

CITATION: OPP v. Ferreira, 2020 ONSC 909
COURT FILE NO.: CR-19-1478-MO
DATE: 2020 02 10

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

ONTARIO PROVINCIAL POLICE

- and -

TOWN OF CALEDON

BERNARDINO FERREIRA

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) Christopher Diana, for the Applicant,
) Commissioner of the Ontario
) Provincial Police
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) Nicole Klein, for the Respondent,
) Town of Caledon
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) Adam Little, for the Respondent,
) Bernardino Ferreira
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)

) **HEARD:** October 4, 2019

REASONS FOR JUDGMENT

COROZA J.

OVERVIEW

[1] The Respondent, Bernardino Ferreira, is charged with speeding. On January 17, 2019 a justice of the peace (Her Worship Justice of the Peace Valerie Carty) ordered that the prosecutor for the Town of Caledon produce the entire user

manual for the speed measuring radar device that was used by the Ontario Provincial Police ("OPP") officer who stopped Ferreira.

[2] The Commissioner of the OPP, a third party to the proceeding, opposes the disclosure of the manual and contends that the justice of the peace erred in law on the face of the record of proceedings by ordering its disclosure without conducting a third party records hearing. The OPP seeks a certiorari order pursuant to s. 140 of the *Provincial Offences Act*, R.S.O. 1990, c. P.33 ("*POA*"), quashing the order.

[3] Counsel for Ferreira argues that the justice of the peace got it right. Ferreira claims that the entire operating manual should be disclosed because it is obviously relevant and a third party records hearing was not required. Alternatively, if the justice of the peace did make an error, Ferreira argues that her error was not a substantial wrong or a miscarriage of justice.

[4] For the following reasons, I dismiss the OPP's application and I would uphold the order of the justice of the peace. In my view, the entire manual, with the exception of one section, is first party disclosure. Pursuant to s. 141(4) of the *POA*, I would amend the order and direct the prosecutor to disclose the entire manual of the speed measuring device except for the excerpts that deal with documents under the heading "Legal Requirements", Section 11 (see Respondent's Application Record, TAB 10A, pp. 54 to 59).

ANALYSIS

A. Overview of Proceedings

[5] The facts are simple. On July 5, 2018, Ferreira was charged with speeding. He filed a notice of intention to appear to dispute the charge. He requested disclosure on July 20, 2018. The first trial date was scheduled for September 27, 2018.

(i) The First Trial Date: September 27, 2018

[6] On September 27, 2018, the trial was adjourned at Ferreira's request so that he could review disclosure that was provided to him for the first time that morning. Ferreira noted that disclosure of the entire user manual for the speed measuring device used by the police officer to apprehend him was still outstanding, and the matter was adjourned to January 17, 2019. The prosecutor directed counsel for Ferreira to ask her only witness (a police officer employed with the OPP) about the outstanding disclosure item. The police officer referred Ferreira back to the prosecutor regarding disclosure of the manual.

[7] On December 18, 2018, Ferreira served and filed his notice of constitutional question seeking a stay of proceedings based on unreasonable delay. Three days later the decision of the Court of Appeal for Ontario in *York (Regional Municipality) v. McGuigan*, 2018 ONCA 1062, 144 O.R. (3d) 81, was released. That case held that where a prosecutor is relying on a speed measuring device to prosecute an

offence, it must, on request, disclose the testing and operating procedures set out in the user manual for that device.

(ii) The Second Trial Date: January 17, 2019

[8] On January 17, 2019, Justice of the Peace Carty heard Ferreira's stay application. The justice of the peace reserved her judgment to February 4, 2019.

[9] At the conclusion of the submissions, the justice of the peace raised the issue of Ferreira's request for disclosure of the entire manual. The prosecutor advised the justice of the peace that she would seek guidance from her office about the issue. She advised the court that she would notify counsel for Ferreira if the prosecutor was prepared to disclose the entire manual.

(iii) The Disclosure Ruling of February 4, 2019

[10] On February 4, 2019, the justice of the peace dismissed the stay application. Counsel for Ferreira then advised the justice of the peace that disclosure of the entire manual was still outstanding.

