

Citation: *R. v. Pumphrey*, 2015 YKTC 2

Date: 20150113
Docket: 14-05923
Registry: Whitehorse

TERRITORIAL COURT OF YUKON
Before His Honour Judge Luther

REGINA

v.

IAN CAMERON PUMPHREY

Appearances:

Evan Kelly
Ian Cameron Pumphrey

Counsel for the Territorial Crown
Appearing on his own behalf

REASONS FOR JUDGMENT

[1] LUTHER J. (Oral): What we are considering is a summary offence ticket from August 28, 2014, in Whitehorse, Yukon, wherein Mr. Ian Pumphrey was charged with the use of an electronic device while driving, contrary to s. 210.1(2) of the *Motor Vehicles Act*, R.S.Y. 2002, c. 153.

[2] On December 17, 2014, the Court heard a number of cases involving cell phones—I believe three or four—and various issues were presented. I did reserve on Mr. Pumphrey's case just so I could check the state of the law, most particularly here in the Yukon but also with some reference to other jurisdictions in Canada.

[3] That day we heard evidence from RCMP Officer, Cst. DeGrace, and we also took a look at a brief video. The evidence from Cst. DeGrace and Mr. Pumphrey did not differ that much. Mr. Pumphrey freely admitted to using his cellular device. It was on his shoulder. The officer indicated that he could see Mr. Pumphrey for one or two seconds and he had the cell phone to his ear.

[4] Just prior to the issuance of the ticket, maybe two, three or four minutes before that, Mr. Pumphrey's phone rang. He pulled over and answered his phone. Mr. Pumphrey then put it in speaker mode and lodged the phone carefully between his shoulder and his head and proceeded to drive. There was no evidence of any driving irregularities or any difficulties that Mr. Pumphrey had with operating his motor vehicle at the time.

[5] The big question in this case has to do with the concept of hands-free use. I am going to look at some cases from Ontario. It is perhaps indicative of the fact that these cases are being contested, as they are, that two of them reached the Ontario Court of Appeal, and decisions were rendered in these two cases on September 27, 2013.

[6] I will just highlight these cases briefly.

[7] In the case of *R. v. Kazemi*, 2013 ONCA 585, the respondent was driving home from work alone. While she was stopped at a stop light, a police officer observed her to have a cell phone in her hand. She said the cell phone had been on the seat but it dropped to the floor of the car when she braked. She picked it up when she got to the red light. That was when she was observed by the officer. After a thorough analysis,

particularly on the meaning of the word "holding", the Court of Appeal restored the original conviction.

[8] The trial judge had registered a conviction. The summary conviction appeal judge had reversed it by expanding on the meaning of the word "holding", but the Court of Appeal ruled:

[15] The interpretation of "holding" offered by the appeal judge requires that there be some sustained physical holding. Any holding for a shorter period of time, with the accompanying risks to road safety and driver attention, would be exempt from the prohibition. With respect, I do not think this accords with the ordinary meaning of the word. Nor does it properly reflect the object of the *HTA* or best achieve the legislature's purpose in enacting the section. Moreover such an interpretation would leave the uncertainty of how long the physical holding must be sustained to be caught by the provision. It would create the enforcement challenge of requiring continued observation of the driver for that period of time if the prohibition is to be effective.

[9] As noted, the Ontario Court of Appeal restored the original conviction.

[10] On the same date, the same members of the Ontario Court of Appeal ruled on the case of *R. v. Pizzurro*, 2013 ONCA 584. The facts were somewhat different. The respondent was driving and was observed by a police officer to have a cell phone in one hand. It appeared to the officer that the respondent was either typing or reading the information on it, and the issue was whether this was an operating cell phone at the time.

[11] The Court of Appeal, at paras. 13 and 14, in that case ruled:

[13] Finally, the legislative purpose of s. 78.1(1) must be considered. In *R. v. Kazemi*, (issued simultaneously with these reasons) this court described that purpose as ensuring road safety and driver attentiveness to driving. It is best served by applying the requirement that the device be capable of receiving or transmitting only to prescribed devices, but not to cell phones. Road safety and driver attentiveness to driving are best achieved by entirely prohibiting a driver from holding or using a cell phone while driving. To hold out the possibility that the driver may escape the prohibition because the cell phone is not shown to be capable of communicating, however temporarily, is to tempt the driver to a course of conduct that risks undermining these objectives.

