
CANADA / JUDGMENT

R. v. Tutty

2007 BCSC 1460

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 1460 R. v. Tutty

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Tutty,

2007 BCSC 1460

Date: 20070928

Docket: X070034

Registry: New Westminster

Between:

Regina

And

Verigin Tutty

Before: The Honourable Madam Justice Gropper

Reasons for Judgment

Counsel for Crown

J. Caldwell

Counsel for Appellant

H. Smith

Date and Place of Trial/Hearing:

July 3, 2007

New Westminster, B.C.

Introduction

- [1] This is a summary conviction appeal from a decision of Her Honour Judge Gordon on January 23, 2007 convicting Mr. Tutty of driving while he was prohibited from doing so pursuant to s. 98 of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 (the "Act") by order of Challenger, P.C.J. on August 16, 2004.
- [2] The issues in this appeal are:
1. whether the s. 98 order is valid, enforceable and in compliance with the provisions of the Act; and
 2. whether the appellant's position that he ought not to be convicted of driving while prohibited is a collateral attack on the s. 98 order imposed on August 16, 2004.
- [3] This appeal was heard at the same time as R. v. Holm, New Westminster Registry X070470. Motor Vehicle Act, ss. 98, 99 and 102

Court prohibition against driving

98 (1) For the purpose of this section, "convicts" includes the granting of an absolute or conditional discharge and the determination under section 123 (2) of the Motor Vehicle Act, R.S.B.C. 1979, c. 288, that a contravention took place.

- (2) If a court convicts a person of
- (a) an offence under this Act,
 - (b) an offence under the regulations, or
 - (c) a motor vehicle related Criminal Code offence,
- the court may
- (d) consider the person's driving record, and
 - (e) even though the person is or may be subject to another prohibition from driving, prohibit the person from driving a motor vehicle for a definite period of time
- (4) If a court prohibits a person from driving a motor vehicle under this section, the court must order that the prohibition
- (a) take effect immediately,
 - (b) continue for the full day of each day of the prohibition, and
 - (c) continue for consecutive days.

Automatic prohibition against driving on conviction

99 (2) A person who is convicted of

- (a) an offence under section 95, 102, 224 or 226 (1), or
- (b) a motor vehicle related Criminal Code offence

is automatically and without notice prohibited from driving a motor vehicle for 12 months from the date of sentencing, the date that the passing of sentence is suspended, the date of being granted an absolute or conditional discharge or the date a court imposes a sentence under the Youth Criminal Justice Act (Canada) or the Youth Justice Act.

Driving while prohibited by court order or operation of law

102 A person who drives a motor vehicle on a highway or industrial road while

- (a) he or she is prohibited from driving a motor vehicle
- (i) under section 98, 99 or 100 of this Act,

commits an offence and is liable,

- (c) on a first conviction, to a fine of not less than \$500 and not more than \$2,000 or to imprisonment for not more than 6 months, or to both, and
- (d) on a subsequent conviction, regardless of when the contravention occurred, to a fine of not less than \$300 and not more than \$2,000 and to imprisonment for not less than 14 days and not more than one year.

Facts

- [4] On August 16, 2004 the appellant pleaded guilty to a charge that on or about September 12, 2003 at or near Coquitlam, B.C. he committed the offence of driving a motor vehicle on a highway without due care and attention contrary to s. 144(1)(a) of the Act. Challenger P.C.J. imposed a driving prohibition of nine months pursuant to s. 98 of the Act.
- [5] Immediately following the sentencing, the appellant received a document, the "Order of Prohibition Against the Defendant", which identified the charge and the sentence and stated:

On August 16, 2004 an Order was made by Judge Challenger prohibiting the defendant from operating a motor vehicle for a period of nine months and this order

- (a) takes effect immediately,
- (b) continues for the full day of each day of the prohibition, and
- (c) continues for consecutive days.

The Order of Prohibition had been signed in a box, below which is stated "A Judge of the Provincial Court or a Clerk of the Court on behalf of Judge Challenger or a Justice of the Peace in and for the Province of British Columbia". The signature in the box is not identified. The appellant signed the document acknowledging that a copy of the Order of Prohibition was given to him.