[11] The prosecutor advised the justice of the peace that after court on January 17, 2019, she contacted the OPP and requested the user manual. However, the OPP advised her that the entire user manual was not to be provided to Ferreira. Pursuant to the Court of Appeal's decision in *McGuigan*, she confirmed that scanned copies of the testing procedures excerpted from the manual were provided to counsel for Ferreira by email on January 24, 2019. The prosecutor

advised that the excerpts of the operating procedures from the manual would be forwarded as soon as possible.

[12] Counsel for Ferreira, relying on *McGuigan*, argued that the entire manual was obviously relevant. He also pointed out that there was nothing unduly voluminous about the manual, nothing privileged about it, and nothing onerous about producing it. He requested a stay of proceedings because of non-disclosure.

[13] The justice of the peace offered to adjourn the matter so that the prosecutor could seek direction about whether disclosure of the entire manual was relevant. The prosecutor declined to adjourn the matter and maintained that the manual was not relevant. However, the prosecutor acknowledged that she had never looked at the entire manual and concluded her remarks by telling the justice of the peace that she would "remain mute" and "leave it in the court's hands".

[14] After a short recess the justice of the peace returned with a ruling. She denied a stay of proceedings. She also stated that she was refraining from commenting or ruling on whether the entire manual was first party disclosure. However, she held that absent any argument from the prosecution with respect to the relevancy of the entire manual, the entire manual should be disclosed.

B. The Availability of Certiorari

[15] A superior court has a broad inherent supervisory jurisdiction over a lower court justice, such as a justice of the peace. The remedy the OPP seeks in this application is certiorari pursuant to s. 140 of the *POA*, which directs the lower court to send its record in a case to the Superior Court of Justice for review. If the Superior Court sees fit, it may quash any order made by the lower court and remit the case back to the lower court for further proceedings.

[16] Generally speaking, the availability of certiorari is extremely rare in *POA* matters. The Court of Appeal in *McGuigan* identified three provisions of the *POA* that limit certiorari in proceedings brought under the Act. First, s. 140(1) states that certiorari is entirely discretionary, extraordinary, and only for matters arising under the Act. Second, s. 141(3) is a "privative clause" that states that certiorari is not available to quash a conviction, order, or ruling for which the Act provides an appeal. Therefore, the parties should wait for the disposition of the case before challenging alleged errors made before and during the trial. Third, s. 141(4) specifically directs that the use of certiorari is prohibited except where there is a substantial wrong or miscarriage of justice: see *McGuigan*, at paras. 41-68; *Ontario (Ministry of Labour) v. Intracorp Developments (Lombard) Inc.*, [2002] O.J. No. 1209 (S.C.), at para. 29.

[17] Although the OPP is not a party to this prosecution, it is not disputed that it can seek recourse by challenging the disclosure order through the application of certiorari. That is because in the proceeding, the OPP has no right of appeal under the POA: see *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 57; *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835, at para. 38; *Toronto (City) v. Riddell*, 2019 ONCA 103, at para. 6. That said, the OPP and the prosecutor are closely aligned in this prosecution. The record reflects that the prosecutor sought direction from the OPP about disclosure of the manual and the prosecutor advanced submissions that were based on communications received from the OPP. I will return to this point below when I address the OPP's argument that the order for disclosure was made without notice.

C. The Disclosure Principles Set out in *McGuigan*

[18] The resolution of the OPP's application turns on the interpretation of the principles reviewed by the Court of Appeal in *McGuigan*. In *McGuigan*, the appellant was charged with speeding contrary to the *Highway Traffic Act*, R.S.O. 1990, c. H.8. The traffic officer measured the appellant's speed with a "Genesis Handheld Directional Traffic Radar device" ("GHD"). This appears to be the same type of speed measuring device used in this case.

[19] The appellant's agent was previously provided with a 2008 GHD manual (copies were given to paralegal agents appearing regularly in traffic court) and current manuals could also be viewed in the prosecutor's office.

[20] However, the appellant's paralegal agent made a written request for disclosure for the "testing and operating procedures" under the current GHD manual. The prosecutor refused disclosure, claiming that the appellant needed to make a third party records application against the police. The appellant made two further requests, which were denied, and ultimately brought a motion to stay the proceedings on the basis of non-disclosure.

