

CANADA / JUDGMENT

R. v. Young

2019 BCSC 1802

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Supreme Court of British Columbia

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2019 BCSC 1802 R. v. Young

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Young,

2019 BCSC 1802

Date: 20191021

Docket: X081417

Registry: New Westminster

Regina

v.

James Robert Sheridan Young

Before: The Honourable Mr. Justice Jenkins

On appeal from: An order of the Provincial Court of British Columbia, dated February 15, 2019 (Regina v. James Young, Port Coquitlam Registry, AH89533579-1).

Reasons for Judgment

Counsel for the Crown:

Nicholas Reithmeier

Counsel for James Robert Sheridan Young:

Kyla M. Lee

Place and Date of Hearing:

New Westminster, B.C.

August 8, 2019

Place and Date of Judgment:

New Westminster, B.C.

October 21, 2019

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- [1] Mr. Young has appealed from a conviction entered on February 15, 2019 by a Judicial Justice in the Provincial Court of British Columbia in which he was found guilty of using an electronic device while driving contrary to section 214.2(1) of the Motor Vehicle Act, R.S.B.C. 1996, c. 318. If successful in his appeal, Mr. Young submits an appropriate remedy is to set aside the judgment of the Judicial Justice and enter an acquittal or, alternatively, that a new trial be ordered.
- [2] The issues raised on appeal were firstly, that the Judicial Justice erred in finding that an interlock device fell within the definition of an electronic device as defined in s. 3(1)(c) of the Use of Electronic Devices While Driving Regulations and secondly, that the Judicial Justice erred in law by giving presumptive reliability to the evidence of the attending police officer.
- [3] An interlock device is a hand-held device connected by a cable under the steering column and behind the dashboard into the ignition system of a vehicle. Where an interlock device is installed, the driver is required to blow into the device to test for alcohol before the vehicle starts and may also be required to blow into the device to continue driving.
- [4] At the hearing of the appeal, submissions were limited to the second ground of appeal as the Judicial Justice's reasoning was that her comments that an interlock device was an "electronic device" were obiter dicta in that the Judicial Justice found that the device in the hands of Mr. Young was a cellular telephone, not an interlock device. At para. 18 of his reasons, he stated:

There was no such evidence accepted to come to that conclusion that due diligence applied or that it was something other than a cell as found by me.

- [5] As a result, the issue before this court is a review of the finding of the Judicial Justice that Mr. Young was holding a cellular telephone while driving.

Standard of Review

- [6] I quote from the decision of Mr. Justice Gaul in *Bains v. British Columbia (Superintendent of Motor Vehicles)*, 2010 BCSC 2028, respecting the appropriate standard of review to be adopted by an appellate court, with which I fully concur:
- [7] Before assessing Mr. Bains' contention that Adjudicator McMorran's decisions were unreasonable, I must first determine the applicable standard of review. The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9 and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, has clearly established that the standard of review for cases such as the one presently before me is "reasonableness". In this regard I have taken particular note of the following observations of Binnie J. in *Khosa* at para. 59:

Reasonableness is a single standard that takes its colour from the context. One of the objectives of *Dunsmuir* was to liberate judicial review courts from what came to be seen as undue complexity and formalism. Where the reasonableness standard applies, it requires [deference]. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

- [7] The standard of review was also discussed by the Supreme Court of Canada in *R. v. Burns*, [1994] 1 S.C.R. 656:

In proceeding under s. 686(1) (a)(i), the court of appeal is entitled to review the evidence, re-examining it and re-weighing it, but only for the purpose of determining if it is reasonably capable of supporting the trial judge's conclusion; that is, determining whether the trier of fact could reasonably have reached the conclusion it did on the evidence before it: *R. v. Yebes*, [1987] 2 S.C.R. 168; *R. v. W. (R.)*, [1992] 2 S.C.R. 122. Provided this threshold test is met, the court of appeal is not to substitute its view for that of the trial judge, nor permit doubts it may have to persuade it to order a new trial.