- [6] On December 8, 2004 the appellant was stopped by an RCMP officer on routine patrol. The officer made checks on the appellant's licence under the Act and concluded that a person by the name of Tutty was prohibited from driving under s. 98 of the Act. The officer then looked at the appellant's licence and confirmed that the driver of the vehicle matched the face on the driver's licence. The appellant was charged with the offence of driving while prohibited from driving a motor vehicle under s. 98 of the Act.
- [7] The appellant argued before the learned trial judge that because Her Honour Judge Challenger imposed a driving suspension under s. 98 without stating the mandatory terms as set out in s. 98(4)(a), (b) and (c) of the Act, the order was neither valid nor enforceable. He argued that Challenger P.C.J. could not delegate that obligation to another person, such as a clerk of the court or a justice of the peace. He therefore could not be convicted of the charge of driving while prohibited.

The Decision of the Learned Trial Judge

- [8] The learned trial judge found that Challenger P.C.J. had the power to delegate the conditions under s. 98(4) of the Act. She states at ¶2:
- [2] Section 98 of the Motor Vehicle Act refers to the Court and not to the judge sentencing the individual. The powers of the Judicial Justices of the Peace in this province permit Judicial Justices of the Peace to explain the provisions of prohibitions to persons who have been prohibited. It is clear from Judge Challenger's Reasons that she intended that the order would take effect that date; and, in fact, she is not permitted to order that it take effect at a date other than the date imposed
- [3] In addition when I look at the certified copy of the Order of Prohibition that the defendant signed it is a form which came into effect and was approved by the Court as of December 2003 I am satisfied now by virtue of the Notice of Prohibition signed by the defendant, by virtue of the powers of the Judicial Justices of the Peace, by virtue of the provisions of the Interpretation Act, that what is required for a person who has been prohibited, what is required by the Court, for the court to tell a person who has been prohibited, was told to this defendant, and I am satisfied, therefore, that I am dismissing the application for insufficient evidence.
- [4] In those circumstances I have no choice but to convict the accused, and I find him guilty.

Positions of the Parties

The Appellant

- [9] The appellant argues that the words "court must order" in s. 98(4) have a plain meaning which specifically requires the trial judge to "speak the language of the legislation". His position is that the reference to the "court" specifically refers to a provincial court judge, not his or her delegate, and requires that the judge specifically state, when imposing a prohibition pursuant to s. 98(4) of the Act, that the prohibition take effect immediately, continue for the full day of each day of the prohibition, and continue for consecutive days. In essence, the appellant argues that without specifically stating those terms of the prohibition, Her Honour Judge Challenger did not comply with s. 98(4) of the Act in imposing the prohibition and therefore her order is invalid and/or unenforceable.
- [10] The appellant contrasts s. 98 with s. 99 of the Act. He asserts that s. 99 intends an automatic driving prohibition which does not require any direction by the court and derives from operation of law upon conviction of certain offences.
- [11] The appellant asserts that "the legislature can only be considered to have specifically intended what it said in s. 98(4)" and argues that non-compliance with that subsection results in a conviction of an accused person who is charged with violating "an improperly placed original prohibition". That argument raises the principle of collateral attack, which states that an order made by a court which has jurisdiction to make the order is binding and conclusive unless it is set aside on appeal or lawfully quashed. The appellant asserts that Challenger P.C.J. does not have the jurisdiction to make an order under s. 98(4) where she does not comply with the legislation.
- [12] The appellant further argues that the provincial court is a statutory court, without inherent jurisdiction. A provincial court judge must comply with the legislation and does not have the jurisdiction to create a driving prohibition independent of any particular legislation. Alternatively, even if the provincial court has jurisdiction to impose a prohibition which does not follow the legislative requirements, such as prohibition is unenforceable against a person found in violation of a s. 98 order of prohibition.
- [13] The appellant relies on *R. v. Leguilloux* (1979), 51 C.C.C. (2d) 99 (B.C.C.A.), where the court determined that s. 663(4) of the Criminal Code, R.S. 1985, c. C-46, requires that where the court makes a probation order, it shall:
- (a) cause the order to be read by or to the accused;
 - (b) cause a copy of the order to be given to the accused; and
 - (c) inform the accused of the provisions of s. 664(4) and of the provisions of s. 666.
- [14] At ¶22, Craig J.A. wrote that:
- [P]arliament intended that the sentencing Judge should personally perform this function and could not delegate it to any other person".