[14] For these reasons I conclude that s. 78.1(1) of the *HTA* does not require that the cell phone held or used by a driver while driving be shown to be capable of receiving or transmitting telephone communications, electronic data, mail or text messages.

[12] Again, in that case, the conviction was restored.

[13] About eight months later, in May 2014, in *R. v. Whalen*, 2014 ONCJ 233, Judge Epstein of the Ontario Court of Justice had occasion to apply the Ontario Court of Appeal cases. As can be seen in that case at para. 2, the facts are more similar to what we have here:

...

On August 20, 2013 an officer of the Waterloo Regional Police Service was conducting cell phone enforcement in the City of Cambridge when he observed the Appellant operating her motor vehicle in the curb lane approaching his position. Her head was tilted significantly to her right and there was a cell phone between her right ear and shoulder. Her lips were moving and she appeared to be talking into the phone. Both hands were on the steering wheel. The officer followed the Appellant and when he stopped her vehicle the cell phone was on the passenger side front seat of her vehicle. ...

[14] The judge reviewed the Ontario laws, particularly the *Highway Traffic Act*, R.S.O. 1990, c. H.8, and also a regulation. Of course, the Minister in Ontario can make regulations just as the Minister here in the Yukon can make regulations to clarify details in the legislation and give important direction to the motoring public.

[15] The Ontario Regulation is important. It says that a driver...

...may drive a motor vehicle on a highway while pressing a button on a hand-held wireless communication device to make, answer or end a cell phone call or to transmit or receive voice communication on a two-way radio if the device is placed securely in or mounted to the motor vehicle so that it does not move while the vehicle is in motion and the driver can see it at a quick glance and easily reach it without adjusting his or her driving position. O. Reg. 366/09, S. 14(1).

[16] In other words, the Ontario Government, through this regulation, has recognized the importance of having the device placed securely in or mounted to the motor vehicle. That provides guidance to the drivers in the Province of Ontario.

[17] Judge Epstein had some discussion which was helpful in outlining the meaning of the word "holding" at para 13:

It would appear by this definition that containing in the hands is but one method of "holding". In common parlance a violin is "held" under the chin and a cello between the knees. Items are "held" against the body by an arm. One "holds" the thong portion of a flip-flop sandal between one's toes. I am satisfied that the definition of "holding" is sufficiently broad as to conclude that the Appellant was "holding" the cell phone between her ear and shoulder.

[18] At para.19, he referred to the reports in the Ontario Legislature as to why they were passing this legislation, and the Minister of Transportation said:

... "We are simply asking drivers not to use hand-held wireless communication and electronic entertainment devices while driving. The use of hands-free wireless communications devices, such as an earpiece or Bluetooth set up to work with your cellphone or BlackBerry, will still be allowed. GPS units mounted on a dashboard will still be permitted."

[19] The foregoing is a discussion in Queen's Park as to what they were trying to achieve, and rather than just have words voiced in that Assembly, they proceeded to enact both the legislation and the accompanying regulation. One of the important parts of that Regulation had to do with the secure mounting of the hands-free device.

[20] These concerns about cell phone use while driving exist in many provinces, and I have a copy of the B.C. Regulations as well. In the B.C. Regulations, the exemption is given, "if the device is securely fixed to the motor vehicle." So, again, the drivers in the province of B.C., just like in Ontario, have guidance from their governments as to what is allowed and what is not allowed.

[21] Turning my attention to the Yukon legislation and s. 210.1 of the *Motor Vehicles Act*, I will just review the main parts of it as it pertains to this particular case:

"electronic device" means

- (a) a device (other than a permitted device) that is either or both of:
 - (i) a cellular telephone or another device that includes a telephone function, and
 - (ii) a device that is capable of transmitting or receiving electronic mail or other text-based messages

"permitted device" means a device that is prescribed for the purposes of this definition;

"permitted user" means

- (a) a peace officer,
- (b) a member of a fire department or fire brigade,
- (c) an emergency medical responder, and
- (d) a prescribed permitted user;

[22] Mr. Pumphrey is clearly not a permitted user.

[23] If we go to the word "use", it means:

...doing any one or more of the following:

- (a) holding the electronic device in a position in which it may be used;

[24] Clearly, Mr. Pumphrey was holding it—not with his hands, but between his shoulder and his head.

- (b) operating any function of the electronic device;

[25] He was speaking on the phone and listening on the phone. He was also:

- (c) communicating by means of the electronic device;

[26] Section 210.1(2) continues on:

Except as provided in subsections (3) and (4), no person shall use an electronic device while operating a motor vehicle on a highway.

