routine matters such as informing the person of the reason for making a demand before making it, which is a requirement of law, and securing the person and vehicle which are subject to the detention. In carrying out the requirements of s.253 one might find it reasonably necessary to be making notes of what is being done at specific times, in particular in relation to when an opinion is formed, when rights are read, et cetera. Such notes are logically connected to the delay in making the demand. If those notes are not made, how does a citizen hold a police officer accountable for making a demand within a reasonably prompt time if they have no means of ascertaining how many minutes were absorbed by other activities?

- [10] Thus, in my view, Madam Justice Levine, as she then was, could not have intended to set out a test that stipulated that, between forming an opinion of impairment and making the demand, no time could be spent attending to the safety of the person or officer, the safety of the vehicle in question, or providing Charter rights, or providing a means of determining whether, in fact, there had been unreasonable delay by making prompt, contemporaneous notes.

- [11] It is obvious that there is no logical connection in Whitesell between waiting for a tow truck and making the breathalyzer demand. There may be such a logical connection between waiting for a tow truck and taking the samples at a detachment, as found in other cases.
- [12] Thus, I find that Whitesell stands for the following proposition: in interpreting as soon as practicable, it must be determined on the evidence whether there is a reasonable explanation for delay in the circumstances. Any such reasons for delay must be logically connected to the police officer's duties in carrying out the proper investigation relating to the issue at hand. Here, that issue is the time period between forming the opinion of impairment and making the demand. I am particularly assisted in my analysis by four decisions: one of this court, *R. v. Colbourne*; one of the British Columbia Provincial Court, *R. v. Marquette*; and two from the Ontario Court of Appeal, *R. v. Vanderbruggen* and *R. v. Squires*. All of these decisions were decided after Whitesell.
- [13] In *R. v. Colbourne*, the court was considering three time periods in relation to as soon as practicable: time one, the period from stopping the person to forming an opinion; time two, the time between forming the opinion and making the demand; and thirdly, the time between the demand and taking the breathalyzer tests. Mr. Justice Taylor provided a summary of the applicable law at paras. 19 through 24, including the Whitesell decision. Then, at paras. 33 and 34, the learned judge on appeal applied the law to the facts at hand:
- [33] The opinion was formed at 23:10. Depending on one's watch, the Roadside Screening Device test was conducted in a maximum of seven minutes or a minimum of five minutes.
- [34] The demand was made at 23:24, 14 minutes from the forming of the opinion upon which the breathalyzer demand was founded. The evidence during that 14 minute time period is that the officer spent the first two minutes asking the appellant questions and the following 12 minutes were occupied by the appellant asking questions and, in essence, pleading with the officer who, although he had not yet made the demand, explained the implications of a refusal. Constable Goodall described the conversation as going in a circle.
- [14] In *R. v. Marquette*, a 2007 decision of Judge Baird Ellan of the Provincial Court, the learned trial judge considered numerous cases including Whitesell on the appropriate test and its application to section 254(3) of the Criminal Code at paras. 34-36 and 38-40.
- [34] The demand in this case was made eight minutes after the screening test result was obtained. Cpl. Foulon testified that she gave the accused a 24 hour suspension following the fail, which entailed filling out some paperwork, and then she commenced reading the Charter of Rights card three minutes after the screening test fail. I observe that this may have taken a little longer than usual because she chose to read the supplemental or "holding off" warning after the standard right to counsel. Following this, she had some conversation with the accused about his getting a lawyer as well as other incidental conversation she had not noted. She then made some notes, called for a tow truck, and read the demand.

