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Segal's Motor Vehicle and Impaired Driving Newsletters
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— Segal's Motor Vehicle and Impaired Driving Newsletter

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Contents

Case Law Highlights

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1. — Highway traffic; Using an electronic device while driving; Appellant playing podcast through car speakers; Phone in cup holder of centre console between seats held in place by rubber grommet or seal of cup holder; No touching; Conviction overturned;* Motor Vehicle Act, *s. 214.2.

R. v. Bleau, 2021 CarswellBC 12, 2021 BCSC 13 (B.C. S.C.) Voith J.: The appellant had been convicted of using an electronic device while driving. He was playing a podcast via Bluetooth through the vehicle's speakers. The phone sat in a cup holder of the centre console between the front seats. It was held in place by either a rubber grommet or the seal of the cup holder. There was no touching. The trier had held that there was a technical violation as the phone was not firmly affixed. The appeal focussed attention on "use".

"Use" is defined to involve:

- holding
- operating the device's functions
- communicating orally
- taking another action set out in the regulations.

The definition of "use" is concerned about actions. They may be positive actions such as holding, operating or communicating or taking another action set out in the regulations. Operating a device's functions always constitute a use. However, not all uses of an electronic device involve operating its functions. There must be some level of interaction between the driver and the device. That informs the requirement of an "accompanying act on the part of the driver" that provides the distractions.

The regulations only add one qualification — a person who watches the screen. The section contains an exception in s. 204.5 relating to fixed systems that are activated when the vehicle is started. While mindful of the risks with devices, what occurred here is not a prohibited "use" and the conviction appeal must be allowed.

2. — Search and seizure; Police bringing detention order; Blood vials in DRE cases seized more than three months before police application; RCMP lab had backlog of over five months before results given to police at which time charging decision would be made; Not in interests of justice to grant Detention Order;* Criminal Code, *s. 490.

Edmonton Police Service v. Cabral, 2021 CarswellAlta 87, 2021 ABPC 4 (Alta. Prov. Ct.) Anderson J.: The court was presented with four applications in which the police sought a Detention Order of blood vials shortly after the three-month period referred to in s. 490(2). All the cases were DRE cases in which blood was seized and sent to the RCMP lab for analysis. Unfortunately, the lab was backlogged and it took them 155 days to process and get back to the police with the results. The police deferred charging decisions until they had received the results. The Crown noted that the blood is essential to proving the offence and of no use to the potential accused. While not brought within the three-month period in s. 490(2), the application was brought shortly after. Finally, the delay in processing was beyond the control of the investigating officer. The defence seized on the plain language requirement that retention must be sought within the 90 days. The issue became whether to permit the police to retain was in the interests of justice. In all the circumstances waiting for the time to lapse could not be excused. Besides, the accused had demonstrated his continuing interest in the property being blood and cannabis. The matter had been hanging over the accused's head with no end in sight. The blood was ordered to be destroyed. As the target indicated it was not his cannabis, it was ordered forfeited to the Crown unless a third party application was filed.

3. — Impaired driving; Failure to provide ASD sample; Several attempts, all unsuccessful to blow; Device merely described as Alcosensor without reference to model in Approved order; Essential element missing; Accused acquitted;* Criminal Code, *ss. 320.14, 320.17, 320.27(1)(b); Approved Screening Devices Order, SI/85-200.

R. v. Paradis, 2021 CarswellNS 32, 2021 NSPC 3 (N.S. Prov. Ct.) van der Hoek J.: An electric bike was weaving down the middle of the street in the bar section. The accused was stopped and read an ASD demand. The officer had an Alcosensor with her. There were nine unsuccessful attempts. The accused was charged with impaired and fail to provide as ASD sample. The sole witness was the constable. The accused did not testify. There was no evidence that an Alcosensor was an approved screening device. Unlike refusal cases, failure after many attempts requires proof of the legality of the device.

The vehicle was a cross between a scooter and an electric bike, something a handy person might put together. It did not have a serial number, licence plate or plates. The officer could not recall whether it had a key. There was a sound coming from it and a basis to conclude it was a conveyance within the meaning of s. 320.11.

The Crown conceded that an impaired conviction was not open as there was a reasonable doubt that the accused was weaving to avoid potholes. Although the accused tried to bring out that he was a heavy smoker the evidence that smoking would inhibit providing a sample was not made out.

All the officer stated was that she was using an Alcosensor. She did not refer to it as an approved screening device, an ASD or any name listed in the Approved Screening Devices Order, SI/85-200. It was referred to variously as the device or the Alcosensor. There are many Alcosensors listed in the Order but there was evidence lacking that this was one of the named ones. The nature of the device is critical in failure cases where attempts are made. Acquittals were registered on both counts.

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