[27] Thus far in the analysis of the legislative scheme for the Yukon, Mr. Pumphrey was using the electronic device while operating the motor vehicle on a highway.

[28] Now we get to the key part. Subsection 3 reads:

Despite subsection (2)

(a) if an electronic device is configured and equipped to allow hands-free use in a telephone function, a fully licensed driver who is operating a motor vehicle on a highway may, subject to **any conditions or requirements imposed by regulation**, use the electronic device in that manner;
[emphasis added]

[29] The facts are very specific in this case.

[30] Mr. Pumphrey pulled over, stopped his vehicle, and lawfully took the call. Then he put his cellular telephone into speaker mode, put it on his shoulder, and away he went.

[31] At that time, a cell phone that is in speaker mode could be considered a hands-free device. If it were at all times in a cell phone holder suitably attached to the dash so as not to interfere with visibility or use of vehicle equipment, we wouldn't be here today.

[32] The key point in the Yukon legislation is this, "...a fully licensed driver who is operating a motor vehicle on a highway may, subject to any conditions or requirements imposed by regulation, use the electronic device in that manner..." that is, in a hands-free use manner.

[33] Mr. Pumphrey had the phone in speaker mode. He was clearly holding it because we know what "holding" means from the Ontario decisions. But the exception exists under the Yukon law that he may use the electronic device in the hands-free use. There is nothing to preclude his having it on his shoulder in speakerphone format.

[34] This is not an ideal way to use your cell phone because of potential problems. For example, you hit a bump in the road, the cell phone flies out from your shoulder and you wonder what is happening to it; a person would be distracted.

[35] Using a cell phone in this manner I do think flies in the face of what is intended by the law, but the citizens of the Yukon are entitled to guidance, just as the citizens in B.C. and Ontario are. In those provinces the law is clear through the specifics in the Regulations as to how a hands-free cellular phone can be used. The key part, as I indicated, is if it is securely fixed to the motor vehicle.

[36] The Yukon Government, for whatever reason, has chosen not to bring in any regulations and leave the drivers in a state of uncertainty. This is particularly concerning to me because it was stated in subsection (3): "...if the device is configured and equipped to allow hands-free use..." -- i.e., in this particular instance, speaker mode -- "...a fully licensed driver who is operating a motor vehicle on a highway may, subject to any conditions or requirements imposed by regulations..."

[37] The Yukon Government has decided not to bring about any regulations. To bring about regulations in this field would be very easy; they do not need to reinvent the wheel. There are many jurisdictions that have these regulations. The Yukon Government has decided not to bring in any regulations. The Territorial Crown Attorney was not aware of any. I searched for regulations and, yes, we do have some regulations, Regulations 88.1 and 88.2, dealing with two-way radios and emergency responses, but nothing that I could find in the Regulations to talk about the importance of having a cell phone in speaker mode firmly attached to your motor vehicle dashboard

such as they not only discussed but, more importantly, implemented in the Province of Ontario and also in the Province of British Columbia.

[38] My job as a judge is to interpret the laws in a sensible way, but it is not to fill in gaps that can easily be filled in by the Legislature or by the Cabinet. In this case, as I indicated, Mr. Pumphrey was not driving his vehicle in any irregular fashion whatsoever. He took the care to receive the phone call by pulling over to the side of the road, which is a requirement of the *Motor Vehicles Act*, and he proceeded as he did.

[39] The net result of this case is that I certainly have a reasonable doubt in this case. The reasonable doubt will be resolved in favour of Mr. Pumphrey, and this matter will be dismissed on the basis of the uncertainty of the law as it presently exists in the Yukon.

[40] The Cabinet would be well advised to clarify this situation by bringing in appropriate regulations in due course. As I indicated, this case is very fact-specific. If you had somebody driving down the road and they picked up their cell phone to take a call and then put it on their shoulder, they would be guilty because they did not pull over to the side of the road as Mr. Pumphrey did. Also, if they did stop, take the call and did not put the cell phone in speaker mode, thereby triggering the hands-free use, they would be in contravention of the *Act*. Similarly, if you had somebody lodge a cell phone between their head and shoulder and they were driving in any way erratically, they may well be guilty.

[41] So my advice to the citizens of the Yukon is not to take this law and flaunt it because of the vacuum that the Yukon Government has left. Rather, they should drive responsibly.

[42] In the meantime, in dealing with this specific case, I have no option but to dismiss the charge.

LUTHER T.C.J.