
CANADA / JUDGMENT

R. v. Swift

2009 BCSC 455

COURT

Supreme Court of British Columbia

DECIDED

6 April 2009

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2009 BCSC 455 R. v. Swift

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Swift,

2009 BCSC 455

Date: 20090406

Docket: 32555

Registry: Campbell River

Regina

v.

Brian Swift

Before: The Honourable Mr. Justice Kelleher

Reasons for Judgment

Counsel for the Crown (Respondent):

D. Fitzsimmons

Counsel for the Accused (Appellant):

J. Green

Date and Place of Hearing:

March 16, 2009

Campbell River, B.C.

- [1] This is an appeal by Brian Swift of his conviction by a Provincial Court Judge on January 9, 2008 of having care or control of a motor vehicle with a blood alcohol level in excess of .08. The appeal is based on the contention that Mr. Swift was denied a reasonable opportunity to consult with counsel of his choice. As a result, the appellant submits that his right to counsel under s. 10(b) of the Charter was infringed.
- [2] On June 17, 2006, at 2:13 a.m., a Constable Cottingham pulled over the appellant in his pick-up truck. The appellant complied with a demand for a breath sample on an approved screening device. The appellant failed the test and was detained for impaired driving. The Constable took the appellant to the Campbell River RCMP detachment. They arrived at 2:29 a.m.
- [3] This detachment has what is called a controlled access policy for implementing a detainee's request to contact counsel. The police officer or a guard places the phone call. The detainee is in a separate room with an extension. When the call goes through, the extension rings and the detainee picks up the telephone. Constable Cottingham took the appellant into this room and gave him a list of lawyers. She told him that three of the lawyers accepted night calls.
- [4] The appellant had no experience with the criminal justice system. He knew one of the lawyers on the list, a Doug Marion. He asked to speak to him. The guard telephoned Mr. Marion at 2:37 a.m. The guard said that an answering machine came on. Constable Cottingham reported to Mr. Swift that Mr. Marion had not answered.
- [5] The appellant first said he did not want to try another lawyer, when asked by the Constable. She then read him a supplementary Charter warning (a "Prosper Warning") regarding his right to counsel.
- [6] The appellant next said he wanted to try Dennis Browne, another lawyer on the list. He could not be reached either.
- [7] Mr. Swift may have asked to try a third lawyer. There is a difference among the recollections of the witnesses. Nothing turns on this discrepancy.
- [8] Finally, he was told he could try Legal Aid. The guard made this call successfully and the appellant spoke to duty counsel. This was at approximately 2:46 a.m. A breath sample was obtained at 3:09 a.m.
- [9] It is agreed that the police had until 4:13 a.m. to rely on the presumption in s. 258 of the Criminal Code, R.S.C. 1985, c. C-46, regarding the collection of a breath sample.
- [10] The appellant argues that having chosen Mr. Marion, he should only be expected to exercise his right to counsel by calling another lawyer if Mr. Marion was not available within a reasonable time. In *R. v. Ross*, [1989] 1 S.C.R. 3, at 11, 46 C.C.C. (3d) 129, Mr. Justice Lamer, as he then was, said:

...accused or detained persons have a right to choose their counsel and it is only if the lawyer chosen cannot be available in a reasonable delay that the detainee or accused should be expected to exercise the right to counsel by calling another lawyer.

- [11] Here, the guard made the call. It was received by an answering machine. The appellant was not connected to the answering machine. That is, he had no opportunity to leave a message asking for a call back. No one did so on his behalf.
- [12] The right to counsel, it is argued, required the guard to leave a message or to permit the appellant to leave a message and required the police to wait a reasonable time to determine if he was available.
- [13] Constable Cottingham told Mr. Swift that Mr. Marion could not be reached, but no message was left for him. The appellant then agreed to call someone else. On this evidence, it cannot be said that Mr. Swift was given sufficient opportunity to exercise his right to choose counsel of his choice.
- [14] The Crown's position is that in the middle of the night it made little sense to leave a message. The Crown referred me to two decisions. In *R. v. Sorenson*, 2008 BCSC 354, the accused was detained. He wished to speak with his lawyer, Mr. Marty Johnson. He had Mr. Johnson's number in his cell phone. He gave it to the police. The guard placed the call. As in *Campbell River*, at the Kelowna detachment suspects have no access to telephones with call-out capability. The guard left a message.
- [15] The officer waited for five or ten minutes for Mr. Johnson to respond to the message. When there was no response the Constable told the guard to call Legal Aid. Mr. Sorenson then had a conversation with a Legal Aid lawyer. The conversation happened 40 minutes after Mr. Sorenson's arrest.
- [16] Mr. Justice Rogers held that there was no breach:
- [13] In the present case, Mr. Sorenson gave the police what he knew to be Mr. Johnson's office telephone number. The police put to Mr. Sorenson the possibility that Mr. Johnson might not respond to that number and asked Mr. Sorenson whether, in that eventuality, he would like to talk to legal aid. Mr. Sorenson replied yes. Under these circumstances and those facts, I have no doubt at all that Mr. Sorenson had the capacity to direct the police to make further efforts to contact Mr. Johnson. He had a duty to diligently exercise his right to speak to his lawyer of choice. Mr. Sorenson cannot blame the police for his own lack of determination to speak to Mr. Johnson.
- [17] In *R. v. Semple*, 2008 BCSC 155, 62 M.V.R. (5th) 265 at para. 33, Mr. Justice McKinnon noted the comments of the Provincial Court Judge as follows:

20. Accordingly, I am satisfied from the evidence and find that Constable Martin did obtain the name of a lawyer from the accused and did find a listed phone number for the name provided, Madryga, and called the number, and that all of this was done in good faith. I am also satisfied that there was no answer and that the officer made this known to the accused.
21. He then provided three choices to the accused: to continue to wait, ostensibly to try the number again; to call any other lawyer; or to call Legal Aid. The accused chose to call Legal Aid. It was an exercise of choice on his part. It is in this respect that the circumstances of this case are distinguishable from those referred to by [counsel for Mr. Semple].
- [18] On appeal it was argued that once Constable Martin took the initiative to call Mr. Madryga he "usurped" the appellant's right to make his own contact and was obliged to make much more effort than he did to effect this contact (para. 35).
- [19] McKinnon J. disagreed. He did not accept the proposition that when police place a call for an accused they then take on the role of "finder of counsel" relieving the accused of any obligation in that regard. He stated, at para. 38, that "there may be circumstances where police 'take charge' and exclude the accused from any meaningful input, but this is not one of those cases".
- [20] The defence relies on R. v. Mainse, 2008 BCSC 1309. The decision post-dates the decision of the learned trial judge.
- [21] The circumstances in Mainse arose in Campbell River as well. The accused was detained. He advised the police officer he wished to speak with Glenn Lloyd, a Campbell River lawyer. He did not have Mr. Lloyd's phone number but said his grandparents would have it. He gave the Constable his grandfather's number. The accused was placed in a room with a telephone, although without dial-out capability. The learned trial judge found, at para. 6:
- Constable LeBlanc came in to tell the defendant that there was no answer at his grandparent's home, and according to the defendant that she could not reach Mr. Lloyd. She asked him if he wanted her to call legal aid for him to which he replied he was not sure. Then she told him it would be advisable for him to do so.
- [22] Eventually, after receiving no answer at Legal Aid, a call was put through to a Mr. Marion, a local criminal lawyer. Mr. Mainse spoke to Mr. Marion and then gave samples of his breath. The court, in allowing the appeal, held at para. 19:

In my view, the failure to wait any time for a call back from the grandparents, and at the same time taking no other steps to locate Mr. Lloyd's number while the Mr. Mainse was in a controlled access environment, does not amount to a reasonable opportunity to contact counsel of choice. Nor did Mr. Mainse make an informed waiver of his right to contact counsel of choice. The learned trial judge accepted that Mr. Mainse understood that the police could not reach Mr. Lloyd, when in fact they made no attempt to do so apart from the call to the grandparents. The evidence is that there was no time pressure on the police to take the breath samples. In the circumstances, Mr. Mainse was not provided with a reasonable opportunity to retain and instruct

his counsel of choice.

[23] In the present case, the learned trial judge said "I find the officers did as least as much as [the accused] himself would reasonably have done".

[24] I respectfully disagree. The reasonable thing to do was to leave a message.

[25] Mr. Fitzsimmons argues that it was the middle of the night. It was not reasonable to assume that a call would be returned.

[26] It must be remembered though that three lawyers, including Mr. Marion, had left numbers for late-night calls. These were not simply any lawyer office numbers. It could easily occur that it was a home number where the lawyer was awakened but did not get to the phone in time. It is also possible the lawyer was speaking to another detained individual. If a message had been left it might have been returned.

[27] In the particular circumstances of this case the accused was entitled to be advised that the call had reached Mr. Marion's voicemail. Mr. Swift then could have made an informed decision to leave a message or to try another lawyer.

[28] In the words of Lamer J. in *Ross*, we do not know whether the "lawyer chosen" was "available in a reasonable delay".

[29] I am satisfied that Mr. Swift's right to counsel under s. 10(b) of the Charter was infringed. A new trial is ordered.

"Mr. Justice Kelleher"

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Prepared on 29 October 2026 · Esheria