The appellant argues that the language of s. 663(4) of the Criminal Code, like s. 98(4) of the Act, require the warnings in those sections to come from the judge. There is no other participant in the judicial system which shares the authority with the judge in s. 98(4) of the Act.

- [15] A s. 98(4) order, the appellant argues, is a judicial, rather than an administrative, function. It cannot be delegated to the court registry or any other body. Section 2.1(e) of the Provincial Court Act, R.S.B.C. 1996, c. 379, specifically reserves to a judge of that court the exclusive jurisdiction to preside over a trial where there is a potential of imprisonment. In any event, Challenger P.C. J. did not specifically delegate her powers to the court registry, nor to any other body.
- [16] The appellant also relies on the decision of *R. v. Morrison*, [1990] B.C.J. No. 1458 (P.C.) (QL). The court addressed the enforceability of a prohibition order imposed under s. 90(4) of the Act (now s. 98(4)). The judge who imposed the s. 90(4) prohibition from driving did not specifically advise the accused during the sentencing that the order would take effect immediately. The court found that although the prohibition order was valid, the judge who made the order did not comply with s. 90(4) of the Act, and therefore the Crown could not succeed in a subsequent prosecution of the accused of driving while prohibited from doing so under s. 90(4).
- [17] Finally, the appellant argues that the provisions of s. 98(4) are to ensure that the judge makes the accused aware of the terms of the prohibition. Having not done so, even if the s. 98(4) order made by the court is valid, in the subsequent proceeding involving driving while prohibited, the accused may lack the necessary mens rea to be convicted of its violation. From this logic the appellant derives that this matter does not raise the issue of collateral attack. Rather, it goes to the issue of the necessary mental element of the accused.

The Crown

- [18] The Crown asserts that the appellant's contention does not provide any basis in law for setting aside his conviction. The principle of collateral attack applies. There are many similar cases which illustrate its application:
- (1) where the accused challenged a term of his bail on the basis that it was vague: *R. v. Lee*, [1999] O.J. No. 1893 (C.A.) (QL);
 - (2) where the court-ordered firearms and ammunition prohibitions were defective as they failed to order a grace period as required by the Code: *R. v. Avery*, [1986] N.W.T.R. 359 (C.A.), *R. v. Kyriakoulis*, (2004) 185 C.C.C. (3d) 553 (Ont. C.A.);
 - (3) where a recognizance under s. 810 of the Code was invalidly imposed by a youth court which lacked the jurisdiction to make the order against a youth under s. 810, although it had the capacity to make similar orders against youth under other statutory provisions: *R. v. J.L.S.*, 2000 BCSC 1784, affirmed 2002 BCCA 174;

- (4) where persons convicted of driving while prohibited tried to challenge the validity of an administrative driving prohibition imposed by a regulatory authority: *R. v. Oudijk*, [1985] B.C.J. No. 129 (Co. Ct.) (QL) at ¶12-15, *R. v. Peter*, 2004 BCSC 1180 at ¶31.
- (5) *R. v. Walkley*, [1995] B.C.J. No. 964 (S.C.) (QL), where an accused was convicted of an offence and was prohibited from driving by the court. He appealed the conviction but did not apply for a stay in the driving prohibition. While the appeal was pending, the accused was caught driving in contravention of the prohibition. His appeal was ultimately successful and the conviction and driving prohibition were set aside. The accused was convicted of violating the driving prohibition, as it was a lawful and valid court order at the time he was caught by the police and remained so until it was set aside by the appeal court.
- [19] The Crown relies on the decision of *R. v. Cook*, [1998] B.C.J. No. 3294 (P.C.) (QL), where the accused was charged with violating a court-ordered driving prohibition under s. 90 (now s. 98) of the Act. The accused challenged the validity of the prohibition because the judge who ordered the prohibition had not referred to the provisions of s. 90(4)(b) and (c) when he made the order. The court convicted the accused and ruled that it was not open to him to attack the original prohibition, especially where the original court had the jurisdiction to make the driving prohibition.
- [20] In addition to the Crown's position regarding collateral attack, the Crown states that if there were any omissions by the judge who prohibited the appellant from driving, such omissions constituted a minor defect. The judge did not make an order contravening s. 98(4)(a), (b) and (c) of the Act. The court imposing the driving prohibition had the legal capacity to prohibit the appellant from driving under s. 98 of the Act.
- [21] In respect of *R. v. Morrison*, the Crown argues that it is incorrectly decided and should not be followed as the court failed to consider and apply the rule against collateral attack.
- [22] The Crown asserts that the rule against collateral attack also precludes the appellant's claim that there was an improper delegation to the court registry staff of the imposition of the conditions in s. 98(4) in its paper form. The Crown asserts that there was nothing improper or irregular in the registry staff drawing up the actual forms; alternatively if there was any technical defect in the procedure, that does not give rise to a defence to the appellant - at most it constitutes an erroneous exercise of jurisdiction by the judge. If the delegation to the registry staff was improper, it only renders the paper form of the order invalid. A valid order of prohibition was made by a judge acting within her jurisdiction.
- [23] The Crown argues that if the appellant had sought to set aside the s. 98 order under s. 126 of the Offence Act, R.S.B.C. 1996, c. 338, the outcome would have been unsuccessful. That section requires the Supreme Court to refrain from setting aside orders due to defects in form where there is no issue as to the substance of the underlying offence or jurisdiction or the lawful duration of the order.

