

Case Name:
R. v. Sandhu

**Between
Regina, and
Rajinder Singh Sandhu**

[2002] B.C.J. No. 696

42 M.V.R. (4th) 73

Surrey Registry No. 117919-01

British Columbia Provincial Court
Surrey, British Columbia

Devitt Prov. Ct. J.

Heard: February 15, 2002.
Judgment: March 22, 2002.

(13 paras.)

*Criminal law -- Offences against person and reputation -- Motor vehicles -- Impaired driving --
Breathalyzer or blood sample, demand, reasonable grounds -- Civil Rights -- Security of the
person -- Lawful or reasonable search -- For reasonable and probable cause.*

Motion by Sandhu to exclude a certificate by a breathalyzer technician. A police officer was stopped at an intersection and informed by a passing driver of the erratic driving of a motor vehicle behind. The officer saw the vehicle turn the corner and proceed slowly down the road. When the officer stopped the vehicle, he observed that Sandhu was unsteady on his feet, that he smelled from alcohol and that he had an open bottle of alcohol in the vehicle. A roadside sobriety test was administered. A Horizontal Astigmas test was also administered, which indicated an elevated level of alcohol in the blood. Sandhu was then read the demand for breath samples and taken to the police station. Sandhu argued that the taking of the breath samples constituted an unreasonable search in violation of his rights under the Canadian Charter of Rights and Freedoms because there was no lawful authority to take a sample of his breath.

HELD: Motion allowed. The police officer relied heavily on the results of the Horizontal Astigmas test. However, he did not strictly follow the recommended procedure. As a result, the results of the test were unreliable and there were no reasonable and probable grounds for the breath demand. The other indicia relied upon by the officer only raised a suspicion that Sandhu was impaired.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, ss. 8, 24(2).

Counsel:

R. Antonuk, for the Crown.
Dilraj Singh Gosal, for the accused.

1 DEVITT PROV. CT. J.:-- This is a ruling on a motion to exclude evidence, namely, the certificate of the breathalyzer technician, on the grounds that there was a violation of the accused's Charter Rights.

2 The accused is charged with impaired driving and with having the care and control of a motor vehicle while having a blood alcohol level in excess of .08. A number of grounds were advanced in support of the motion, however, I find that I need only address one as it is in my view determinative.

THE CIRCUMSTANCES:

3 Constable Chew of the R.C.M.P. was in a marked police vehicle stopped at a intersection waiting for the light to change. A civilian in a vehicle pulled alongside the officer and commented about the erratic driving of a person in a blue and green vehicle behind them. The light changed and the civilian drove off. Constable Chew had no further information about the driving of the vehicle in question. Further he did not know the informant or his reliability.

4 Having received that information the officer glanced back and saw a car, which he described as blue, pulling up in the curb lane to make a right turn. The officer acknowledged that the turn was a perfectly legal manoeuvre. The vehicle slowed down for the turn and then proceeded for about 50 or 60 yards. There was nothing untoward in the driving of the vehicle during that period except the officer was suspicious because the vehicle continued to be driven very slowly. Constable Chew put on his emergency equipment and the vehicle came to a stop. He said that he was satisfied that he had the right vehicle and that the reason for the stop was to investigate the complaint of erratic driving, possibly impaired driving and pursuant to the Motor Vehicle Act. The officer approached the vehicle and asked the accused for his drivers licence. In response to that request the accused first produced a bank card and then his insurance binder after which he produced his licence. Another officer who was present and who had approached the vehicle on the passenger side informed Const. Chew that there was a opened bottle of rye approximately half full in the vehicle.

5 Constable Chew explained to the accused that the reason he stopped him was because he thought that he was impaired. The accused denied that he was impaired. The officer then asked the accused to perform some sobriety tests and the accused agreed. Upon exiting the vehicle the accused used both hands on the door to steady himself. In walking the accused took short staggered steps and had a subtle sway from side to side. Const. Chew described the accused's eyes as normal. There was a strong odour of liquour emanating from his mouth. There was a slight slurring of the accused's speech and he seemed confused.

6 At that point Constable Chew decided to administer a roadside test referred to as the Horizontal Astigmas test. The officer said that in his experience the result may indicate a

elevated level of alcohol in the blood. He described the training that he had received in performing the test and his experience in applying it. The officer said that all six indicia of elevated blood level were present in this case. As a result he formed the opinion that the accused's ability to drive a motor vehicle within the preceding three hours was impaired by alcohol. In support of that opinion the Constable said he considered the information of erratic driving, the discovery of the alcohol, the result of the test, the physical condition of the accused and the odour emanating from him. It was his opinion the accused was heavily impaired. The accused was read the demand for breath samples and taken to the police detachment. He was chartered and warned.

7 Constable Chew in cross examination conceded that he wasn't given information about the number of people in the blue car, the model, the licence plate number nor how many doors it had. Nor could the officer say how the civilian obtained his information. It was suggested to him that the colour of the car was green to which he responded that he believed that he had the right car. There was also some question about whether the officer had the correct street when giving his evidence. The officer acknowledged that accused's vehicle did not wander in or out of its lane of traffic, it did not speed, in fact, the officer was of the view it went too slowly. Constable Chew also acknowledged that driving is a somewhat complicated task and yet the accused was able to perform that task without any untoward driving except the slow speed. The accused at one point told Constable Chew that he needed to urinate and he was told he could when they arrived at the detachment. Defence Counsel suggests that the observation of some unsteadiness may be attributed to that.