[21] The presiding justice of the peace ordered disclosure and denied the stay. However, the prosecutor brought a certiorari application to the Superior Court of Justice, which quashed the disclosure order. The Court of Appeal reversed this decision, holding that the application judge at the Superior Court erred in granting the certiorari order and in quashing the disclosure order. In the Court's view, first party disclosure applied.

[22] The Court of Appeal set out the governing principles for disclosure and the different modes of obtaining disclosure from the prosecutor. I will review those principles.

[23] Disclosure falls into two categories: first party disclosure and third party disclosure.

(i) First Party Disclosure

[24] First party disclosure is information and material in the Crown's possession or control that the Crown is obliged to deliver to the defendant on request, without an application to Court.

[25] Information can become first party disclosure in three ways:

- (a) Fruits of the investigation: information generated or acquired during or as a result of a specific investigation into the charges against the defendant must be disclosed. It does not include clearly irrelevant or privileged information, or disclosure otherwise governed by the law. The Crown has a limited, reviewable discretion regarding the timing and manner of disclosure where the circumstances are such that normal disclosure could result in harm to anyone or prejudice the public interest.
- (b) Obviously relevant information possessed by the investigating police force: where information is obviously relevant, it should be provided without prompting to the Crown. The definition of "obvious relevance" is that the evidence has some logical tendency to make a material proposition more or less likely. Information not in the investigative file that relates to the accused's ability to meet the Crown's case, raise a defence, or otherwise consider the conduct of the defence must be disclosed. A third party record application is not needed.
- (c) Relevant information that comes into the possession of the prosecuting crown: where the Crown is put on notice of existing relevant information in the hands of other Crown agencies or

departments (including the investigating police force), the Crown must inquire about that information and obtain it if it is reasonably feasible to do so.

(ii) Third Party Disclosure

[26] Third party disclosure is other information and material not falling under first party disclosure that requires an application to the Court (achieved by serving notice on third party record holders with a subpoena requiring the target information be brought to court).

(iii) Testing and Operating Procedures

[27] The Court of Appeal held that when a prosecutor relies on a speed measuring device as part of its case, it is representing that the device is a reliable measure of vehicle speed. Therefore, the testing and operating procedures were logically relevant and had to be disclosed to determine if the officer complied with the procedures (and that the results were accurate). The testing and operating procedures fall under the second category of first party disclosure ("obviously relevant information"), as they related to the ability to meet the Crown's case and raise a defence, were not part of the investigative file, were not produced as part of the investigation, and were integral to the integrity of the reading secured by the police officer. The Court of Appeal held that the police therefore had an obligation to furnish this information to the prosecutor without prompting.

D. NO SUBSTANTIAL WRONG OR MISCARRIAGE OF JUSTICE

(i) The Justice of Peace Was Entitled to Control the Disclosure Process

[28] The OPP argues that the justice of the peace erred because she ruled that the entire manual should be disclosed without analyzing whether the manual was or ought to have been in the possession of the prosecutor because it was part of the “fruits of the investigation” or “obviously relevant”. The OPP contends that in the absence of such findings, the OPP should have been given notice of the proceeding and a third party records hearing should have been held.

[29] I have examined the record of proceedings. The entire proceeding leading up to the justice of the peace's ruling must be analyzed when assessing the OPP's claim.

[30] Generally speaking, in the context of a *POA* matter, given the volume of cases in that court, it seems to me that a justice of the peace must be decisive and dispose of a case efficiently and fairly. In my view, the justice of the peace is to be commended for the conduct of the hearing. There was nothing else she could do. Moments after delivering a thorough judgment disposing with the original stay application based on unreasonable delay, she was faced with another stay application based on non-disclosure.

[31] After hearing submissions made by the parties, the justice of the peace attempted to ensure that no more judicial time was consumed on a matter where the prosecutor offered no legal basis for resisting disclosure. As I read her brief oral ruling, it appears she took a cautious approach. She acknowledged that *McGuigan* was a recent decision and, in order to be fair to the OPP and the prosecutor, she did not want to pronounce definitively that the entire manual was first party or third party disclosure. However, she ruled in the circumstances of this case that the entire manual was first party disclosure because the prosecutor offered no legal basis to suggest otherwise. Her decision to deal with the matter by way of oral submissions and a short oral ruling ensured the proceeding was conducted in a speedy, efficient, convenient and fair manner: see *R. v. Chaplin*, [1995] 1 S.C.R. 727, at para. 31; *R. v. 1353837 Ontario Inc.* (2005), 74 O.R. (3d) 401 (C.A.), at para. 42.