- [24] In respect of the appellant's position regarding delegation, the Crown argues that the judge imposing the prohibition approved of the procedure whereby the registry staff, on behalf of the court, drew up a paper form of the order (the Order of Prohibition) which refers to the conditions in s. 98(4)(a), (b) and (c) of the Act. The appellant signed the order. There was no delegation of decision making power by the judge to the registry staff.
- [25] The Crown points out that the judge could not vary the s. 98 order by implementing a grace period or by creating exceptions on certain days or on certain times of the day when the prohibition would not apply. Because the terms of the prohibition orders made pursuant to s. 98 are mandatory, the Crown argues, no improper delegation took place and no decisions were delegated to the registry staff. The only function which was delegated was an administrative function. It is appropriate for judges to allocate the task of detailing conditions of a driving prohibition to court staff: *R. v. Sterner* (1981), 60 C.C.C. (2d) 68 (Sask. C.A.), *aff'd* [1982] 1 S.C.R. 173.
- [26] The Crown further argues that the Order of Prohibition which was used was valid and in accordance with s. 131(1) of the Offence Act.
- [27] Finally, and alternatively, the Crown suggests that if any defects arose from improper delegation, that does not afford a defence to the appellant. The Crown relies on the curative provisions in s. 686(1)(b)(iii) of the Criminal Code and s. 109(1) of the Offence Act.
- [28] The Crown asserts that the court should take a purposive interpretation of s. 98(4) applying the modern approach to statutory interpretation: *R. v. Bagri*, [2004] 2 S.C.R. 248. The Crown asserts that the most reasonable interpretation of the purpose of s. 98(4) is to prevent a court from allowing an initial grace period on a driving prohibition, or allowing for exceptions to the prohibition at certain times of day or certain days of the week. The Crown asserts that to interpret the purpose of s. 98 as absolutely requiring the court to state the words of subsections (a), (b) and (c) is "absurd" because there cannot be a grace period or temporal exceptions.

Analysis and Decision

- [29] Though much of the argument of both the appellant and the Crown concerned whether Her Honour Judge Challenger made a s. 98 order that was valid and/or enforceable, the first issue to be addressed is whether the appellant's position attacking that order as a means to avoid conviction in a subsequent charge of driving while prohibited is an impermissible collateral attack. It is my conclusion, for the reasons that follow, that it is a collateral attack and that the conviction entered by Her Honour Judge Gordon must be upheld. As that is my view, it is unnecessary for me to determine whether the s. 98 order was valid or enforceable, and I decline to do so.
- [30] The rule against collateral attack is described in *R. v. Wilson*, [1983] 2 S.C.R. 594 at ¶47:

It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well-settled that in the authorities that such an order may not be attacked collaterally and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. Where appeals have been exhausted and other means of direct attack upon a judgment or order, such as proceedings by prerogative writs or proceedings for judicial review, have been unavailing, the only recourse open to one who seeks to set aside a court order is an action for review in the High Court where grounds for such a proceeding exist. Without attempting a complete list, such grounds would include fraud or the discovery of new evidence.

