IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Whyte v. British Columbia (Superintendent of Motor Vehicles),*** 2012 BCSC 1559

Date: 20121023
Docket: S134840
Registry: New Westminster

Between:

Spencer Donald Robert Whyte

Petitioner

And

The Superintendent of Motor Vehicles and The Attorney General of British Columbia

Respondents

Before: The Honourable Mr. Justice Schultes

Reasons for Judgment

Counsel for the Petitioner:	J.C. Gopaulsingh
Counsel for the Respondents:	F. Zaltz
Place and Date of Hearing:	New Westminster, B.C. July 7, 2011
Place and Date of Judgment:	New Westminster, B.C. October 23, 2012

Introduction

[1] In this petition Spencer Whyte is seeking judicial review of a decision upholding a driving prohibition that he received from a police officer in Vancouver on April 7, 2011. Mr. Whyte argues that the adjudicator did not act reasonably in reaching his decision because he declined to address fundamental conflicts in the evidence.

Evidence

[2] There is no issue that on the evening of April 7, Mr. Whyte was prohibited from driving for 90 days by Constable Alice Fox of the Integrated Road Safety Unit, pursuant to s. 215.41 of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318. The ostensible basis for the prohibition under the legislation was that Mr. Whyte had care or control of a vehicle, a sample of his breath registered a "fail" in an approved screening device, and his ability to drive was affected by alcohol.

[3] Pursuant to s. 215.47 of the *Act*, Constable Fox forwarded the material required by that section to the Superintendent of Motor Vehicles. The documents that she forwarded that are relevant to this petition were:

- Notice of Driving Prohibition and Certificate of Service (one document);
- Report to Superintendent; and
- a brief synopsis of her investigation.

[4] In her report and synopsis, Constable Fox described Mr. Whyte being the driver and sole occupant of his vehicle on Wesbrook Mall at the University of British Columbia. The vehicle was running, with the keys in the ignition. Mr. Whyte had a strong odour of liquor on his breath and his eyes were slightly watery and bloodshot. He provided breath samples into two different approved screening devices, one at 8:07 p.m. and the other at 8:10 p.m., and both registered as "fail".

[5] As he was entitled to do, Mr. Whyte sought a written review of the prohibition pursuant to s. 214.48 of the *Act* on April 12. In support of the review he swore an affidavit describing his version of the events and also provided one from a friend, Mariah Spence.

[6] Mr. Whyte describes a very different interaction with the police in his affidavit. According to him, the plan was for Ms. Spence to drive him, in his car, from UBC to his home in Burnaby. He conceded that he was sitting in the driver's seat but maintained that he did not intend to drive. The keys were in the centre console and the engine was not running. Ms. Spence was still retrieving her belongings from a nearby building.

[7] A male police officer pulled up, asked him to roll down his window and then asked him where the keys were. Mr. Whyte showed the keys and in response to further questions, confirmed that he had been drinking and that his last drink was at 3 p.m. The officer requested him to step out of the car and after he did had him blow into a "handheld breathalyzer". He was told that he had failed, and this male officer then placed him in handcuffs and told him to stand on the sidewalk.

[8] After he had stepped out of his car, another police car containing two additional male officers arrived, but he did not have any contact with them.

[9] Once he was standing on the sidewalk, a third, unmarked police car arrived, driven by a female police officer. She placed Mr. Whyte into the back of her car and had him blow into a second breathalyzer, which he was told also registered as a fail. She advised him that his licence would be suspended and his car would be impounded and then had him sign some "paperwork".

[10] Ms. Spence describes the same plan to drive Mr. Whyte to Burnaby in his car and similarly disavows any intention on his part to drive it. She deposes that she was about five feet from his car when the male officer approached him. Her description of the events that followed is the same as in Mr. Whyte's affidavit, with the exception that she did not see what Mr. Whyte did while he was in the back of the female

officer's car and that she left the scene for about five minutes at this point, to look for one of Mr. Whyte's friends. In addition, she spoke to the female officer, who told her that the paperwork would take about 15 minutes and that she could wait for Mr. Whyte, I infer, to be released.