[32] That said, I agree that the justice of the peace appears to have erred by not making a specific finding as to whether the entire manual was first party or third party disclosure before ordering the production of the entire manual. But, her error does not mean certiorari should automatically be granted in this case. In my view, her error was not a substantial wrong or a miscarriage of justice. I have reached this conclusion for two reasons.

[33] First, the OPP was not denied procedural fairness. The interests of the OPP were advanced by the prosecutor, as evidenced by the fact that the prosecutor read out email exchanges between OPP senior officers. However, the OPP did not provide any meaningful submissions to the prosecutor to resist disclosure on the basis of relevance. The prosecutor advised the court that the OPP was refusing to disclose the entire manual because the *McGuigan* decision did not specifically hold that the entire manual had to be disclosed. However, the justice of the peace asked for a more precise position from the prosecutor:

"I think what I have determined based on an overview of his [counsel for Ferreira] comments and the cases he's directed us to, is that it's their position that the manual, for all of the reasons that he stated in submissions, is obviously relevant. And that a portion of that provides prejudice to the defendant because it's only just that, a portion, and they have no context for it. And so, in that circumstance, he believes and I'm not certain I disagree with him, that the prosecution should be asked to describe why they don't see it that way. [Underling added]

This request went unanswered and the prosecutor made no further submissions and told the justice of the peace she would leave the matter in the court's "hands".

[34] In my view, the OPP was given every opportunity to support its position and it provided no assistance to the prosecutor or the justice of the peace. The request for the entire manual had come to the attention of the OPP at least by January 17, 2019 and I think it is implicit in the prosecutor's submissions made to the justice of the peace that the OPP knew that there was a possibility that the court could make

the order sought by Ferreira. Yet, although it was in possession of the manual and could provide specific direction to the prosecutor as to why certain sections did not fall under first party disclosure, the OPP chose not to provide the prosecutor with specific direction so that she could advise the justice of the peace why the OPP disagreed with Ferreira's argument. I am not persuaded that the failure of the justice of the peace to make a specific finding in her ruling before she ordered disclosure denied the OPP procedural fairness.

[35] I now turn to the second reason for my conclusion that there is no substantial wrong or miscarriage of justice. The entire manual is first party disclosure and should have been disclosed without an application. Therefore, I agree with the justice of the peace's ultimate decision to order the entire manual disclosed to Ferreira.

(ii) The Entire Manual is First Party Disclosure

[36] The disclosure of relevant material, whether it be for or against Ferreira, is part of the OPP's duty to participate in the disclosure process. Where information is obviously relevant to the case, it should form part of the first party disclosure package to the prosecutor without prompting.

[37] I have carefully reviewed the manual. It contains information that plays a central role in the integrity of evidence gathered by the police which is going to be used by the prosecutor at trial. The prosecutor will use the results obtained by the

OPP from the speed measuring device in Ferreira's trial. How the device is used and whether it was operated and tested properly are important issues for Ferreira. A user manual that includes directions and instructions on testing, operation instructions, and information related to the proper use of the device is obviously relevant, even though that information was not itself created, produced, or located during the investigation.

[38] There is no dispute that the Court of Appeal in *McGuigan* held that where a prosecutor is relying on a speed measuring device to prosecute an offence, it must, on request, disclose the testing and operating procedures set out in the user manual for that device. The central question then is whether the entire manual falls within the parameters of testing and operating procedures. With due respect to the OPP's position, in my view, the term 'operating procedures' embraces most of the sections of the manual in this case.

[39] The manual, which is attached to an affidavit of a student-at-law employed with counsel for Ferreira, is not a large manual. It is also not disputed that it was widely available on a website for the Regional Municipality of York on September 23, 2019. However, it appears that as of September 29, 2019, the entire manual is no longer available; only pages 44 to 49 of the manual remain available.