- [31] The Supreme Court of Canada reiterated the principle described in *Wilson* in *R. v. Litchfield*, [1993] 4 S.C.R. 333 at ¶19-22. Mr. Justice Iacobucci, writing for the majority, added another example of when the rule would not apply: "a lack of capacity in the court to make the type of order in question, such as a provincial court without the power to issue injunctions". Where the court does have jurisdiction, but allegedly exercises it erroneously, the rule against collateral attack applies. The powerful rationale behind this rule is the preservation of the repute of the administration of justice. Unless reversed on appeal, court orders must be considered final and binding. To hold otherwise would endanger the orderly and functional administration of justice (*Litchfield* at ¶22, citing *R. v. Pastro* (1998), 44 C.C.C. (3d) 485 (Sask. C.A.) at 497).
- [32] In *Cook*, the accused made the same argument as the appellant makes here: the judge ordering the prohibition did not comply with all the requirements of s. 90(4)(b) and (c) (now s. 98(4)). While the judge imposing the order in *Cook* confirmed that it would commence immediately and would carry on for six months, he did not specifically order that the prohibition continue for the full day of each day of the prohibition and that it continue for consecutive days.
- [33] The court found that the judge had the jurisdiction to make the s. 98 order. There was also no dispute about the prohibition being duly acknowledged and recorded by the Superintendent of Motor Vehicles as being an outstanding court-imposed driving prohibition. Relying upon *R. v. Conkin* (1998), 52 B.C.L.R. (3d) 315 (C.A.), *Litchfield* and *Avery*, Maughan P.C.J. concluded in *Cook*:
- [28] To allow a collateral attack on a court order of one Judge by another Judge on the same court would open the door to confusion and uncertainty in the law which would undermine the court's authority and thus adversely affect the reputation of the administration of justice generally.

- [29] In Provincial Court, where the volume and speed of cases is often onerous for all concerned, and countless statutory orders such as, inter alia, weapons prohibitions, license prohibitions, and probation orders, undertakings, recognizances, all containing prohibitory terms, are daily made, it is imperative that such orders once made with statutory jurisdiction, be treated as valid unless and until they are found on appeal to be invalid.
- [30] To do otherwise, Judges of this court, in embarking upon an examination of the process of making the impugned order, comparing it to the statutory requirements, and then drawing conclusions as to its sufficiency, would be performing the functions of an appellate court. All of the accepted case law is against this.
- [34] The Cook and Morrison decisions reach opposite conclusions about the enforceability of the original prohibition order; however, Morrison does not consider the rule against collateral attack. Whether or not the rule was raised before the judge in that case, any consideration of the validity or enforceability of a previous court-imposed prohibition invites a serious consideration of the rule and its application. To that extent, I agree with the Crown that Morrison was wrongly decided.
- [35] The court can only impose a driving prohibition which takes effect immediately, continues for the full day of each day of the prohibition and continues for consecutive days. The court has no discretion to order any other kind of driving prohibition under s. 98(4). I am satisfied that imposing the driving prohibition, even without stating the precise words in ss. (a) to (c) of s. 98(4) to the offender at the time of sentencing, does not mean that the court has lost jurisdiction, or is proceeding without jurisdiction. Clearly, a provincial court judge has the jurisdiction to impose a driving prohibition under s. 98 of the Act.
- [36] In respect of the argument that the appellant did not have the necessary mens rea to commit the offence of driving while prohibited, the learned trial judge focused not only on the fact that Challenger P.C.J. could only make the order prescribed in s. 98(4); she also relied on the certified copy of the Order of Prohibition, which the appellant signed. The Order told the appellant that he was prohibited from driving, and that the Order took effect immediately, that it continued for the full day of each day of the prohibition and continued for consecutive days. Thus, the learned trial judge concluded that the mental element of the offence had been proved. There is no basis for this court to interfere with that finding as I have concluded that the appellant's position constitutes an impermissible collateral attack.

Disposition

- [37] The summary conviction appeal is dismissed.

"The Honourable Madam Justice Gropper"

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