- [8] Keeping those principles in mind, what evidence was before the Judicial Justice at the hearing in Provincial Court?
- [9] Counsel for Mr. Young provided the court with written submissions of argument which included a summary of the evidence before the Judicial Justice. The Crown took no exception to those facts but did include excerpts from the transcript of the proceedings of February 15, 2019. I reproduce relevant facts as set out by counsel for Mr. Young:

Facts

2. On February 15, 2019 the Appellant appeared in Port Coquitlam Provincial Court regarding a Violation Ticket for one count of using an electronic device contrary to Section 214.2 of the Motor Vehicle Act. Constable Arora appeared for the Crown. The appellant was represented by counsel who appeared as agent.
3. Constable Arora testified for the Crown. He testified that he called for Constable Shea to stop the Appellant in Maple Ridge after he observed the Appellant with both hands off the wheel looking up and down while driving. He testified that the Appellant had a black phone in his hand and that the Appellant's thumbs were tapping it.
4. Constable Arora was then cross-examined by counsel. Under cross-examination he agreed that it was a black device with a flat surface on top.
5. Constable Shea also testified for the Crown. He testified that he stopped the Appellant after receiving a message over the radio from Constable Arora to stop the vehicle.
6. Constable Shea obtained a driver's license from the Appellant and identified him. He testified that he saw a phone sitting on the centre console. The phone rang over Bluetooth through the vehicle speakers during their interaction. Constable Shea then issued a violation ticket because the Appellant held a Class 7 license. He testified that the Appellant told him that he had an interlock in his hand.
7. Constable Shea was then cross-examined by counsel. Under cross-examination he agreed that he did not have reason to doubt that the Appellant would need an interlock device inside the vehicle. He agreed that he could only see the Appellant's chest area. Constable Shea did not know whether the Appellant answered the phone when it rang over the speakers.
8. The Appellant testified for the defence. The Appellant testified that he had an interlock device in his vehicle for fifteen months at the date of the offence. The Appellant testified that the interlock device is installed into the ignition system in his vehicle underneath the steering wheel column behind the dash. The Appellant described the interlock device as a black hand-held device that is the shape of [a] cell phone with buttons on the top.
9. The Appellant testified that when it is time to take a test on the device, a long beep occurs. The Appellant testified that when this noise occurs, he is then required to blow into the device and receive a pass to continue driving.
10. The Appellant testified that the interlock device was continually beeping on the day of the offence. The Appellant picked up the ignition device off the floor. The Appellant was holding the ignition device as he approached the stop sign and looking up and down at it.

11. The Appellant came to a full stop as directed by Constable Shea. The Appellant testified that his phone is hooked into Bluetooth, which he only uses during work hours. The Appellant testified that the interlock device does not have any communication functions other than to measure alcohol levels.
12. The Appellant was cross-examined by Constable Arora. The Appellant agreed that the interlock device is twice the thickness of a cell phone. The Appellant testified that he is required to hold the interlock device in his hand when it makes a noise and he has to blow. The Appellant is required to perform a rolling test as he drives where he is required to blow in order to keep driving. The Appellant agreed that there was a difference of five inches between the vantage point of Constable Arora and Constable Shea due to the sidewalk.
13. The Court asked the Appellant to clarify which part of the black cord is a quarter inch. The Appellant confirmed that the thickness is a quarter inch. The Appellant testified that the length of the cord from behind the wheel to the interlock device is around two to two and a half feet.
14. The Appellant was re-examined by counsel. The Appellant agreed that the cord for the interlock device is like the black coil for the phone in the courtroom.

. . . .

- [10] The transcript of the proceedings at trial are more detailed than the summary given above. The testimony of Cst. Arora is at the heart of this matter, i.e. what did he see at the time in question? Commencing at p. 3 of the transcript, the following was recorded:

p.3, line 15 ff -

A Okay. I was at the front yard of a residential area where I can see the vehicles going eastbound on River Road, so that will make me stand little bit west of Laity.

The Court: Standing a little west of Laity.

A. So I'm in the front lawn behind a fence and this lawn is where I can clearly see the vehicles, the drivers. The whole objective of me standing there is based on numerous complaints we get from this neighbourhood regarding people disobeying stop sign. It's actually a stop-sign intersection. It's a three way stop sign. So the whole objective is people - for motor - motor vehicle infractions for disobeying stop sign, people aren't wearing seatbelt or using electronic device.