[40] The manual contains 66 pages, including a table of contents and cover pages. It is divided into 14 sections and contains two appendices. The manual has

an introduction page that directs law enforcement officers to study the manual before using the device to maximize the benefits of the device.

[41] In my view, all of the sections in the manual with the exception of Section 11 (“Legal Requirements”) deal with testing and operation of the device. The manual deals with several topics, including proper installation of the device in the police car; the operation and use of the computer and display unit of the device; the use of the handheld remote buttons for the device; how to use the device with other products that may be purchased by law enforcement; how to specifically operate the antenna of the device; a description of how radar works; the description of proper field tests using the device; the directions to care, clean and properly store the device to ensure that it is in working condition; the specifications of the device and a list of frequently asked questions by users and operators; and manufacturer information for questions about the device.

[42] All of this material is obviously relevant to the speed measuring device's functioning or proper operation. Even the sections that do not, strictly speaking, deal with testing and operation are so inextricably linked to the operation of the speed measuring device that they should be disclosed because they relate to the conduct of the defence. It is not a stringent standard: see *R. v. Gubbins*, 2018 SCC 14, [2018] 3 S.C.R. 35, at paras. 23 and 36; *R. v. Stipo*, 2019 ONCA 3, 144 O.R. (3d) 145, at paras. 86 and 120. For example, defendants may want to know about

the particular specifications of the device and a list of frequently asked questions to assist them in asking questions or conducting their own research as to how the device is operated.

[43] I take a different view of the section entitled “Legal Requirements”. A review of that section discloses certificates that reveal that the device is subject to Canadian and American regulations. There is no basis to suggest that this has any relevance to the operation and testing of the device.

[44] In summary, I do not accept the OPP’s argument that disclosing only portions of the manual complies with the decision in *McGuigan*. A fair reading of the entire manual in this case (with the exception of section 11) is that it is obviously relevant. It should have been disclosed without prompting.

[45] Finally, there are several factors that support the argument that disclosure of the manual will not harm the administration of justice. These factors only fortify my conclusion that certiorari should not be granted in this case.

[46] First, there is no evidence that disclosure of other portions of the manual will breach any type of public interest privilege.

[47] Second, there is no evidence that disclosure of the manual would compromise past, ongoing or future police investigations.

[48] Third, disclosure of the manual will not be onerous.

[49] Finally, the ruling here deals with production of the manual as opposed to the admissibility of evidence. I am not concerned that disclosing the entire manual to defendants like Ferreira will prolong trials in the *POA* context because justices at trial still retain the discretion to not permit irrelevant questions being asked of police witnesses during cross-examination. To the contrary, it seems to me that the OPP's position that a third party records application has to be brought each time there is a dispute about the relevance of certain sections of the user manual is something that would fragment and delay *POA* trials. It would also be inconsistent with the purpose of *POA* trials.

E. CONCLUSION AND COSTS

[50] I conclude that the justice of the peace erred by ordering disclosure without making a specific finding that the entire manual was first party disclosure. That error is apparent on the face of the record of proceedings. However, that error was not a substantial wrong or a miscarriage of justice. The OPP was not denied procedural fairness and the manual should have formed part of the first party disclosure package because it was obviously relevant. Therefore, there is no basis to grant certiorari under the *POA*.

[51] I would make a slight change to the order made by the justice of the peace. The entire manual should be disclosed with the exception of section 11 "Legal Requirements". The OPP's application is otherwise dismissed.

[52] In his written materials, counsel for Ferreira requests that costs be awarded to Ferreira pursuant to s. 142(5) of the *POA*. The general rule is that no costs are awarded either against the prosecutor or the defendant in *POA* proceedings: see *R. v. Felderhof* (2003), 68 O.R. (3d) 481 (C.A.).

[53] However, it appears that counsel is seeking costs against the third party Applicant. Therefore, Counsel for the OPP may file submissions as to Ferreira's requests for costs within 15 days of this order. Counsel for Ferreira may file submissions in reply, as to costs within 15 days of receipt of the OPP's submissions.


"S.A. Corroza" Corroza J.

Released: February 10, 2020

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