- [35] There are a number of cases dealing with this issue, the seminal one being *R. v. Whitesell*, [1998] B.C.J. No. 303 (S.C.). Cases following *Whitesell* that were cited in submissions include *R. v. Drohan*, [2004] B.C.J. No. 1909, *R. v. Beaulieu*, 2006 BCPC 438, *R. v. Parhar*, 2007 BCPC 187, and *R. v. Harniman*, 2005 BCPC 359.
- [36] I note that *Whitesell* and *Drohan* involved delays of over 20 minutes, and *Beaulieu*, over 15. In *Whitesell*, the officer had waited until the arrival of a tow truck before making the demand, which *Levine J.* (as she then was) found to be unnecessary. Calling for a tow truck as soon as possible is not the same as waiting for it to arrive. In *Beaulieu*, there was a specific finding that some of the delay did not relate to the performance of investigative obligations.
- [38] I prefer the reasoning of Judge Auxier in *Harniman* as well as *R. v. Colbourne*, 2002 BCSC 416, *R. v. Moller*, (25 October 2000), *Williams Lake Registry*, 9912877 (B.C.S.C.), and *R. v. Vien* (1981), 10 M.V.R. 21 at 28 (B.C.S.C.), referred to in *Harniman*. The Supreme Court cases, being appeals of Provincial Court rulings, are binding on me. As I read them they hold that the Crown need only lead some evidence from which it may be concluded that the demand was made as soon as reasonably possible, and it is not required that the police account for every minute.
- [39] While an out of the ordinary timeframe would require something more by way of explanation, where the evidence involves only a gap of a few minutes, and in these investigations delays of up to 10 minutes seem to be routine, in my view it may be presumed that the officer is conducting a fairly routine investigation, though it may take her a little longer to get to the wording of the demand or she may do things in a slightly different order from another officer.
- [40] There is no suggestion in this case that the officer was doing something other than parts of her investigation during the specific unaccounted for minutes of the wait, which amount really to only about four to five minutes. In the absence of a suggestion based upon the evidence that the officer was engaged in an activity other than a step in the conduct of her investigation within the eight minute period in this case, I am unable to find any basis for holding that the demand was not made in accordance with the legislation.
- [15] I will pause to say here that, in my view, the learned trial judge in *R. v. Marquette*, was not saying that any step in an investigation would be fine or that 10 minutes is a *prima facie* amount of time before one can begin to find that a delay is unreasonable. She is putting all of that in the context of necessary steps taken in an investigation where time is important, such as securing the safety of the person stopped, of the vehicle, of the road, the police officers, and providing the subject of an impaired investigation their rights.
- [16] In this case, the time to be accounted for is between six and nine minutes. The learned trial judge in this case discussed the *Whitesell* decision and made the following observation at para. 52 of her decision:

[52] I am of the view that the critical factor with respect to the delay in the Whitesell decision was the officer's decision to wait for the tow truck. It was in this context that Madam Justice Levine found that none of the duties performed by the officer provided a reasonable explanation for the delay of the 26 minutes in making the demand. As she said at paragraph 15:

. . . neither waiting for the tow truck nor any of the other duties performed by the officer during the time in question [and I am emphasizing during the time in question] provide a reasonable explanation for the failure to make the demand during that period.

[17] Continuing with the quote from the reasons in this case of the learned trial judge:

Again, I emphasize that wording; "that period" being 26 minutes.

[18] In my view, this was a reasonable interpretation of the Whitesell decision. Appellant counsel submits that the honourable Provincial Court judge found in Whitesell that the critical factor in finding the 26 minutes an unreasonable was solely waiting for the tow truck which, he submits, is not correct. In my view, based on the analysis of Whitesell set out above in these reasons, the learned Provincial Court judge was most justified in finding that the wait for the tow truck was in fact the critical factor.

[19] Appellant counsel also submits that the learned Provincial Court judge erred because she appeared to find relevant that in Whitesell the delay was 26 minutes and in this case the delay is nine minutes. He quotes in his written submissions at paras. 46-49 from the learned Provincial Court judge's reasons as follows:

[46] I find the reasoning in *R. v. Marquette* persuasive. Applying it to this case, is there evidence or a suggestion based on the evidence that Constable Beaulieu was engaged in something other than his investigation during the six minutes before he began reading [John] Sullivan his rights from his card?

[47] Defence counsel said that he was and refers in particular to the time he spent obtaining information from the passenger in [John] Sullivan's vehicle who he was not planning to arrest and did not consider to be a person of interest in the investigation of [John] Sullivan. This conversation in which he obtained the passenger's address and driver's licence number could not have taken more than a couple of minutes, given Constable Beaulieu's evidence that he also spent approximately one and a half to two minutes talking to [Constable] Woroshelo and, prior to that, walked [John] Sullivan across the street and searched him before returning to deal with the passenger.

[48] The fact of an obviously intoxicated passenger in a motor vehicle late at night is an aspect of the conduct of an impaired investigation, whether or not the officer intends to arrest the person or sees them as a potential witness. The officer had a legitimate, in fact, laudable concern for the welfare of the passenger, and it made imminent sense to take a couple of minutes to obtain some details from him in order to ensure he could be taken home.