So I am at front yard, and in front is the fence of that residential house that I'm standing in the yard, and there is a sidewalk and then it's actually a street. So the street is I'll say about - my position is a little bit elevated to the street level, so about six to eight inches because it's a sidewalk and then front yard where they have just the front-yard step.

So I'm in a clear position. On the left side where I'm standing is bushes so all the vehicles coming and travelling to east on River Road towards the stop sign to stop at Laity, I can clearly see them.

p. 4, line 12 and ff.

A. Yeah. And fence is very low. It's not any obstruction of the view. And the bushes on the left is just for me to basically see the vehicles coming in through, but it's no obstruction for me to see the drivers or anyone with seatbelts or any - their hands or vehicles going through the stop sign. I have a clear view of basically all the passengers in the vehicle.

p. 5, line 18 to p. 6, line 37

The Court: So officer Shea - Officer Shea is a little bit east of you?

A. East of my location.

The Court: Okay.

A. So the whole purpose of where exactly I was standing is so I can see. If I see any infraction, I let Cst. Shea know that the vehicle is coming towards his direction and if the vehicle stop - if we have to stop - the stop sign or seatbelts or any other infraction I see he gets notified.

And based on this particular infraction I saw, I saw the driver of a vehicle is the only occupant in the vehicle, so I have a clear view of the driver, his hands, where exact - from where exactly I was standing. While approaching the stop sign this driver of this vehicle, his both hands were off the wheel while going towards the stop sign. I can see a black phone and the driver was tapping using both of his thumbs looking up and down while driving, so -

. . . .

A. So - and his both hands were off the wheel.

When I saw the infraction, I informed Cst. Shea that there is a vehicle, pickup black vehicle coming towards his direction and I also provided the license plate of the vehicle.

. . . .

Your Worship, after a few minutes I saw the driver back on my location on foot. He came to my location to take some pictures of where exactly I was standing, and the phone he was using to take the pictures appeared to be the same one I saw when he was driving with black phone and black case.

And, Your Worship, I'd also like to mention where I'm standing, like I already mentioned, it's a clear view of the driver, and from me to the driver I'll say approximate it's about 15 feet distance. And the weather that day was clear, there was enough light for me to see inside the vehicle, and it was clear view because there was no obstruction in between . . .

[11] On cross-examination, Cst. Arora was asked questions as to what he was able to see from standing by the fence and ground which was elevated some six to eight inches above the road surface, suggesting he would not have been high enough to be able to see the driver's hands:

p. 7, line 32 and ff:

Q - You're five-foot-seven. You're five - you said six to eight inches elevated above the road surface, correct?

A. Yes, yes.

....

Q. All right. So you're talking about being six-foot -three to six-foot-five in terms of your ability to observe inside the vehicle

A. Yes.

....

Q. And if I suggest to you that at six-foot-three or six-foot-five on this vehicle the best you'd be able to see is the upper body of the driver?

A. If I see a vehicle, if I don't see somebody's hand I cannot see infraction, so I make myself visible in a sense where I can see the vehicle's hand - the driver's hand.

And the six inches higher with a pickup truck, unless it's really boosted for few inches or feet I can absolutely see the driver.

[12] Cst. Arora also testified that he did not see an interlock device in the vehicle, saying:

p. 8, line 24 ff

A. I did not see any electronic device that has cable attached to anything like that, because when I see - that time saw the hands of the driver with thumbs on the electronic device.

[13] Cst. Arora was also asked if he was familiar with the appearance of interlock devices:

p. 8, line 38 ff

A. Based on what I've seen it is a black-colour device - -

Q. Okay

A. With buttons on top and it has a cable attached.

Q. All right. So it's a black coloured device, it's about the size of a cell phone and about the length of a cell phone, do you agree with that?