[11] In his written submissions in support of the review, which he provided on April 19, Mr. Whyte's counsel emphasized the conflicts between Constable Fox's unsworn report and the consistent affidavit evidence of Mr. Whyte and Ms. Spence. He pointed to the absence of any description in the report of the circumstances under which she first came to deal with Mr. Whyte and of any reference to other officers who attended -- details that one might expect to find in a report of this kind. In this regard, counsel raised the unlikelihood of a single officer possessing two approved screening devices, which would have to have been the case if she was the only one who dealt with Mr. Whyte and no other officers were there.

[12] The use of two devices and the gap of three minutes between their use supports Mr. Whyte's claim of having been dealt with by two officers, it was argued, and is not consistent with Constable Fox's implicit assertion that she was on her own.

[13] Finally, counsel submitted that the plausibility of Mr. Whyte's evidence, confirmed on these points by Ms. Spence, that the keys were in the console and the car was not running, combined with Mr. Whyte's sworn assertion that he had no intention to drive, should resolve the question of whether he had care or control of the car in his favour.

[14] On April 20, 2011 the adjudicator provided written reasons confirming the prohibition.

[15] On the issue of whether Mr. Whyte was a "driver" within the meaning of s. 215.41(1) of the *Act*, the critical parts of his analysis were:

> The evidence you and Ms. Spence provided conflicts with certain aspects of the police evidence, and your lawyer...argued that I must prefer your evidence over the evidence of the constable. However, I find that I do not

> need to resolve the conflict in the evidence. You have admitted that you were in the driver's seat, and I find it reasonable to infer that you were awake at the time. Although you and Ms. Spence have both said you did not intend to drive, I have difficulty believing this if you were awake in the driver's seat with the keys close at hand, whether or not they were in the ignition. I find that this alone is sufficient for me to reject your assertion that you did not intend to drive, and to find you were in care or control of the vehicle. I am, however, bolstered in this finding when I consider your statement "[a]s Mariah was walking towards my vehicle, a male police officer pulled up...", which, in my view indicates you were aware that Ms. Spence was approaching your vehicle, but yet you remained in the driver's seat and did not shift to the passenger's seat. Ms. Spence said she was only five feet away when the constable confronted you.
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> ...
>
> I have found it not necessary to determine whether the vehicle was running or not, or whether the keys were in the ignition or not or on the console. I have also found it not necessary to determine whether the constable who wrote the report was the same officer as the one who confronted you. Overall, you have not satisfied me that you did not intend to drive. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41 of the Act on April 7, 2011 at 2005 hours.

[16] On the issue of whether Mr. Whyte had registered a fail on the approved screening devices, after recounting his counsel's arguments the adjudicator concluded:

> ...Here again, I do not find it necessary to resolve any inconsistencies in the evidence, since you have admitted that you were told twice that you failed ASD tests, and there is no evidence before me that you did not fail these ASD tests, nor that the devices themselves were faulty.
>
> Based on the evidence before me, I am satisfied that an ASD did register a "fail" on April 7, 2011 at 2010 hours.

Discussion

[17] I will summarize the parts of the legislative scheme that apply to this case.

[18] Sections 215.41(3)(d) and 215.43(2) of the *Act* require a peace officer to serve a 90 day prohibition on a driver who registers a fail on an approved screening device, if the officer has reasonable grounds as a result of the fail to believe that the driver's ability to drive is affected by alcohol.

[19] Section 215.41(1) defines “driver” to include a person who has care or control of a vehicle on a highway, whether or not it is in motion.

[20] Section 215.42 allows the driver to demand a second analysis with a different approved screening device. If that is done then the result of the second analysis determines whether the prohibition continues.

[21] Under s. 215.48 a prohibited driver can apply within seven days for a review. It will be a written review unless the driver requests an oral one and pays the prescribed oral hearing fees. Even at an oral hearing, no cross-examination is permitted.

[22] Section 215.49 governs the information that the superintendent (in practice, the adjudicator acting on his behalf) must consider. This includes any evidence provided by the driver and the report of the peace officer.

[23] Under s. 215.5, if the adjudicator is satisfied that the driver meets the definition of “driver” that I have referred to and that he or she registered a fail on the approved screening device, then the prohibition must be confirmed.