- [49] During the few minutes after he left [John] Sullivan in his police cruiser and prior to his return to read [John] Sullivan his rights and the breath demand, Constable Beaulieu was properly engaged in his investigation, and the breath demand made at 11:43 was made as soon as practicable.
- [20] Appellant counsel asserts further error on the part of the learned trial judge as follows at paras. 48 and 49 of his written submissions:
48. With the greatest of respect to Judge Birnie, she formulated the wrong question when she asked, "... is there evidence or a suggestion based on the evidence that Constable Beaulieu was engaged in something other than his investigation during the six minutes before he began reading John Sullivan his rights from his card?"
49. This is fundamentally wrong. The question should not have been if there was any evidence of delay in the Officer's investigation, but whether there was any evidence to show the delay was a reasonable delay in reading the breath demand.
- [21] With respect to appellant counsel's thorough submissions, that submission is fundamentally wrong. In my reading of the whole of the learned trial judge's reasons, she properly asked herself if there was any evidence that any delay in making the demand was occasioned unreasonably, that is, in devoting time to matters unnecessary to the investigation. As she points out, spending time ascertaining information from an intoxicated passenger is an act which, while tangentially related to the investigation, is a matter of potential safety in relation to both the officers and the welfare of the passenger.
- [22] I do not accept that the learned trial judge relied on time alone, as contended for by the appellant. Rather, she analyzed the reasonableness of the actions of the officer in taking six minutes to begin the demand and determined that all actions were sufficiently related to his investigation such that taken together with the six minute period of delay, it could not be said there had been unreasonable delay.
- [23] In summary, I find that in this case on the facts as found by the learned trial judge, a six-to-nine minute delay between forming the opinion of impairment to making the breathalyzer demand meets the legislative intent of as soon as practicable, and I should say forthwith or as soon as practicable.
- [24] The overwhelming majority of the time taken by the police officer in carrying out his duties was devoted to ensuring the physical safety of the accused, his passenger, the attending officers, and ensuring the protection of the rights of the accused.
- [25] I adopt the reasoning in *R. v. Moller* relied upon by Mr. Justice Taylor in *Colbourne* at para. 23 of that decision as an overview of the appropriate way to approach the issue raised by the appellant. I consider that the principles referred to apply equally to any delay, whether between opinion and demand or demand and test:

[23] Finally, in *R. v. Moller* (25 October 2000), Williams Lake Registry, 9912877 (B.C.S.C.) Chamberlist J., when considering the term "as soon as practicable" in the context of taking the tests, referred to an earlier decision of Dohm J. in *R. v. Vien* (1981), 10 M.V.R. 21 at 28 (B.C.S.C.):

...There is no rule that the Crown must explain in its case what transpires minute by minute, what occurred from the time of the alleged offence until the taking of the first test, or what occurred between the first and second tests. What the Crown must do is to lead some evidence from which the trial Judge can conclude directly, or by inference, that the test or tests were taken as soon as practicable. That onus may be satisfied by leading evidence as to the time and sequence of certain events... It seems to me that the onus on the Crown in cases where the time lapse inches closer to the two hour time limit will only be satisfied by more direct and cogent evidence explaining the delay.

[26] To be entirely clear, in relying on that quote as an approach, I note that the two-hour time limit has no application to the time period at issue in this case.

[27] In this case, as has been noted in other cases relating to this kind of time period, there is, in fact, no specific time that is *prima facie* in support of either a breach of the appellant's rights or a time period which satisfies the legislative amount. It is solely in relation to those matters which must be part of a proper investigation.

[28] In the result, I find no overriding error in the conviction of Mr. Sullivan for failing to provide a breath sample, and I affirm the conviction.

[29] The appeal is dismissed. I thank counsel for very thoughtful and complete submissions which made the job of writing these reasons much easier.

[30] MR. GIDDINGS: Yes, Your Honour. The only other point is that there was a stay on the conviction but there was a period of time that the original conviction was running, so I just -- I'm not sure how that is going to be dealt with. Would there be an order from this court saying that the remainder of the sentence be -- I just don't want it to have him start from zero again because he -- there was about a month where his sentence was imposed before I was able to get it back into court to get the stay order from the -- the decision.

[31] THE COURT: I'm sorry. There has been a stay from when?

[32] MR. GIDDINGS: There was a stay about a month after the decision.

[33] MR. SIMPKIN: Yes, My Lady. Mr. Justice Groves entered a stay on the 5th of May 2008, and that was a stay to the conviction and the fine and the remainder, it's expressed, of the driving prohibition. I recall the sentence was the minimum \$600 fine and a 12-month driving prohibition.

[34] THE COURT: Well, in my view, the stay stops the -- well, let me just back up. Was Mr. Sullivan able to drive during the stay?

- [35] MR. GIDDINGS: Yes, but not until I got the order.
- [36] THE COURT: So from the time of the order to when, to these reasons he has been able to drive?
- [37] MR. GIDDINGS: Well, technically, yes.
- [38] THE COURT: Well, in fact, I take it.
- [39] MR. GIDDINGS: Well, certainly he -- there's nothing under the justice system that's stopped him from driving, but he hasn't been able to drive because of the Department of Motor Vehicles not letting him drive, but in any event, that's neither here nor there.
- [40] THE COURT: I think that what needs to follow, and subject to what Mr. Simpkin may advise me, that the driving suspension begins again and the time that is counted is the time from the order, you said May --
- [41] MR. SIMPKIN: May the 5th, My Lady.
- [42] THE COURT: -- 5th, to today, and that time period is not counted in determining the -- or in terms of the suspension.
- [43] MR. GIDDINGS: Yes, as long as it's clear.
- [44] THE COURT: Yes, that is quite proper and an interesting point.
- "Koenigsberg J."

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