A. It has more thicker than actually the cellphone.

Q. Yeah, a little thicker, okay.

A. And it has buttons on top, very clearly visible buttons. When cell phone is on top they don't have buttons.

Q. Okay, so it has buttons that a person can manipulate with their thumbs?

A. Yes, it can manipulate, but if something like this is visible I have to see the cable also attached. Normally, if I see a cell phone device, if someone's using electronic device, I make in my notes, okay, I saw the cell phone or electronic device and I also saw a cable attached as if charging. In this case, I didn't see - - -

Q. Well -

A. - - anything that's attached.

[14] Cst. Shea also testified and stated that when he pulled over the vehicle, he heard a cell phone ringing with the sound coming through the vehicle speakers, i.e. on a Bluetooth device which was sitting in the center console. Cst. Shea also confirmed that he did not see an interlock device in the vehicle.

Decision of the Judicial Justice

[15] The Reasons for Judgment of the Judicial Justice as they relate to the sole issue, i.e. whether Mr. Young was using an electronic device, i.e. a cellular phone, was as follows:

[12] Now, let me examine the evidence a little bit more closely. Mr. Young maintains that the officer could not have seen him. The facts before the court is that a black device was seen in his hand on that day and he acknowledges to holding a black device, but, would have the court believe that it was something else.

[13] The officer told the court that he was about 15 feet away when he saw this black device in Mr. Young's hands. He said the fence at that location was low, to the left of him were bushes but he could see the vehicle and the lone driver in that vehicle. He said both his hands were off the wheel and that a black phone was in his hands. He showed the court with his hands the holding position. Mr. Young was seen tapping using his thumbs to move up and down. At the same time, his head would go up and down. That is [an] action more consistent with utilizing a cell phone. Mr. Young does not say that he was tapping the keys to get the equipment to work. He says he was simply holding it low because he feared that it was malfunctioning. That is not what the officer saw. The officer saw a driver with something in his hand on which he was tapping.

[14] There is circumstantial evidence too before the court that when Officer Shea stopped the vehicle there was a cell phone on the console. Not only was there a cell phone on the console, but it is obvious that the cell phone was on. A ringing sound was heard over the speaker.

. . . .

- [16] A police officer testified that what he saw was a cellular device. Cellular devices are electronic devices that are notorious. My use of the word "notorious" is language adopted from an Ontario [decision] which [is] cited in *R. v. Schulz*, a B.C. reported case. The court makes reference to the fact that these devices are so common today that even children use them. Anyone looking at a cellular device, the court found, would be able to say that it is a cellular device.
- [17] If the device was held up high as shown with thumbs seen moving up and down, it appears to me that if there was an interlock cord, the officer would have noted that too. Nothing that Mr. Young said raises a reasonable doubt to the fact that his thumbs were seen tapping on the screen of the device that he held. He was not simply holding as asserted, he was tapping on the screen.
- [18] Taking the evidence in its entirety, I am unable to accept Mr. Young's evidence that what he held was a breathalyzer. I am unable to find that anything that he says raises a reasonable doubt. I find that Crown has proven its case beyond a reasonable doubt. I would re-iterate, as said before on the exception raised as a defence to the charge, the defence had the burden to prove that on a balance of probabilities and that due diligence applied to this case. There was no such evidence accepted to come to that conclusion that due diligence applied or that it was something other than a cell as found by me.

Presumptive Reliability

- [16] Mr. Young submits that in making her decision, the learned Judicial Justice gave presumptive reliability to the testimony of Constables Shea and Arora over that of Mr. Young. What decision making can be considered to provide presumptive reliability to one party over another?
- [17] In *R. v. Kesa*, 2008 BCSC 1200, Justice H. Holmes (as she then was), discussed the application of a different standard of scrutiny in assessing the evidence of the Crown witnesses as opposed to defence witnesses:
- [76] The British Columbia Court of Appeal has cited with approval the law from Ontario that the application of a different standard of scrutiny to the evidence of Crown and defence is reversible error: *R. v. Rahmani*, 2007 BCCA 6 at para. 11 and para. 13; *R. v. MacLeod*, 2007 BCCA 589 at para. 13.
- [77] The authorities however strongly caution that it is a difficult argument on which to succeed: This is a difficult argument to make successfully. It is not enough to show that a different trial judge could have reached a different credibility assessment or, that the trial judge failed to say something that he could have said in assessing the respective credibility of the complainant and the accused, or that he failed to expressly set out legal principles relevant to that credibility assessment. To succeed in this kind of argument, the appellant must point to something in the reasons of the trial judge or perhaps elsewhere in the record that make it clear that the trial judge

had applied different standards in assessing the evidence of the appellant and the complainant.