[24] In *Sivia v. British Columbia (Superintendent of Motor Vehicles)*, 2011 BCSC 1639, Mr. Justice Sigurdson found that the limited ability of a driver who had provided a fail reading on an approved screening device to seek a review of a prohibition imposed pursuant to s. 215.41 of the *Act* resulted in a breach of s. 8 of the *Charter*, one that was not saved by s. 1. This was based on both the driver’s inability to seek a verification of the approved screening device results by a breathalyzer test and the fairly narrow basis for reviewing the prohibition that I have described.

[25] In subsequent reasons, reported at 2012 BCSC 1030, Sigurdson J. held that this declaration of constructional invalidity applied prospectively. This means that the offender parts of the legislative scheme were not invalid when Mr. Whyte was subject to them and this judicial review must be conducted on that basis.

[26] The principles governing this review are not in dispute.

[27] The adjudicator's decision cannot be overturned unless it is unreasonable, in the sense that it falls outside "a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Nagra v. British Columbia (Superintendent of Motor Vehicles)*, 2010 BCCA 154, citing *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 59.

[28] In addition, the adjudicator is entitled to make findings of fact, including deciding which evidence to believe, on the basis of the written record and as long as there is some evidence on which the findings could reasonably have been made, the Court should not interfere. In other words, the fact that there is a conflict in the evidence does not preclude the adjudicator from making findings, even when credibility may be an issue: *Nagra,* at paras. 27-28.

[29] Although it was expressed as his inability to be satisfied that Mr. Whyte did not intend to drive, the adjudicator in effect found, despite conflicting evidence, that he did intend to drive. He provided reasons for coming to that conclusion, which are in essence that Mr. Whyte was in the driver's seat with the keys close at hand and that he did not vacate this position despite Ms. Spence, who was supposed to be driving, being only five feet away. Nothing about that part of his decision-making process can be said to be unreasonable. The risks posed by a person in care or control of a vehicle clearly go beyond the intention to drive and embrace the broader risk of inadvertently setting the vehicle in motion, despite the absence of any intention: *Kalja v. British Columbia (Superintendent of Motor Vehicles)* (5 May 2010), Vancouver S101702 (B.C.S.C.), at paras. 4-5.

[30] The problem instead is with the adjudicator's assertion that it was not necessary for him to decide whether the key was in the ignition and the engine was running, or whether only one officer carried out all aspects of the investigation, as asserted by Constable Fox and denied by Mr. Whyte and his friend. If the constable was not being truthful about any of those matters, then the findings could have been quite different.

[31] If findings of fact were made that the engine was off and the keys were in the centre console, then that would have to be weighed in the analysis when deciding whether Mr. Whyte had established a lack of intention to drive and that he had committed no act that raised the risk of setting the car in motion. Similarly, if Constable Fox was not actually there when Mr. Whyte was taken out of the car, her assertions about the state of the engine and keys could not reasonably be given any weight.

[32] Of course the adjudicator's own reasons for rejecting Mr. Whyte's claims would still have gone into the mix as well, but the point is that under a proper analysis his reasons would have had to be balanced against this other potentially relevant evidence *before* a conclusion was reached. Instead, the possibility of any competing findings of fact was dismissed from consideration at the outset.

[33] In short, the adjudicator was perfectly entitled to reject the evidence of Mr. Whyte and Ms. Spence. What he was not entitled to do was conclude that their evidence did not matter in his analysis. If it had been properly considered, it may have mattered.

Conclusion

[34] As a result, I find that no adjudicator acting reasonably could have reached a decision in this case without considering the implications of the conflicts in the evidence on these critical points. This adjudicator's failure to do so went to the very heart of his jurisdiction. In that potentially decisive evidence was precluded from consideration by his error, a substantial wrong or miscarriage of justice has occurred as a result.

[35] Accordingly, I order that this matter be returned for a new hearing, one that must be based on the proper considerations that I have identified. Specifically, the adjudicator must grapple with the conflicting evidence and the resulting reasons for decision must give some indication that the conflicts have been resolved by reasonable findings of credibility and fact.

[36] While I have found that the decision in this case was unreasonable, the adjudicator certainly did not exhibit “misconduct or perversity” in the proceedings before him (see *Lang v. British Columbia (Superintendent of Motor Vehicles)*, 2005 BCCA 244) so I will not make any order for costs.

The Honourable Mr. Justice T.A. Schultes