8 With respect to the road side sobriety test Constable Chew admitted that he did not have the accused perform the heel to toe test, the walk and turn test, or the finger to nose test. A road side screening device was not used as the officer did not have one with him. The officer was satisfied with relying on the Horizontal Astigmatas Test. He acknowledged that he did not have any scientific degree nor was he an ophthalmologist. Constable Chew was aware that there were in excess of five types of astigmatism but he would not say what they were. He took a four day course under the U.S. National Highway Training program. Constable Chew said that the object of the test was to observe the pupil of the eyes for any jerking motion as the pupil followed the course of an object passed in front of the eye. The distance of the object from the eye and the angle are important aspects of the test. The required angle to observe any jerking of the pupil fixed on the object is 45 degrees. In other words, the object is moved from the centre to the right or left to a point of 45 degrees. The officer's evidence was that the pupil should follow the object in a smooth motion to the point of 45 degrees and hold the gaze without a jerking motion of the pupil. The Constable conceded that any deviation in procedure could negate the results of the test. In this case one procedural deviation was the angle used. The officer used a rough estimate in calculating that angle. He said that it is his practice to determine that by lining up a sight line with his shoulder which he said is roughly a forty-five degree angle. The object that he used was a pen light. He wasn't sure if there were cars with their headlights on going by at the same time which might affect the eye movement. The other area of concern in this case is the distance the officer held the object from the eye. The officer said that he was aware that there was controversy with the use of the test and that he was not an expert but he was giving his opinion based on his experience.

ISSUE:

9 As I said at the outset a number of grounds were advanced in support of this motion, however, in my view the deciding issue is whether the officer had the requisite reasonable and probable grounds. I am satisfied that in the circumstances Const. Chew had the authority to

stop the accused. Authority for that is found in *Ladouceur v. The Queen* 56 C.C.C.(3d) 22.

ANALYSIS

10 There is no doubt that Constable Chew suspected the accused was impaired based on the information he had received and his observations. However he had nothing to substantiate that suspicion. Certainly the driving exhibited by the accused was not sufficient to provide reasonable and probable grounds. The only driving he observed was the accused slow down from 50K to 5k per hour as he made a turn and then maintain that speed for approximately fifty yards. When he stopped the vehicle and asked the accused for his licence the accused seemed confused. He smelled liquor on his breath. When the accused got out of his car he hung onto the car door using both hands. In addition the officer was told that there was a half bottle of Rye in the car.

11 Constable Chew obviously did not believe he had reasonable and probable grounds as he decided to administer roadside sobriety test presumably in order to raise his suspicion to reasonable and probable grounds. The distinction between suspicion and reasonable and probable grounds was discussed in *R. v. Andree*, [1990] B.C.J. No. 1869 (B.C.S.C.) Vancouver Registry No. CC90014 where Oliver J. said at p. 2

"Applying the word "suspicion" in its ordinary meaning as set out in the Shorter Oxford Dictionary Edition, the objective test of reasonable and probable grounds is clearly not met by seeking to equate that test with mere "suspicion" nor on a careful reading of the authorities, which Andrews J, cites in his judgment, do those authorities taken as a whole lend support to the use of that term. In the case of *Rogers v. Regina*, [1981] B.C.J. No. 2031, November 25, 1981, the words "reasonable and probable cause" are described as "an honest belief in the guilt of the accused, based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed".

12 In this case to obtain reasonable and probable grounds, the officer restricted himself to a single test he knew was controversial. He chose to rely heavily on the astigmatic test which to him would indicate an elevated amount of alcohol in the accused's system. The astigmatism test is only an aid to assist the police in forming reasonable grounds. As with any test to be effective the test must be performed correctly. Any deviation from the recommended procedure will compromise the results. In this case the officer did not strictly follow the recommended procedure. The conclusion therefore that he drew from the test is unreliable. He said that he formed his opinion that the accused was impaired after administering the test and taking into consideration his other observations and what he had been told. In my view his belief was only formed after the unreliable test. While that test may have given him his subjective belief it falls short of providing reasonable and probable grounds for that belief. He could have administered other roadside sobriety tests but instead chose to rely on the one test and in doing so by failing to exactly follow the suggested procedure put in doubt the reliability of his conclusions. The officers' subjective belief was based on a false premise that the accused had failed the test but because the test was compromised the results were unreliable and could not be the basis for reasonable and probable grounds. In the circumstances I find that there were no reasonable and probable grounds for the breath demand. The taking of the breath sample therefore

constituted an unreasonable search of the accused there being no lawful authority to take a sample of his breath. Consequently the search was a violation of s. 8 of the Charter.

CONCLUSION:

13 Since the certificate of the technician is the result of conscriptive evidence its admission would automatically render the trial unfair and bring the administration of justice into disrepute. In such circumstances an analysis under s. 24(2) of the Charter is unnecessary. See: R. v. Girrard [1999] B.C.J. No. 2576; R. v. Stillman (1979), 113 C.C.C. (3d) 321 (S.C.C.) As a consequence the certificate of the technician is inadmissible.

DEVITT PROV. CT. J.

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