[R. v. Howe, (2005) 192 C.C.C. (3d) 480 (Ont. C.A.) at para. 59]

- [78] In Rahmani, supra at para. 19, the court characterized the argument as "an invitation to retry the case" and "to reach different conclusions with respect to credibility than did the court below". In MacLeod, supra at para. 25, the court described the argument as a "thinly veiled invitation to this Court to review and reweigh the evidence and to substitute our view of credibility for that of the trial judge".
- [79] Specifically in respect of the nine individual matters raised by the appellant in paragraphs 69 to through 77 of the Appellant's Statement of Argument, I do not find any different standard of scrutiny has been demonstrated and the import of the arguments advanced seek only to retry the case and reach a different conclusion than the trial judge.
- [18] In Scott v. British Columbia (Superintendent of Motor Vehicles), 2013 BCCA 554, at para. 32 the court stated:
- [32] In the present case, although there was some evidence from which the adjudicator could have reasonably concluded that the respondent had unequivocally refused to provide a breath sample, her assessment of credibility was manifestly flawed because she afforded a presumption of reliability to the officer's report and required the respondent to refute the statements in the report. As her reasoning process was not reasonable, her decision cannot stand.
- [19] Reviewing the evidence that was before the Judicial Justice, her findings of fact appear to be very clear and there was much evidence to support her finding that what Mr. Young was holding was a cellular phone. I reference her finding in para. 13 of her reasons regarding the distance the officer was from the accused, that he set up behind a fence and bushes which allowed him to see into the vehicle and saw Mr. Young holding a cell phone in both hands and was tapping the surface of the phone with his thumbs. She found the tapping was consistent with using a cellular phone.
- [20] Cst. Arora testified that he and his fellow officer took up observation at the intersection in question based upon complaints by neighbours of vehicles failing to stop with the objective of being able to observe vehicles failing to stop and also to view seatbelt violations and the use of electronic devices by drivers. In that case, the officer's testimony that he set up in a location where he could easily observe infractions is practical and allows him to observe such infractions.
- [21] Although not mentioned in her reasons, the Judicial Justice heard testimony that the officer was standing behind a fence which was level with the tip of the curb and sidewalk which would place him Between Six foot three to six foot five inches above the road surface considering the officer's height was five feet seven inches.

- [22] The defence submitted that the officer could not have seen him holding and tapping a device as Mr. Young's pickup truck was raised and the officer could not have seen the area of Mr. Young's lap if he were holding a device at that level. Regarding that submission, Mr. Young testified the top of the cab of his pickup was seven feet one inch. If so, officer Arora being five feet seven inches in a raised area which would place him at a height of six foot three or six foot five would place him six to eight inches below the top of the pickup which would give him an angle at which he could look down into the cab of the pickup. That evidence would be consistent with the officer being able to see Mr. Young tapping on a cell phone.
- [23] The testimony of both officers was not successfully challenged by the defence in any respect.

Conclusion

- [24] I conclude that there was ample evidence to support the statement by the Judicial Justice that the Crown had proven beyond a reasonable doubt that Mr. Young was using a cellular phone, i.e. an electronic device, while driving. There is no evidence that the Judicial Justice applied a different standard of scrutiny in the case of the Crown than it did for the defence. The Judicial Justice considered the testimony of Mr. Young that he was using an interlock device or "breathalyzer" and found he was not using the latter. The conclusion reached by the Judicial Justice was fully justified, noting the "tapping" motion while holding the device would indicate he was "tapping" on a cellular phone, not an interlock device.
- [25] What is of concern are the words of the Judicial Justice in para. 18 of her reasons for judgment following her finding of proof beyond a reasonable doubt where she stated "... the defence had the burden to prove that on a balance of probabilities and that due diligence applied to this case." There was no burden on the defence and since she had found the Crown had proven its case beyond a reasonable doubt, the reference to the defence having a burden was not only incorrect, it was unnecessary and confusing. As well, "due diligence" has little if any place in a consideration as to whether or not the Crown has proven guilt beyond a reasonable doubt.
- [26] This appeal is dismissed.

"Jenkins J."

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